

Congress of the United States
Washington, DC 20515

January 26, 2017

Donald F. McGahn, II
White House Counsel
The White House
1600 Pennsylvania Avenue N.W.
Washington, D.C. 20500

Dear Mr. McGahn:

We are writing to request that you take immediate action to remedy the Trump Administration's apparent violations of multiple federal laws by imposing gag orders on federal employees that prevent them from communicating with Congress.

It has been widely reported that the Trump Administration has issued restrictions at multiple agencies on employee communications including, in some instances, communications with Congress.¹ These directives appear to violate a host of federal laws.

First, these gag orders appear to violate the Whistleblower Protection Enhancement Act because they do not include a **mandatory statement** that employee communications with Congress and Inspectors General are protected. Congress passed the Act unanimously in 2012 to prohibit agencies from implementing or enforcing "any nondisclosure policy, form, or agreement" that does not include 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.²

The Office of Special Counsel, which is charged with protecting the rights of federal whistleblowers, has made clear that "this statement should be incorporated into every non-disclosure policy, form, or agreement used by an agency."³

¹ See, e.g., *Information Lockdown Hits Trump's Agencies*, Politico (Jan. 24, 2017) (online at www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122).

² 5 U.S.C. § 2302(b)(13).

³ Memorandum from Special Counsel Carolyn Lerner to the Heads of Executive Departments and Agencies, *The Whistleblower Protection Enhancement Act of 2012 and Non-Disclosure Policies, Forms, and Agreements* (Mar. 2013) (online at

Second, the implementation or enforcement of any nondisclosure policy that does not include the required whistleblower protection statement also violates section 744 of the Consolidated Appropriations Act of 2016.⁴

Third, these gag orders also apparently violate Section 713 of the Consolidated Appropriations Act of 2016, which provides:

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who—

- (1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee.⁵

Fourth, these gag orders also may violate 5 U.S.C. § 7211, which was enacted in 1912 to protect the rights of federal employees to communicate with Congress. This law states:

The rights of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.

One example of the restrictions the Trump Administration has placed on employee communications is a memo issued by the Acting Secretary of the Department of Health and Human Services on President Trump's first day in office. That memo states:

No correspondence to public officials (e.g. Members of Congress, Governors) or containing interpretations or statements of Department regulations or policy, unless specifically authorized by me or my designee, shall be sent between now and February 3, during which time you will have the opportunity to brief President Trump's appointees and designees on any such correspondence which might be issued.⁶

<https://osc.gov/Resources/OSC%20Memorandum%20on%20Whistleblower%20Law%20and%20Non%20Disclosure%20Agreements%2003%2014%2013.pdf>.

⁴ Pub. L. No. 114-113 as continued by Pub. L. No. 114-254.

⁵ *Id.*

⁶ Memorandum from Acting Secretary, Health and Human Services, to OPDIV Heads and Staff Div Heads, *Immediate Action on Regulatory Review—ACTION* (Jan. 20, 2017).

The memo also provides: "If you identify any actions taken inconsistent with these requests, please know they shall not be considered impliedly ratified and please immediately withdraw or rescind them as void and without effect."⁷

This memo appears to violate all of these laws, and it creates the impression that the Trump Administration intends to muzzle whistleblowers. Other agencies have reportedly issued similar restrictions, including the Departments of Interior, Transportation, and Agriculture, among others.⁸

For more than a century, Congress has protected the rights of federal employees to communicate with Congress about waste, fraud, and abuse in the Executive Branch.

For the reasons set forth above, we urge you to immediately rescind all policies on employee communications that do not comply with the Whistleblower Protection Enhancement Act and other federal statutes.

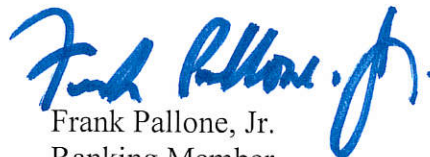
In addition, because of the magnitude of these problematic directives, we request that the President issue an official statement making clear to all federal employees that they have the right to communicate with Congress and that he and his Administration will not silence or retaliate against whistleblowers.

Thank you for your consideration of this request.

Sincerely,



Elijah E. Cummings
Ranking Member
House Committee on Oversight and
Government Reform



Frank Pallone, Jr.
Ranking Member
House Committee on
Energy and Commerce

cc. The Honorable Jason Chaffetz, Chairman
House Committee on Oversight and Government Reform

The Honorable Greg Walden, Chairman
House Committee on Energy and Commerce

⁷*Id.*

⁸ *Information Lockdown Hits Trump Agencies*, Politico (Jan. 24, 2017)
(www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122).