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February 28, 2011

Transmitted Electronically and via Overnight Delivery

ken.melson@usdoj.gov

Kenneth E. Melson
Acting Director
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Avenue, NE
Washington, DC 20226

Re: George T. Gillett, Jr.
Assistant Special Agent in Charge, Phoenix Field Division

Dear Acting Director Melson:

Please be advised that this office represents George T. Gillett, Jr. in matters relative to his federal employment. We recently became aware of a number of issues concerning an ATF operation known as the "Fast and Furious" Investigation. Specifically, we learned of allegations that ATF knowingly permitted the sale of hundreds of weapons to known gunrunners and/or the Mexican cartel, allegations that ATF's actions or omissions resulted in the death of U.S. Border Patrol Agent, Brian Terry and allegations of purported whistleblower retaliation. We also understand that these allegations will be the subject of forthcoming administrative and/or criminal investigation(s). We believe that any such investigation may potentially lead to the civil, criminal and administrative sanctioning of both the Agency and its individual agents. Insofar as ASAC Gillett was, for a limited period of time, involved in Fast and Furious' operations, we are concerned about the level of personal exposure these forthcomings investigations may present to our client.

At this time, we wish to make clear ASAC Gillett's stance with respect to the above-referenced matters. First, all of ASAC Gillett's actions concerning the Fast and Furious initiative, as well as any questioning of subordinate agents related thereto, were taken at the direction, guidance and control of his superiors. Second, notwithstanding the fact that all such actions were explicitly authorized and endorsed by ATF Management, ASAC Gillett's actions were fully appropriate and in accordance with established law, procedure and Agency policy. At all times, ASAC Gillett acted in furtherance of the Bureau's mission.

As the issues surrounding the Fast and Furious investigation continue to garner significant attention in the media, we ask that you assign Agency counsel to work with ASAC Gillett, and this office, as we proceed forward with defending against the

unfounded intimations of wrongdoing attributed to our client. We believe that the Agency's input with respect to this matter will not only ensure the protection of ASAC Gillett's rights, but will simultaneously protect and bolster ATF's defenses against these serious allegations.

We are also aware of several correspondences and inquiries emanating from the office of Senator Charles Grassley concerning the aforementioned allegations. These letters of inquiry are of particular concern to us, as Senator Grassley pointedly references ASAC Gillett, by name, on multiple occasions throughout these letters. We understand that ATF has provided certain materials and information in response to Senator Grassley's varied inquiries. We respectfully request that any and all documentation provided to Senator Grassley that in any way references ASAC Gillett and/ or his involvement in the Fast and Furious Investigation, and the subsequent, related allegations of whistleblower reprisal, be forwarded to this office immediately.

As always, ASAC Gillett strives to serve the best interests of the Agency and, accordingly, looks forward to working with ATF in defending against these baseless allegations and resolving this matter in an expeditious fashion.

We thank you, in advance, for your cooperation.

Very truly yours,

AVERY DOOLEY POST & AVERY, LLP

Peter H. Noone

PHN/caf

Corinna Ferrini

From: Melson, Kenneth E. <Ken.Melson@usdoj.gov>
Sent: Monday, February 28, 2011 6:33 PM
To: Corinna Ferrini
Cc: Peter Noone; Joanne Fitch
Subject: RE: Correspondence from Attorney Noone

Peter: Thank you for your correspondence. I have forwarded the letter to Chief Counsel's office for review and I have asked them to respond to your letter. Thanks. Ken Melson

From: Corinna Ferrini [mailto:ccferrini@averydooley.com]
Sent: Monday, February 28, 2011 5:18 PM
To: Melson, Kenneth E.
Cc: Peter Noone; Joanne Fitch
Subject: Correspondence from Attorney Noone

Dear Acting Director Melson;

Please see the attached correspondence from Attorney Peter Noone regarding Assistant Special Agent in Charge, George T. Gillett, Jr.

Thank you,

Corinna A. Ferrini, Esq.
Avery Dooley Post & Avery, LLP
90 Concord Avenue
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March 8, 2011

Transmitted via Electronic Mail
ken.melson@usdoj.gov

Kenneth E. Melson
Acting Director
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Avenue, NE
Washington, DC 20226

Re: George T. Gillett, Jr.
Assistant Special Agent in Charge, Phoenix Field Division

Dear Acting Director Melson:

Please be advised that this office represents George T. Gillett, Jr. in matters relevant to his federal employment. As discussed in our previous correspondence, letters emanating from the office of Senator Charles Grassley allege that ASAC Gillett engaged in some level of misconduct and/or illegal activity in connection with the Project Gunrunner and/ or "Fast and Furious" initiatives. Unfortunately, since our last correspondence there have been additional communications from Senator Grassley's office as well as mounting national media coverage with respect to this matter. Because these letters contain glaring, inaccurate statements regarding ASAC Gillett's conduct, we believe it is now necessary that we take appropriate, proactive measures in order to protect ASAC Gillett's rights, interests and personal safety.

In furtherance of these objectives, we ask that you review the enclosed letter we have prepared to Senator Charles Grassley. As stated in this letter, we are requesting that Senator Grassley stop attributing allegations of misconduct and/or illegal activity to ASAC Gillett in any public forum. We additionally address the concern that ASAC Gillett has received threats to his safety as a result of Senator Grassley's public dissemination of such unsubstantiated claims. We would greatly appreciate your assistance and guidance in attempting to bring these concerns to Senator Grassley's attention.

We fully appreciate that this is a sensitive and politically charged issue and that sending the enclosed letter to Senator Grassley may result in certain repercussions to

ATF and ASAC Gillett. However, our obligation to ensure our client's safety, preserve his right to defend himself and preempt Senator Grassley's release of any further deleterious accusations is, of course, our utmost priority. Accordingly, we ask that ATF contact us before close of business on March 9, 2011, to discuss any concerns it may have about the attached correspondence and to communicate its input with respect to ASAC Gillett's defense against these unfounded allegations.

Very truly yours,

AVERY DOOLEY POST & AVERY, LLP

Peter H. Noone

PHN/caf
Enclosure

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20540-6275

Sharon A. Church, Chief Counsel and Staff Director
Kathleen L. Davis, Republican Chief Counsel and Staff Director

April 8, 2011

VIA ELECTRONIC TRANSMISSION

Kenneth E. Melson
Acting Director
Bureau of Alcohol, Tobacco, Firearms, and Explosives
99 New York Avenue, NE
Washington, DC 20226

Dear Acting Director Melson:

Attached is an email released through the Freedom of Information Act (FOIA).¹ It appears to contain proposed guidance to ATF employees about how to respond to contacts from my office. The guidance instructs ATF employees that they “are in no way obligated to respond” to questions from Congress. It also attempts to prevent direct communications with my office by instructing that ATF employees “should refer congressional staff who seek information from you to the ATF’s office of congressional affairs.” The guidance further attempts to prevent direct communications with my office by claiming that ATF employees “are not authorized to disclose non-public information.”

It is unclear from the email released through FOIA whether this guidance was actually communicated to ATF employees. However, it is of grave concern because, as you know, such attempts to prevent direct communications with Congress are not a lawfully authorized activity of any officer or employee of the United States whose salary is paid with appropriated funds.² Specifically, no officer or employee may attempt to prohibit or prevent “any other officer or employee of the Federal Government from having *direct* oral or written communication or *contact* with any Member, committee, or subcommittee of the Congress” about a matter related to his employment or the

¹ Attachment 1.

² Consolidated Appropriations Act, 2010, P.L. 111-117, 123 Stat. 3034, § 714 (2010), as continued by §101 of continuing resolutions P.L. 111-242, 124 Stat. 2607 (2010) and P.L. 112-6, 125 Stat. 23 (2011)—which extends the funding levels in the 2010 appropriations bills, as well as “the authority and conditions provided in such Acts,” through April 8, 2011.

agency “in any way, *irrespective of whether such communication or contact is at the initiative*” of the employee or Congress (emphasis added).³

I wrote to you on January 31 to ensure you were aware of these provisions and to express concerns that without proper guidance, managers might inappropriately intimidate employees to discourage them from speaking with Congress and thus unlawfully interfere with a Congressional inquiry.⁴ In order for Congress to exercise its oversight authority and act as a check on Executive power, it is crucial that agency employees are free to communicate directly with Members and Committee staff. Direct contact means contacts that do not necessarily involve Congressional liaison or agency management. Without such direct, unfiltered communications, Congress would still be unaware of, and unable to inquire about, the serious allegations involving the death of Border Patrol Agent Brian Terry and the sales of weapons to known and suspected gun traffickers.

I have a long experience of witnessing retaliation against whistleblowers. Sometimes it is explicit and immediate. Often it is subtle and delayed until after public scrutiny has faded. Unfortunately, it is so frequent that employees fear that even truthful answers to direct factual questions from Congress will get them in trouble. That is why I am committed to maintaining the confidentiality of those employees who wish to cooperate with a Congressional inquiry or report problems anonymously. Direct contact with Congress of the sort protected by the law serves as an extra level of protection against retaliation and is obviously essential where an employee seeks confidentiality.

However, in some cases, agency employees choose to disclose their direct contacts with Congress, despite the potential consequences. As I explained in my January 31 letter, one employee chose to disclose his protected contacts with my staff and was immediately questioned about the content of those communications. I was concerned about that because forcing an employee to reveal the details of such communications would intrude on the integrity of the Congressional inquiry and offend the comity between the Branches that flows from the separation of powers under the Constitution.

Now, a second agency employee has chosen to disclose that he has had protected contacts with Congress. George Gillett, through and in conjunction with his legal counsel, is cooperating with this investigation. Mr. Gillett is the Assistant Special Agent in Charge of the ATF's Phoenix field division, and Committee staff's direct contacts with him are an essential component of our inquiry. He has participated in two preliminary meetings jointly with Senate Judiciary Committee staff and House Oversight and Government Reform Committee staff. As you know, retaliation for such communications is prohibited by law.

³ *Id.*

⁴ 18 U.S.C. § 1505 (providing criminal penalties for obstructing or impeding the power of Congressional inquiry).

On one previous occasion when an agency sought to compel an individual to disclose the content of his communications with Congress, I was prepared to introduce a resolution authorizing the Senate Legal Counsel to seek legal remedy in the courts. Fortunately, in light of that draft resolution, the Executive Branch withdrew its attempt to compel discovery of communications between a whistleblower and Congress.⁵

In this current inquiry, a similar attempt was also abandoned. The first ATF agent to disclose that he had direct contacts with Congress was ordered to describe the content of his communications in writing. However, shortly after my January 31 letter, I was pleased to learn that the order was withdrawn. I appreciate the agency's willingness to respect Congressional prerogatives and avoid interfering with a Congressional inquiry. Similarly, the agency should avoid intruding into our investigative process by seeking to learn the content of ASAC Gillett's communications with Congress.

In light of the attached email, I have renewed concerns that the guidance being given to employees may be inconsistent with the law.⁶ Therefore, please provide written answers to the following questions:

1. Was the attached guidance distributed, either in writing or otherwise, to ATF field offices or other ATF personnel?
2. Was any guidance on contacts with Congress distributed, either in writing or otherwise, to ATF field offices or other ATF personnel? If so, please provide a copy.
3. What steps have you taken or do you plan to take to ensure that employees are aware of their right to communicate directly with Congress if they so choose?

⁵ See S. PRT. 110-28, § VIII.D.2 "Attempt to Compel Disclosure of Confidential Communications with Congress," p. 103, 641, 652 ("Nothing in this agreement shall require [the production of] any communications with, or documents that were created for, any Senate Committees (or the staff or members thereof)"). See also S. HRG. 109-898, at 39-41, 470-471, responses to questions for the record to Dec. 5, 2006, Senate Judiciary Committee hearing at 8.

⁶ See generally, Government Accountability Office, "Department of Health and Human Services—Chief Actuary's Communications with Congress," B-302911 (Sep. 7, 2004) (discussing the history and background in support of the government-wide prohibition on attempts to prevent direct communications with Congress) (Attachment 2).

Kenneth E. Melson
April 8, 2011
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Please reply no later than April 14, 2011. If you have any questions about this request, please contact Jason Foster at (202) 225-5225. Thank you for your cooperation.

Sincerely,

A handwritten signature in cursive script that reads "Chuck Grassley".

Charles E. Grassley
Ranking Member

Attachments

cc: Chairman Patrick Leahy, Senate Committee on the Judiciary
Chairman Darrell Issa, House Committee on Oversight and Government Reform