

Congress of the United States
Washington, DC 20515

May 4, 2017

The Honorable Thomas E. Price, M.D.
Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Mr. Secretary:

Attached is an internal memorandum we obtained from your Department. It instructs Department employees to consult with legislative affairs personnel prior to communicating with Congress. Federal employees will most certainly read this instruction as a prohibition against direct communications with Congress without permission. As such, it is potentially illegal and unconstitutional, and will likely chill protected disclosures of waste, fraud, and abuse.

The memorandum, dated yesterday, is from your Chief of Staff Lance Leggett to the heads of operating and staff divisions at the Department. It references "long-standing policy regarding congressional relations," and states: "[A]ny communications with Members of Congress and staff should not occur without prior consultation with the Office of the Assistant Secretary for Legislation."

Yet federal employees have a constitutional right to communicate *directly* with Congress and "petition the Government for a redress of grievances," a fact the memorandum fails to note.¹ Congress has long protected that right. In response to a misinterpretation of that right by the Executive Branch, Congress enacted the Lloyd-LaFollette Act of 1912 to clarify that the right extends to federal employees' communications on matters directly related to their employment. The law states:

The right 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.²

To enhance enforceability of the provision, during the Clinton Administration, Republicans in Congress passed a similar restriction for Fiscal Year 1998 government-wide appropriations.³ The provision, which remains in force today, states in part:

¹ U.S. CONST. amend. I.

² Postal Service Appropriations Act, 1912, Pub. L. No. 336 § 6, 37 Stat. 539, 555 (1912). The provision has been found at 5 U.S.C. § 7211 since the Civil Service Reform Act of 1978, Pub. L. No. 95-454 Title VII § 703(a)(3), 92 Stat. 1111, 1217 (1978).

³ Treasury & Gen. Gov't Appropriations Act, 1998, Pub. L. No. 105-61 § 640, 111 Stat. 1272, 1318 (1997).

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[.]⁴

This so-called “Lloyd-LaFollette anti-gag rider” has been an important provision in protecting federal employee communications with Congress. In fact, as the result of an opinion we requested with House Judiciary Committee Chairman Bob Goodlatte, the Government Accountability Office last year found that two officials at the Department of Housing and Urban Development (HUD) had violated the provision, and that “HUD’s appropriation was not available to pay the salaries of [the two officials] while they prevented or attempted to prevent” an interview sought by the three committees.⁵

Although the language of the attached memorandum does not ultimately *prohibit* all direct communication from employees, it forces employees to expose their communications with Congress to agency management, necessarily subjecting them to a significantly increased risk of reprisal. The effect will be to substantially chill those communications.

Another appropriations restriction, sometimes known as the “Grassley anti-gag rider,” was introduced by Senator Grassley in the 1980s to ensure no money was used to enforce any nondisclosure policy, form, or agreement that does not include a specific provision regarding whistleblower protections and employees’ rights to communicate with Congress and inspectors general.⁶ In 2012 the requirement was codified in the Whistleblower Protection Enhancement Act, and failing to abide by it was made a prohibited personnel practice.⁷ Both of our offices have provided continued oversight of this provision, and in April 2014, Senator Grassley’s staff issued a report on the provision’s implementation.⁸

⁴ Consol. Appropriations Act, 2016, Pub. L. No. 114-113 Div. E § 713, 129 Stat. 2241, 2475 (2015).

⁵ GOV’T ACCOUNTABILITY OFFICE, B-325124.2, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT—APPLICATION OF SECTION 713 OF THE FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS ACT, 2012 (RECONSIDERATION) 2 (Apr. 5, 2016).

⁶ See, e.g., Consol. Appropriations Act, 2016, Pub. L. No. 114-113 Div. E § 744, 129 Stat. 2241, 2485 (2015).

⁷ Whistleblower Prot. Enhancement Act of 2012, Pub. L. 112-199 § 115(a)(1).

⁸ Memorandum from Republican Staff, S. Judiciary Comm., to Spec. Counsel Carolyn Lerner, et al., *Report on the Implementation of Section 115(a) of the Whistleblower Protection Enhancement Act of 2012 (WPEA)*, Apr. 4, 2014, <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/WPEA%2C%2004-02-14%2C%20Report%20of%20WPEA%2C%20anti-gag%20Implementation.pdf>.

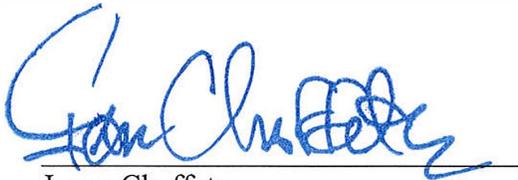
However, the attached memorandum contains no exception whatsoever for lawful, protected communications with Congress. In its current form, employees are likely to interpret it as a prohibition, and will not necessarily understand their rights. The Grassley anti-gag rider and the associated WPEA provision are designed to ensure that employees understand that any such agency policy does not supersede the protections afforded them by statute and the Constitution.

These provisions are significant because they ensure that attention can be brought to problems in the Executive Branch that need to be fixed. Protecting whistleblowers who courageously speak out is not a partisan issue—it is critical to the functioning of our government.

To assist the Committees in understanding the basis for this memorandum, provide us with all documents and communications referring or relating to this directive as soon as possible but no later than May 18, 2017. An attachment to this letter provides additional instructions for responding to this request.

In addition, in order to correct this potential violation of federal law, we request that as soon as possible you issue specific written guidance to all agency employees making them aware of their right to communicate directly and independently with Congress. Such guidance should inform employees of the whistleblower protections that apply, and make clear that the agency will not retaliate against any employee who chooses to exercise these rights. Once you have issued this guidance, please provide the Committees with a copy.

Absent such a clear communication from you, agency management may seek to intimidate whistleblowers from providing information to Congress. We will not allow that to happen and trust that nor will you. Protecting whistleblowers is crucial to effective government and the oversight process.



Jason Chaffetz
Chairman
House Committee on Oversight and
Government Reform

Sincerely,



Charles E. Grassley
Chairman
Senate Committee on the Judiciary

Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Member
House Committee on Oversight and Government Reform

The Honorable Dianne Feinstein, Ranking Member
Senate Committee on the Judiciary



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

To: Heads of Operating Divisions
Heads of Staff Divisions

From: Lance Leggitt, Chief of Staff

Subject: Congressional Relations

Date: May 3, 2017

On behalf of Secretary Tom Price, I write to restate the Department's long-standing policy regarding congressional relations.

I am excited about the opportunities we have to work together to advance the President's agenda in Congress. By collaborating across agencies, we will achieve more of our goals.

To ensure that our efforts are coordinated, any communications with Members of Congress and staff should not occur without prior consultation with the Office of the Assistant Secretary for Legislation (ASL). This includes requests for calls, meetings, briefings, technical assistance, policy development, hearings, oversight, detailees, etc. The ASL is responsible for ensuring Secretary Price's involvement on appropriate matters.

Please instruct your staff to adhere to this procedure. Your cooperation will help us avoid unnecessary problems in our relationships with Congress. I appreciate your support.

If you have additional questions or comments, please contact Barbara Clark, Acting Assistant Secretary for Legislation, at Barbara.Clark@hhs.gov.

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,
CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.