

November 30, 2017

Special Counsel Henry Kerner
U.S. Office of Special Counsel
1730 M St. NW
Suite 218
Washington, DC 20036

Dear Special Counsel Henry Kerner:

The Project On Government Oversight (POGO) requests an investigation into a potential violation of the Whistleblower Protection Enhancement Act (WPEA) by Customs and Border Protection (CBP). CBP appears to have violated the requirement to include—in all nondisclosure policies, forms, and agreements—language clarifying that such management communications do not override employees’ rights to blow the whistle.¹

Specifically, CBP has issued a communications document to the Army Corps of Engineers regarding President Trump’s border wall project and related infrastructure on the southern border that seeks a “Unitary Voice” and “Message Discipline.”²

“In the field, only the CBP Office of Public Affairs or a Border Patrol agent can speak about the mission to the public or media. Media questions can also be referred to the PMO [Program Management Office] Border Infrastructure public affairs,” the CBP communications document states.

At no point does this “Strategic Communications Plan” from CBP management note that all federal government employees are offered protections for whistleblower disclosures—this language is required by law in management communications to federal employees that direct them not to communicate outside of their agency. Federal civilian employees, including those at the Army Corps and at CBP, are protected for whistleblower disclosures to the media as long as those disclosures do not involve classified information or information specifically barred from public release by statute.³

Whistleblowers are the nation’s first line of defense against waste, fraud, abuse, and illegality within the federal government. Even if inadvertent, deterring whistleblowing in an effort to stymie leaks makes the federal government less effective and less efficient.

¹ 5 U.S.C. § 2302(b)(13); 5 U.S.C. §2302 – “Prohibited personnel practices.”

² Operations Order: TF Southwest Border 17-XX (Operations Southwest Border), Annex R – Strategic Communications, June 6, 2017. <https://www.documentcloud.org/documents/4199075-6-9-2017-ANNEX-R-STRAT-COM-Plan-v4.html>

³ *Department of Homeland Security v. MacLean*, 135 U.S. 913 (2015)

The U.S. Office of Special Counsel (OSC) has broadly interpreted 5 USC § 2302 (b)(13) to consider management communications, including emails to staff, that fail to include required whistleblower disclosure language as violations of the law that require corrective action.⁴

Most federal employees are not experts on the nuances of whistleblower protections, and thus the government should err on the side of caution when guiding employees on nondisclosure practices. That is why, after considering this and the inherent power balance between employees and their employers, Congress legally requires the inclusion of specific language when management issues communication guidelines. Without such clarification, staff could erroneously get the impression that any unauthorized communication outside of their chain-of-command is prohibited.

As Senate Judiciary Chairman Chuck Grassley (R-IA), House Government Operations Subcommittee Chairman Mark Meadows (R-NC), and then-House Oversight and Government Reform Committee Chairman Jason Chaffetz (R-UT) wrote in February, it is important to “alleviate any potential confusion for federal employees” when there are management communications that could “implicate whistleblower protection laws.”⁵ Senator Grassley was responsible for the statutory provision in question. Ranking Members Elijah Cummings (D-MD)—who is an original sponsor of the WPEA along with Senator Grassley—and Frank Pallone (D-NJ) have similarly noted that these kinds of ambiguous management communications can create “the impression that the” administration “intends to muzzle whistleblowers.”⁶ Any such impression can and should be remedied.

Additionally, appropriations law states:

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

⁴ Office of Special Counsel, “OSC’s Enforcement of the Anti-Gag Order Provision in Whistleblower Law”, January 25, 2017. <https://osc.gov/News/pr17-03.pdf> (Downloaded November 30, 2017)

⁵ Letter from Senate Judiciary Chairman Chuck Grassley, then-House Oversight and Government Reform Committee Chairman Jason Chaffetz, and House Government Operations Subcommittee Chairman Mark Meadows, to Mr. Donald McGahn, II, Counsel to the President, about whistleblower rights and recent gag orders, February 1, 2017. <https://www.judiciary.senate.gov/imo/media/doc/2017-02-01%20JEC%20MM%20CEG%20to%20White%20House%20Counsel%20-%20Protecting%20Whistleblowers.pdf> (Downloaded August 10, 2017)

⁶ Letter from Ranking Members Elijah Cummings and Frank Pallone, Jr., to Mr. Donald McGahn, II, Counsel to the President, about whistleblower rights and recent gag orders, January 26, 2017. <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2017-01-26.EEC%20and%20Pallone%20to%20White%20House%20Counsel%20re.%20Agency%20Directives%20to%20Silence%20Employees.pdf> (Downloaded August 10, 2017)

officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee.⁷

One or more individuals at CBP were presumably involved in the creation of this “Strategic Communications Plan” that could be interpreted by employees as an attempt to prevent unauthorized disclosures to Congress, and therefore may also be in conflict with appropriations law.

As with the WPEA provision, POGO believes CBP can correct this.

This communications plan should be withdrawn and revised immediately to include the language required by law.

A key component to any remedy is clear communication from the highest levels of leadership in an organization. A strong message from DHS and CBP leaders to all employees and contractor staff stating that they are protected when blowing the whistle is an important step towards solving this problem. Again, for federal civilian employees, these protections include disclosures of wrongdoing to the press as long as the disclosures are not classified or otherwise protected by statute from public disclosure.

In sum, CBP’s management communications are likely to erroneously create the impression that government employees and contractors at CBP, the Army Corps of Engineers, and other agencies have no legal avenue to blow the whistle on government waste, fraud, and abuse. This must be remedied, fast. We urge OSC to investigate and work to resolve this concern.

My staff and I are available to discuss this matter further, and we thank you for your time and consideration of this matter.

Sincerely,



Danielle Brian
Executive Director

cc: The White House
Elaine Duke, Acting Secretary of the Department of Homeland Security
Kevin K. McAleenan, Acting Commissioner, Customs and Border Protection
Senator Charles Grassley
Representative Mark Meadows
Representative Elijah Cummings
Representative Frank Pallone

⁷ U.S. Congress, “Consolidated Appropriations Act, 2017 (P.L. 115-31), Introduced January 4, 2017, by Representative Paul Cook. <https://www.congress.gov/bill/115th-congress/house-bill/244/text> (Downloaded August 10, 2017)