



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 8, 2011

The Honorable Darrell Issa
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to your letter dated March 16, 2011, and your subpoena issued on March 31, 2011, to Kenneth Melson, Acting Director of the Department's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Your letter and subpoena requested documents and other information concerning, among other things, the pending criminal investigation undertaken by ATF known as Operation Fast and Furious and the pending criminal investigation into the shooting death of Customs and Border Protection (CBP) Agent Brian Terry.

To date, our search has located several law enforcement sensitive documents responsive to the requests in your letter and the subpoena. We have substantial confidentiality interests in these documents because they contain information about ATF strategies and procedures that could be used by individuals seeking to evade our law enforcement efforts. We are prepared to make these documents, with some redactions, available for review by Committee staff at the Department. They will bear redactions to protect information about ongoing criminal investigations, investigative targets, internal deliberations about law enforcement options, and communications with foreign government representatives. In addition, we notified Committee staff that we have identified certain publicly available documents that are responsive. Committee staff informed us that, for now, they do not want us to produce such documents. Our search for records responsive to your letter and the subpoena is continuing and we will supplement this response when additional information becomes available.

While our efforts to identify responsive documents are continuing, many of your requests seek records relating to ongoing criminal investigations. Based upon the Department's long-standing policy regarding the confidentiality of ongoing criminal investigations, we are not in a position to disclose such documents, nor can we confirm or deny the existence of records in our ongoing investigative files. This policy is based on our strong need to protect the independence and effectiveness of our law enforcement efforts. The enclosed May 17, 2000 letter from Attorney General Reno to Senator Hatch, then-Chairman of the Senate Judiciary Committee, provides a fuller statement of the rationale for this policy, as well as its lengthy and nonpartisan

history. Within those constraints, we would appreciate the opportunity to confer with Committee staff to explore other options to accommodate your interests and look forward to working with you regarding the information you seek.

Your letter also asks certain questions, and reflects certain assumptions, concerning Operation Fast and Furious that we are presently unable to address because they relate directly to an ongoing investigation. We can say, however, that Operation Fast and Furious is a criminal investigation of an extensive gun-trafficking enterprise.¹ The purpose of the investigation is to dismantle a transnational organization believed to be responsible for trafficking weapons into Mexico, in part by prosecuting its leadership. The investigation is led by a dedicated team of United States Attorney's Office prosecutors and ATF agents. These efforts have already resulted in an indictment charging 20 defendants with federal firearms offenses, and the investigation is continuing.

Mexican drug cartels are a significant organized crime threat, both to the United States and to Mexico. According to the Department's 2010 National Drug Threat Assessment, these cartels present the single greatest drug trafficking threat to the United States. Mexican cartels use violence to control drug trafficking corridors, through which drugs flow north into the United States, while guns and cash flow south to Mexico. Drug-related violence in Mexico was increasing at an alarming rate well before the inception of Operation Fast and Furious. For calendar year 2009, the Mexican government reported 9,635 murders in Mexico resulting from organized crime and drug trafficking – an increase of 50 percent from the number of murders in 2008 and three times the 2,837 killed in 2007. In part because Mexican law severely restricts gun ownership, Mexico's drug traffickers routinely smuggle weapons purchased in the United States into Mexico.

Stopping the flow of weapons across the border into Mexico is a challenging task given the resources of the cartels and the cartels' use of sophisticated trafficking organizations to move firearms across the border. These trafficking organizations typically involve the use of straw purchasers, who purchase the weapons not for themselves, but with the purpose of transferring them to others who then facilitate their movement across the border to the cartels. Among the challenges in investigating a trafficking organization is developing sufficient evidence to prove that particular firearm purchases are, in fact, unlawful straw purchases. As you know, it is legal for a non-prohibited person to purchase an unlimited number of firearms from a licensed gun dealer and then to sell or barter those firearms to another person.

Allegations have been raised about how Operation Fast and Furious was structured and conducted. As you note, at the request of the Attorney General, the Department of Justice's Office of the Inspector General (DOJ-OIG) is now investigating those allegations. Your letter asks about DOJ-OIG's ability to handle this inquiry in an independent and objective manner.

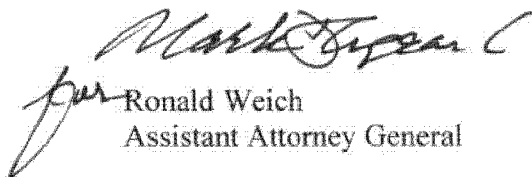
¹ Operation Fast and Furious, which is one law enforcement investigation, should not be confused with Project Gunrunner, which is the broader initiative to deal with weapons trafficking along the Southwest Border generally. As was recently noted by the Congressional Research Service, "[a]s of March 2010, Project Gunrunner had led to the arrest of 1,397 defendants – 850 of which had been convicted – and the seizure of over 6,688 firearms." Congressional Research Service Report RL32724, *Mexico-U.S. Relations: Issues for Congress*, February 15, 2011, at 19.

The enclosed letter to Senator Grassley, dated March 16, 2011, from the acting Chairperson of the Integrity Committee of the Council of Inspectors General on Integrity and Efficiency (CIGIE), responds to similar questions raised by Senator Grassley. CIGIE's response to Senator Grassley describes DOJ-OIG as "a model of independence, objectivity, and above all, integrity in every aspect of its daily pursuits." The response goes on to state that DOJ-OIG has "fully earned an unquestioned reputation for successfully addressing highly difficult and sensitive cases, and deserves the trust and confidence of the public. Further, its prior involvement in a review of a portion of the same ATF program can properly be viewed, not as an impediment to objectivity, but rather as an opportunity for the DOJ-OIG staff to have obtained familiarity with the subject-matter and working environment that would be used advantageously in the investigation requested by the Attorney General."

Finally, your letter asks about the shooting death of CBP Agent Brian Terry. The Department, with the Federal Bureau of Investigation leading the effort, is investigating the shooting death of Agent Terry. ATF has assisted in that investigation and the United States Attorney's Office has assigned senior prosecutors to the case. We are dedicated to holding Agent Terry's killer or killers responsible through the criminal justice process that is currently underway, but we are not in a position to provide additional information at this time regarding this active criminal investigation for the reasons set forth above and in the enclosed Attorney General Reno letter.

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

Sincerely,


Ronald Weich
Assistant Attorney General

Enclosures

cc: The Honorable Elijah E. Cummings
Ranking Minority Member



Office of the
Inspector General

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

March 16, 2011

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

Dear Senator Grassley:

This is in response to your letter of March 8, 2011, to Kevin L. Perkins, in his capacity as Chair of the Integrity Committee of the Council of Inspectors General on Integrity and Efficiency (CIGIE). You expressed concern that the Department of Justice's Office of Inspector General would not be able to apply a publicly acceptable level of independence and objectivity in carrying out a review that the Attorney General had requested it to perform regarding an operation of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

In accordance with the Integrity Committee's rules, because this matter involved the DOJ-OIG, Mr. Perkins, as an official of the FBI and other Justice Department staff recused themselves from any involvement in this matter. Accordingly, as the Committee's senior member, I am acting as Chairperson for this case.

At a special meeting called on March 14, 2011, to consider the issues identified in your letter, the membership concluded unanimously that neither the Committee's authorizing statute nor its internal rules and procedures apply to the matters you identified. The Committee's jurisdiction, as defined by section 7(d)(1) of the Inspector General Reform Act of 2008 (Public Law 110-409, October 14, 2008), is to "receive, review, and refer for investigation allegations of wrongdoing that are made against Inspectors General and staff members." In this context, the Committee has consistently interpreted its mandate to extend only to questions of improper or wrongful conduct on the part of individuals occupying positions of significant responsibility in Inspector General offices, and then, as required by the statute, make recommendations, where appropriate, to the Chair of the CIGIE. However, your statement of reasons why "the public may be unable to trust that the DOJ-OIG is completely disinterested and independent" appears to involve concerns of an institutional or organizational nature, about which the Committee is not empowered to act. Furthermore, the IC has no authority to mandate the recusal of an Office of Inspector General.

However, as the name Integrity Committee implies, scenarios may occur from time to time that cause the membership to comment in a manner that goes beyond the chartered structure. Your stated reservations about the suitability of the DOJ-OIG to properly investigate the Project Gunrunner case present one of those instances.

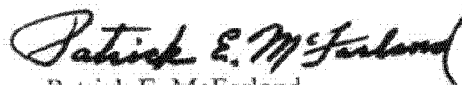
Honorable Charles E. Grassley

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While that office is currently headed by an acting Inspector General, the organization, managed for many years by former Inspector General Glenn Fine, has established itself as a model of independence, objectivity, and above all, integrity in every aspect of its daily pursuits. It fully earned an unquestioned reputation for successfully addressing highly difficult and sensitive cases, and deserves the trust and confidence of the public. Further, its prior involvement in a review of a portion of the same ATF program can properly be viewed, not as an impediment to objectivity, but rather as an opportunity for the DOJ-OIG staff to have obtained familiarity with the subject-matter and working environment that would be used advantageously in the investigation requested by the Attorney General. Thus, although an Inspector General from another agency could feasibly conduct this work, it would face a learning curve that might involve some delay in completing the assignment. Finally, it appears that the belief DOJ-OIG was not responsive to disclosures made by an ATF agent may have been initially reached without obtaining information from that office.

If you have any questions or need further information, please do not hesitate to contact me on (202) 606-1200.

Sincerely,



Patrick E. McFarland
Inspector General



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

May 17, 2000

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to the Committee's subpoena, received on May 12, 2000, seeking certain Department records relating to Loral Space and Communications Ltd. ("Loral") and Hughes Electronics Corporation ("Hughes"). We intend to cooperate fully with the part of the subpoena seeking documents on the *closed* investigation of the Campaign Finance Task Force ("CFTC") regarding the Presidential waiver in 1998 to permit Loral to export a satellite to the Peoples' Republic of China ("PRC"). We cannot, however, comply with the part of the subpoena seeking the files of the United States Attorney's Office for the District of Columbia ("U.S. Attorney's Office") for its *open* criminal investigation into the separate matter of the role Loral and Hughes played in a possible technology transfer to the PRC in 1996 following the failure of a satellite launch from the PRC earlier that year.*

Providing *open* criminal investigative files to Congress would undermine public and judicial confidence in the criminal justice process and would be in complete contravention of the Department's policy of declining congressional requests for non-public information about pending investigations. This policy is neither new nor partisan. It is based on the longstanding belief of top Department officials, both Democrat and Republican alike, that the Department's ability to discharge its responsibilities for the fair administration of justice would

* The closed CFTC investigation and the open U.S. Attorney's Office investigation have always been completely separate. The U.S. Attorney's investigation is directed only towards the possible technology transfer in 1996 and not to any matters concerning the 1998 waiver or the possible impact of campaign contributions on the granting of waivers to launch satellites or on which agency should have jurisdiction over licensing decisions for satellite launches. The Department has already provided the Committee with more than 400 pages of documents relating to the CFTC investigation, including all documents we have identified that are responsive to subparagraph B of the Committee's subpoena, and we are continuing to search for responsive documents.

be compromised by the disclosure to Congress of open investigative files. Almost 60 years ago, Attorney General Robert H. Jackson, relying on positions taken by many of his predecessors, informed Congress that:

It is the position of the Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the Laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Position of the Executive Department Regarding Investigative Reports, 40 Op. Att'y. Gen. 45, 46 (1941) ("Jackson Op.").

The rationale underlying this policy was further explicated in a 1986 published opinion of the Office of Legal Counsel ("OLC") issued by Charles J. Cooper, OLC's Assistant Attorney General during part of the Reagan Administration. See Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act, 10 Op. O.L.C. 68, 76-77 (1986). Mr. Cooper noted in his opinion that providing a congressional committee with confidential information about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecution of criminal cases. Id. at 76, citing Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Deputy Assistant Attorney General, OLC, Re: Submission of Open CID Investigation Files, at 2 (Dec. 19, 1969) ("[T]he Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."). Moreover, providing open investigative files in response to a congressional subpoena could give rise to a claim, by defense counsel or others, of improper congressional influence over the criminal justice process should it turn out that an indictment was returned in the matter after Congress had obtained access to the files.

The danger of such congressional influence was one of the principal reasons the Framers of the Constitution enshrined the concept of the separation of powers in the Constitution. The Framers of the Constitution regarded the combination of the powers of government as "the very definition of tyranny." The Federalist No. 47, at 301 (Madison) (Clinton Rossiter ed., 1961). They were particularly concerned about the threat of combining the power to legislate and the power to execute the law. They agreed with Montesquieu that "there can be no liberty" "[w]hen the legislative and executive powers are united in the same person or body." Id. at 303.

The disclosure of the files of the U.S. Attorney's Office's open criminal investigation, which is apparently what is sought by the Committee's subpoena, would be extremely damaging

from a law enforcement perspective as well. Such a disclosure would reveal the investigative reports and other evidence that has been collected in the investigation, as well as the internal documents setting out investigative strategies and plans. These materials would provide a "road map" of the ongoing investigation to the targets of the investigation and to anyone else with access to them. As Attorney General Jackson observed:

Disclosure of the [law enforcement] reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or a prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.

Jackson Op. at 46.

The Committee's subpoena would also require the Department to produce grand jury material covered by the non-disclosure provision of Rule 6(e) of the Federal Rules of Criminal Procedure. As you know, the production of any such material would be in violation of the law. Thus, while we would obviously remove grand jury material from the scope of any production, the remaining documents that were responsive to the Committee's subpoena would still provide a "road map" of a portion of the Department's criminal investigation.

We have received no statement on behalf of the Committee as to why it believes it has a need for documents relating to this ongoing criminal investigation. We understand that proponents of the subpoena may contend that the U.S. Attorney's Office is not investigating quickly enough, or that it does not intend to seek an indictment even if the evidence and Principles of Federal Prosecution support one. This speculation is entirely without merit, as the U.S. Attorney's letters to Senator Specter, dated April 21 and May 10, 2000, have previously explained. In any event, the Framers sought to avoid such contemporaneous second-guessing of the executive branch by the legislative branch through the separation of powers principle. In light of that principle and the dangers to the criminal justice system it is designed to forestall, we cannot conceive of any interest that would justify providing the files of an ongoing criminal investigation to Congress.

In closing, I appreciate the fact that you have expressed a willingness to consider an accommodation "for structuring the production of the open case materials so as to have as little impact on the open case as possible." When it comes to *ongoing* criminal investigations, however, I do not believe that an accommodation along the lines you might envision is possible

that would not do violence to the paramount interests set forth above. Nonetheless, as always, I would be happy to discuss this matter with you further and consider alternative ways of satisfying your oversight needs.

Sincerely,



Janet Reno

cc: Honorable Arlen Specter
Honorable Robert G. Torricelli
Honorable Charles E. Grassley