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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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May 16, 2011

VIA ELECTRONIC TRANSMISSION

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Holder:

Last week I submitted Questions for the Record (QFRs) following the Judiciary Committee hearing on Oversight of the Department of Justice (DOJ).

Historically, the Justice Department generally takes five to eight months to respond to QFRs. However, because of my ongoing investigation into the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), I would appreciate receiving responses to questions on this topic much sooner. Attached is a copy of those questions. Please provide responses as soon as possible.

Additionally, I would like to reiterate the requests that have remained unanswered from my previous letters on this matter.

a) In my letter of February 16, 2011, I requested that you provide:

- 1) All records relating to communications between the ATF and the Federal Firearms Licensee (FFL) who sold the weapons to Avila, including any Report of Investigation (ROI) or other records relating to the December 17, 2009 meeting "to discuss his role as an FFL during this investigation."
- 2) All records relating to communications between ATF headquarters and Phoenix Special Agent in Charge (SAC) William Newell from December 1, 2010 to the present, including a memorandum, approximately 30 pages long, from SAC Newell to ATF headquarters following the arrest of Jaime Avila and the death of CBP Agent Brian Terry.
- 3) A copy of the presentation, approximately 200 pages long, that the Group 7 Supervisor made to officials at ATF Headquarters in the Spring of 2010.

4) Copies of all e-mails related to Operation Fast and Furious, the Jaime Avila case, or the death of CBP Agent Brian Terry sent to or from SAC Newell, Assistant Special Agent in Charge (ASAC) George Gillette, Group 7 Supervisor, or the Case Agent between November 1, 2009 and January 31, 2011.

I requested that these documents be provided on a rolling basis as they are identified and located. I also requested that you please prioritize your search for documents and produce them in the following order: (1) documents in response to requests one through three, (2) documents in response to request four dated between December 13, 2010 and January 31, 2011, and (3) documents in response to request four dated between November 1, 2009 and December 13, 2010.

b) After ICE Agent Jaime Zapata was brutally murdered in Mexico on February 15, I was shocked to learn that, like Border Patrol Agent Brian Terry, Agent Zapata had been killed with a weapon traced to an individual in the U.S. that the ATF had been aware was trafficking firearms. Accordingly, in my March 4, 2011 letter, I requested answers to the following questions:

(1) Although the gun used in the assault on Agent Zapata that has been traced back to the U.S. was purchased on October 10, 2010, how can we know that it did not make its way down to Mexico after the November investigation, when the arrest of these three criminals might have prevented the gun from being trafficked and later used to murder Agent Zapata?

(2) When did law enforcement first become aware that Morrison purchased the gun?

(3) Given that the likely recipients of any trafficked guns were so close to the border, did any ATF personnel raise concerns about the possibility of those guns being used against U.S. law enforcement? If so, how did the ATF address those concerns?

(4) Did any ATF personnel raise concerns about the wisdom of allowing individuals like the Osorio brothers or Morrison to continue their activities after the November weapons transfer? If so, how did the ATF address those concerns?

In addition to answering those questions, I also requested all records relating to:

(5) When law enforcement officials first became aware of the trafficking activities of Otilio and Ranferi Osorio and Kelvin Morrison;

(6) Surveillance that may have been conducted on the Osorio brothers or Morrison prior to the November transfer of weapons between the ATF's confidential informant and the Osorio brothers and Morrison;

(7) The November transfer; and

(8) Any surveillance that law enforcement continued to conduct on the Osorio brothers or Morrison after the November transfer.

Finally, I requested a briefing on the Zapata matter. I reiterated these requests in my letter of March 28, 2011, and am still awaiting both a response and a briefing.

c) In my letter of April 8, 2011, I requested written answers to three questions. The third read:

(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?

In response, you provided me with information about the ATF providing its agents with information about the Whistleblower Protection Act in order to prevent retaliation against whistleblowers. While that is appreciated, it does not respond to my question. I asked about making employees aware of the appropriations provision that protects their right to communicate directly with Congress. As I outlined in that letter:

[A]ttempts 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.¹ 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 agency "in any way, *irrespective of whether such communication or contact is at the initiative*" of the employee or Congress (emphasis added).²

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

¹ 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.

² *Id.*

inappropriately intimidate employees to discourage them from speaking with Congress and thus unlawfully interfere with a Congressional inquiry.³ 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.

Accordingly, please provide responses to the questions attached, as well as those outlined above, by May 30, 2011. If you have any questions regarding this letter, please have your staff contact Tristan Leavitt at (202) 224-5225. Thank you for your prompt attention these important issues.

Sincerely,



Charles E. Grassley
Ranking Member

Attachment

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

Attachment 1

Questions for Mr. Eric Holder Attorney General, Department of Justice

1. ATF Investigative Strategy Briefing Paper

The Department of Justice wrote on February 4, 2011, in response to letters I sent on January 27 and January 31:

At the outset, the allegation described in your January 27 letter—that ATF “sanctioned” or otherwise knowingly allowed the sale of assault weapons to a straw purchaser who then transported them into Mexico—is false. ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico.

Yet one briefing paper written by ATF Phoenix Field Office agents listed the investigative strategy of Operation Fast and Furious. The briefing paper, which was recently released by the House Oversight and Government Reform Committee states:

Currently our strategy is to *allow the transfer of firearms to continue to take place* in order to further the investigation and allow for the identification of additional coconspirators who would *continue to operate and illegally traffic firearms to Mexican DTOs* [Drug Trafficking Organizations] which are perpetrating armed violence along the Southwestern Border.

Questions:

- (1)(a) Have you read this briefing paper?
- (1)(b) Was it ever provided to the Deputy Attorney General’s office or any other component of the Justice Department other than the ATF? If so, please describe the circumstances in detail.
- (1)(c) How does this document square with your Department’s assertion that “ATF makes every effort to interdict weapons that have been purchased illegally and prevent their transportation to Mexico”?
- (1)(d) How does this document square with your Department’s assertion that the whistleblower allegations are false?
- (1)(e) Why was this inaccurate information provided to the Senate Judiciary Committee?

- (1)(f) What steps were taken to verify the truth of the assertions in the February 4, 20011 letter before it was sent?
- (1)(g) Please list each official within DOJ and ATF who reviewed the draft letter and indicate whether that individual was aware of the briefing paper at that time.

2. Genesis of Operation Fast and Furious

Questions:

- (2)(a) When was Operation Fast and Furious first conceived?
- (2)(b) Who first suggested the methods of investigation employed in Operation Fast and Furious, specifically the strategy of “*allow[ing] the transfer of firearms to continue to take place* in order to further the investigation”?
- (2)(c) Which officials at ATF and DOJ are responsible for authorizing the strategy of “*allow[ing] the transfer of firearms to continue to take place* in order to further the investigation”?
- (2)(d) Did any investigative methods in Operation Fast and Furious require the approval of the Department of Justice? If so, please describe in detail the method and the persons providing authorization.
- (2)(e) If no investigative methods used in Operation Fast and Furious required the approval of the Department of Justice, what is the process used to authorize such methods, and who conducts it?

3. U.S. Attorney’s Office Involvement

Questions:

- (3)(a) When did U.S. Attorney Dennis Burke first become aware of Operation Fast and Furious and the strategy of “*allow[ing] the transfer of firearms to continue to take place* in order to further the investigation”?
- (3)(b) What was his subsequent involvement in Operation Fast and Furious?
- (3)(c) When did Assistant U.S. Attorney Emory Hurley first become aware of Operation Fast and Furious and the strategy of “*allow[ing] the transfer of firearms to continue to take place* in order to further the investigation”?

- (3)(d) What was his subsequent involvement in Operation Fast and Furious?
- (3)(e) As of May 10, 2011, is the U.S. Attorney's Office for the District of Arizona listed as the point of contact for any Phoenix Police Department criminal case? If so, please describe each case and explain why a Phoenix AUSA is listed as the point of contact on each case.
- (3)(f) I understand that the U.S. Attorney's Office for the District of Arizona has been unwilling in recent history to prosecute firearm trafficking or straw purchase cases in which they did not have the possession of the firearm because of a belief that case law required it as "the *corpus* of the crime." This policy was followed even in cases where there was a signed confession from the straw purchaser or trafficker. However, I also understand that other districts, including others in the 9th circuit, do not take that position. Is it the Justice Department's understanding possession of the firearm is required to prosecute a straw purchaser or trafficker? If not, please explain why this policy is enforced in the District of Arizona.
- (3)(g) How many cases have been declined for prosecution by U.S. Attorney's Office in the District of Arizona on this basis? How many have been declined in each of the other districts on this basis?

4. Federal Firearms Licensees

On April 13, 2011, I provided DOJ emails in which Federal Firearms Licensees (FFLs) expressed concerns to ATF about the dangers of engaging in suspicious sales to further the ATF's investigation. ATF arranged at least one meeting between at least one FFL and the U.S. Attorney's Office for the District of Arizona to discuss these concerns.

Questions:

- (4)(a) How many meetings did the U.S. Attorney's Office for the District of Arizona have with FFLs to discuss similar concerns?
- (4)(b) Please describe in detail the dates, participants, and communications during any such meetings.

5. ATF Acting Director

Questions:

- (5)(a) When did Acting Director Kenneth Melson first become aware of Operation Fast and Furious and the strategy of “*allow[ing] the transfer of firearms to continue to take place* in order to further the investigation”?
- (5)(b) How often was Acting Director Melson briefed on Operation Fast and Furious?
- (5)(c) When did you first speak to Acting Director Melson about Operation Fast and Furious? What was the context?

6. Awareness of Operation Fast and Furious

Questions:

- (6)(a) When and how did you first learn of Operation Fast and Furious or the strategy of “*allow[ing] the transfer of firearms to continue to take place* in order to further the investigation”?

7. Deputy Attorney General’s Office

Questions:

- (7)(a) When and how did any official in the Deputy Attorney General’s office first become aware of Operation Fast and Furious or the strategy of “*allow[ing] the transfer of firearms to continue to take place* in order to further the investigation”? Please provide a detailed answer for each official in that office.

8. Criminal Division

Questions:

- (8)(a) When and how did the Assistant Attorney General for the Criminal Division, Lanny Breuer, first become aware of Operation Fast and Furious or the strategy of “*allow[ing] the transfer of firearms to continue to take place* in order to further the investigation”?
- (8)(b) When and how did any other official in the office of the Assistant Attorney General for the Criminal Division first become aware of Operation Fast and

Furious or the strategy of “*allow[ing] the transfer of firearms to continue to take place* in order to further the investigation”? Please provide a detailed answer for each official in that office.

9. Other Awareness

Questions:

(9)(a) Before the death of Border Patrol Agent Brian Terry, who else at the Justice Department headquarters knew about the existence of Operation Fast and Furious or the strategy of “*allow[ing] the transfer of firearms to continue to take place* in order to further the investigation”?

(9)(b) When and how did they become aware of it?

10. Priorities

When questioned about portions of the above matters at the House Judiciary Committee hearing last week, you repeatedly said that you were not sure or did not know the answer.

Questions:

(10)(a) Since your Department informed me on March 2, 2011, that you had asked the Acting Inspector General to evaluate the concerns that had been raised about ATF’s actions, you had at least two months to inquire into this matter. Other than referring this matter to the Acting Inspector General, what actions have you personally taken to inquire into Operation Fast and Furious or the strategy of “*allow[ing] the transfer of firearms to continue to take place* in order to further the investigation”—now that you are aware of it?

11. Connection of Terry Guns to Operation Fast and Furious

In your testimony before the House Judiciary Committee last week, you said that if the guns that were found at the murder scene of Border Patrol Agent Brian Terry had indeed come from the ATF’s Operation Fast and Furious, a serious problem likely occurred. I identified for you in my February 9, 2011, letter the serial numbers of the two firearms recovered at Agent Terry’s murder scene, as well as the fact that both were purchased by Operation Fast and Furious suspect Jaime Avila on January 16, 2010.

Questions:

- (11)(a) Given that the recently unsealed indictment of Manuel Osorio-Arellanes for his involvement in the murder of Border Patrol Agent Brian Terry confirms the serial numbers of two AK-47 variant rifles recovered at the murder scene, does the Department officially acknowledge that those two guns are connected to Operation Fast and Furious?

12. Recovery of Guns

At last week's hearing, I presented you with a chart regarding the firearms purchased by fifteen specific targets before and after they were identified in Operation Fast and Furious. This chart also identified the firearms recovered in the U.S. after the target was identified in the investigation. These fifteen targets were later indicted, but they are not the only suspects involved in Operation Fast and Furious.

Questions:

- (12)(a) For these fifteen defendants, what was the number of firearms they purchased that were recovered in Mexico after the suspects were identified in the investigation?
- (12)(b) What was the total number of firearms purchased by *all* suspects in Operation Fast and Furious (not just the fifteen on the chart) before they were entered in the investigation?
- (12)(c) What was the total number of firearms purchased by *all* suspects in Operation Fast and Furious (not just the fifteen on the chart) after they were entered in the investigation?
- (12)(d) For *all* suspects in Operation Fast and Furious (not just the fifteen on the chart), what was the number of firearms they purchased that were recovered in the U.S. after the targets were identified in the investigation?
- (12)(e) For *all* suspects in Operation Fast and Furious (not just the fifteen on the chart), what was the number of firearms they purchased that were recovered in Mexico after the targets were identified in the investigation?
- (12)(f) How many guns from *all* suspects in Operation Fast and Furious (not just the fifteen on the chart) were purchased after the targets were entered into the investigation but have not been recovered in the U.S. or Mexico?

(12)(g) Can the Department of Justice, the ATF, or any other agency under your oversight account for the whereabouts of any of these guns that have not been recovered in the U.S. or Mexico? If so, how many can be accounted for, and how many cannot? Please explain.

13. Recovery of Guns in Connection with Violent Crimes

Questions:

(13)(a) In addition to the two guns recovered at the Terry murder scene, how many of the guns connected to Operation Fast and Furious that have been recovered were recovered in connection with violent crimes in the U.S.? Please describe the date and circumstances of each such recovery in detail.

(13)(b) How many of the guns connected to Operation Fast and Furious that have been recovered were recovered in connection with violent crimes in Mexico? Please describe the date and circumstances of each such recovery in detail.

14. Accountability

(14)(a) If Acting Director Melson was fully informed of Operation Fast and Furious throughout the operation, do you believe he should be held accountable?

(14)(b) If the whistleblower allegations of allowing straw purchases of weapons in Operation Fast and Furious prove true and Acting Director Melson approved, condoned or remained complicit of these investigative techniques, should he be removed from his position of leadership at ATF?

(14)(c) If individuals in the Deputy Attorney General's office were aware that the ATF was not making every effort to interdict guns that have been purchased illegally and approved, condoned, or remained complicit regarding the ATF techniques of knowingly allowing straw purchases, do you believe they should be held accountable?

(14)(d) If individuals in the office of the Assistant Attorney General for the Criminal Division were aware that the ATF was not making every effort to interdict guns that have been purchased illegally and approved, condoned, or remained complicit regarding the ATF techniques of knowingly allowing straw purchases, do you believe they should be held accountable?

(14)(e) Who do you believe should be held accountable for the “major errors” of Operation Fast and Furious?

15. ATF Leadership in Phoenix

I understand that the ATF Phoenix Field Office has temporarily assigned a new Special Agent in Charge and two new Assistant Special Agents in Charge. That constitutes the top three leadership positions in that office.

Questions:

- (15)(a) Why was this new leadership assigned?
- (15)(b) Has this ever happened before in the ATF? Please provide supporting documentation of these changes in the Phoenix field office leadership in addition to any other similar changes in ATF leadership.
- (15)(c) Does this change in leadership represent an acknowledgement that mistakes have been made by those who were replaced? Please explain.
- (15)(d) Will the ATF officials who were temporarily replaced return to their posts or will they permanently be replaced in the Phoenix Field Office?
- (15)(e) Where will Phoenix Special Agent in Charge (SAC) William Newell be assigned after his temporary Headquarters assignment ends?

16. Murder Weapon of ICE Agent Jaime Zapata

According to a Justice Department press release from March 1, 2011, one of the firearms used in the February 15 murder of U.S. Immigration and Customs Enforcement (ICE) Agent Jaime Zapata was traced by the ATF to Otilio Osorio, a Dallas-area resident. Otilio Osorio and his brother Ranferi Osorio were arrested at their home, along with their neighbor Kelvin Morrison, on February 28. According to that same press release, the Osorio brothers and Morrison transferred 40 firearms to an ATF confidential informant in November 2010. Not only were these three individuals not arrested at that time, according to the press release their vehicle was later stopped by local police. Yet the criminal indictment in *United States v. Osorio*, filed March 23, 2011, is for straw purchases alone and references no activity on the part of the Osorio brothers or Morrison beyond November 2010.

Questions:

- (16)(a) Why did the ATF not arrest Otilio and Ranferi Osorio and their neighbor Kelvin Morrison in November?

- (16)(b) Was any surveillance maintained on the Osorio brothers or Morrison between the November firearms transfer and their arrest in February?
- (16)(c) Did any ATF personnel raise concerns about the wisdom of allowing individuals like the Osorio brothers or Morrison to continue their activities after the November weapons transfer? If so, how did the ATF address those concerns?
- (16)(d) Although the gun used in the assault on Agent Zapata that has been traced back to the U.S. was purchased on October 10, 2010, how can we know that it did not make its way down to Mexico after the undercover transfer in November, when the arrest of these three criminals might have prevented the gun from being trafficked and later used to murder Agent Zapata?
- (16)(e) Why should we not believe that this incident constitutes a further example, outside of the Phoenix Field Office and unconnected to Operation Fast and Furious, of the ATF failing to make arrests until a dramatic event is linked to a purchase from one of their targets, even when those targets are ultimately only charged for the same offenses the ATF was aware of months prior to their arrest?
- (16)(f) Do you believe that it was appropriate for the ATF to wait until Agent Zapata was shot before arresting these individuals on February 28?

17. Earlier Knowledge of Zapata Murder Weapon Traffickers

The DOJ press release alludes to an August 7, 2010, interdiction of firearms in which including a firearm purchased by Morrison. Further documents released by my office make clear that not only did Ranferi Osorio also have two firearms in that interdicted shipment, ATF officials received trace results on September 17, 2010 identifying these two individuals.

- (17)(a) What efforts did the ATF take in September to further investigate the individuals whose guns had been interdicted, including Morrison and Osorio?
- (17)(b) When did law enforcement officials first become aware that Otilio Osorio purchased a firearm on October 10, 2010?
- (17)(c) Had the ATF placed surveillance on the Osorio home in September or arrested Ranferi Osorio and Kelvin Morrison, isn't it possible that the ATF might have prevented Otilio Osorio from purchasing a weapon on October 10 with the intent for it to be trafficked?