

February 22, 2018

The Honorable Henry Kerner  
Special Counsel  
Office of Special Counsel  
1730 M St NW  
Washington, DC 20036

Dear Special Counsel Kerner:

The Make It Safe Coalition, a coalition of organizations concerned with government accountability, transparency and whistleblower protection, requests you conduct a *sua sponte* investigation into the Department of Justice's violation of anti-gag provisions in the Whistleblower Protection Enhancement Act (WPEA) and the FY 2017 Consolidated Appropriations Act (CAA). Collectively, our organizations helped draft, implement, and execute these statutes. We are alarmed at a pattern of actions violating the spirit and letter of these laws.

On January 29<sup>th</sup>, Attorney General Jefferson Sessions issued a memorandum barring "attorneys, officers, boards, divisions, and components" from communicating with "Senators, Representatives, congressional committees, or congressional staff" without prior consultation with the Department of Justice's (DOJ) Office of Legislative Affairs.<sup>1</sup> This gag order is an unacceptable infringement on DOJ employees' free speech rights.

As your agency made clear last year, agencies cannot block federal employees from speaking without "including required language that informs employees that their statutory right to blow the whistle supersedes the terms and conditions of the nondisclosure agreement or policy. (5 U.S.C. §2302(b)(13))."<sup>2</sup> Both the WPEA and CAA contain language prohibiting Congress from funding agencies that "implement or enforce" any "non-disclosure policy, form, or agreement if such policy, form, or agreement does not contain" provisions reaffirming that employee whistleblower rights are controlling, despite any nondisclosure restrictions.<sup>3</sup> Your agency reads "non-disclosure policy, form, or agreement" to include management communications broadly.<sup>4</sup> This includes management communications like memoranda.

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<sup>1</sup> February 5, 2018, "Communications with Congress," [https://www.judiciary.senate.gov/imo/media/doc/2018-02-05\\_CEG\\_to\\_DOJ\\_\(Communications\\_with\\_Congress\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2018-02-05_CEG_to_DOJ_(Communications_with_Congress).pdf)

<sup>2</sup> January 25, 2017, "OSC's Enforcement of the Anti-Gag Order Provision in Whistleblower Law," <https://osc.gov/News/pr17-03.pdf>

<sup>3</sup> 5 USC §2302(b)(13); §§713 and 744, Consolidated Appropriations Act, 2016; Division E, Financial Services and General Government Appropriations Act, 2016; Title VII, General Provisions, Government-Wide.

<sup>4</sup> <https://osc.gov/News/pr17-03.pdf>

The DOJ memorandum does not include provisions affirming employee whistleblower rights. They have implemented an illegal non-disclosure policy gagging their employees without recognizing those WPEA requirements.

Senate Judiciary Chairman Chuck Grassley has sent a letter to Attorney General Sessions identifying this problem.<sup>5</sup> As the agency charged with enforcing 5 USC §2302(b)(13), we request you investigate this gag order and ensure Attorney General Sessions follows through with Chairman Grassley's request. Pursuant to 5 USC §1214, we request that you recommend Attorney General Sessions to include the statutorily mandated whistleblower language. Further, as Attorney General Sessions' memorandum claimed to be in line with "past policy and practice," we ask that you ensure all other DOJ gag orders include statutory whistleblower language.

When an agency unlawfully gags its employees, it threatens Congress's ability to engage in oversight and hampers citizens' right to know about waste, fraud, abuse and threats to the public's health, safety and liberty.

These efforts also create a chilling effect on the many federal employees committed to exercising professional integrity in fulfilling their agencies' mandates. The Whistleblower Protection Act and the WPEA recognize the essential role whistleblowers play in promoting accountability and transparency in government. Silencing DOJ employees undermines the intent and letter of these laws, which were all passed with unanimous, bipartisan support.

This entire situation is made worse because it is the Department of Justice that has implemented this gag order. This is the agency entrusted to enforce our laws. Instead, it is blatantly violating them.

We hope you take action to investigate and correct this prohibited personnel practice, including calling for Attorney General Sessions to revoke the illegal memorandum.

Sincerely,

Tom Devine  
Government Accountability Project

Michael Ostrolenk  
Liberty Coalition

Pete Sepp  
National Taxpayers Union

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<sup>5</sup> February 5, 2018, "Communications with Congress," [https://www.judiciary.senate.gov/imo/media/doc/2018-02-05\\_CEG\\_to\\_DOJ\\_\(Communications\\_with\\_Congress\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2018-02-05_CEG_to_DOJ_(Communications_with_Congress).pdf)

Elizabeth Hempowicz  
Project on Government Oversight

Shanna Devine  
Public Citizen

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Taxpayer Protection Alliance

Yogin Kothari  
Union of Concerned Scientists

cc: Michael Horowitz, Inspector General, Department of Justice