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July 20, 2007

The Honorable Scott J. Bloch
U.S. Special Counsel
U.S. Office of Special Counsel
1730 M Street, N.W.
Washington, DC 20036

Dear Mr. Bloch:

Thank you for your testimony at last week's Committee hearing examining the U.S. Office of Special Counsel ("OSC"). The hearing raised numerous questions. As you may recall, you committed to answer the Committee's questions posed to you in writing. Pending your written response, the official hearing record from the July 12, 2007 Committee hearing will remain open.

1. At the hearing, the Ranking Member disclosed an e-mail apparently from your personal account, dated Tuesday, June 19, 2007 at 11:52 a.m. That e-mail ("the June 19 e-mail") discusses official business relating to the agency you head the OSC. The e-mail discusses OSC's reauthorization hearing, disparages an individual under investigation by OSC and two Members of the U.S. House of Representatives with oversight responsibility for your agency.

    a. Please identify all e-mail communications sent from a non-governmental account controlled by you since January 26, 2007, including but not limited to the above-listed AOL account, where you discuss official agency business, including those e-mails where you name individuals currently under investigation by your agency or Members of the U.S. Congress. When identifying all e-mail communications, we ask you to list the account the e-mail was sent on, the date, the time, the subject, and all individuals named in the text of the e-mail.

2. Your location at the time could corroborate whether the June 19 e-mail reflects the use of nongovernmental e-mail systems to conduct official business. At the hearing, Rep. Issa asked you where you were on June 19, 2007 at 11:52 a.m. You refused to answer.

a. Please explain the basis for your refusal?

b. Rep. Issa asked you to determine the answer to this question and notify the Committee. Have you?

c. Where were you on June 19, 2007 at 11:52 a.m.?

d. Was government-supplied computer equipment used in the composition or transmission of the e-mail message you sent on June 19, 2007 at 11:52 a.m. on the scottb1132@aol.com account?

3. At the hearing, Committee members expressed their concern to you about the repeated disparagement of Administrator of General Services Lurita Doan. As they explained at the hearing, your staff disparaged her at an April 26, 2007 Congressional briefing and at a May 2, 2007 social event. You conceded that these comments were inappropriate, presumably because they prejudice the subject of your investigation and suggest bias by the agency against the subject. Moreover, you reinforced that sense of bias by personally disparaging her in your June 19 e-mail.

a. What have you done to remedy this situation?

b. What do you plan to do to restore confidence in your agency's broken investigative process?

4. The improper disclosure of an unpublished and unfinished OSC report on GSA Administrator Lurita Doan prejudiced her ability to respond effectively and, again, suggests bias by the agency. A report that can withstand scrutiny need not be prematurely disclosed to the press for political or public relations advantage. OSC Communications Director James Mitchell acknowledged in a telephone conversation with our staff that the source of this leak could only have been your agency and that he would make sure that you understood that. He further advised that OSC would not make any internal inquiry about it because leak investigations never go anywhere.

At our hearing, you provided a less than clear explanation of your understanding of this leak, including an invocation of your First Amendment right to free speech and the power to disclose information if it is in the public interest under your regulations. Your testimony about the leak of the draft report dated May 17, 2007 was not credible. Indeed, it may have been deliberately false.

a. Prior to the hearing did Mr. Mitchell discuss with you the disclosure of the May 17 draft of the Doan Report?

b. Did he tell you that the disclosure could only have come from within the agency?

c. Did you tell him that you did not believe that?

d. Do you acknowledge that the *Washington Post* published a correction that it used a May 17 draft and not the final report that was sent to Doan?

e. If not, please explain the basis for your refusal to acknowledge that such a correction was published in the *Washington Post*.

f. Do you now acknowledge that the disclosure of the May 17 draft could only have come from your office?

g. If not, please explain the basis for any "belief" that the May 17 draft could have come from somewhere else.

h. Please explain the basis for your belief you have personal First Amendment rights in connection with your leak of the May 17 draft report on Lurita Doan.

i. Please explain how it was in the public interest to release the unpublished and unfinished draft May 17 report on the Administrator of General Services Lurita Doan.

5. During our examination of your agency's handling of the Lurita Doan matter, we learned the Administrator – the target of your investigation – was not permitted to see interview or deposition transcripts of witnesses against her.

a. Is this true?

b. If so, the procedural protections afforded to targets of OSC investigations appear to be lacking. Would you support legislation ensuring that targets of OSC investigations are able to have access to such transcripts?

c. What types of additional due process rights would you support?

6. In response to questions from Rep. Issa relating to the Report of Prohibited Political Activity (Lurita A. Doan), you repeatedly advised Rep. Issa that only you have seen the entire Doan file. Amplifying your comments, you told Mr. Issa that he has not seen the witness transcripts and complete documentary record. The disclosure of confidential evidence that would be material to your report but that was not in the report raises serious ethical questions.

a. Please explain why evidence that you claim to be material to your report was not included in your report.

b. Please provide the Committee with any ethical standard that would permit the disclosure of such evidence.

c. If you claim that public disclosure of confidential evidence not included in your report is in the "public interest" under your regulations, please explain how such a disclosure is in the public interest if it was not in the public interest to put it in your report.

7. As an "independent" and "nonpartisan" federal agency, OSC officials have an obligation to conduct themselves professionally. On April 27, 2007 appearing on C-SPAN you said "our guide is the law, our lodestar are facts and evidence." You said "we make sure we read the case law to make sure we know what we are talking about." "Federal Courts and the MSPB tell us if we are right or wrong." Your Doan report relies on very few MSPB or federal court decisions.

a. Please identify all cases that would support the conclusion that the question "How can we help our candidates" constitutes a "commit[ment]" of agency resources to help Republican candidates.

8. In your May 18, 2007 Report you needlessly identify GSA employees by name. Surely you could have redacted these individual names.

a. Why did you fail to redact these names?

b. The publication of individual names in situations like this can lead to unfair consequences for these people. Do you agree?

c. Isn't this a terrible practice for the agency that is supposed to be protecting federal employees?

d. The May 17 draft of the report did not include the names, suggesting that the disclosure of the draft was part of a deliberate strategy to attack the Administrator of General Services but protect the agency from claims that it violated the Privacy Act. Why did the May 17 draft not include the names when the final version did?

9. When lawyers present information to a court they have a responsibility to be true to the evidence. There is a discipline required for preparing court papers. This includes quoting the actual words witnesses said, and citing the precise page number from the deposition transcript where you found those words. These practices establish credibility and demonstrate methodical, unimpeachable legal analysis.

a. Why do you eschew this practice in your Report on Prohibited Activity (Lurita A. Doan)?

b. You do not quote witnesses interviewed by OSC. You do not use footnotes to identify the transcript pages the information was found in the record. Please explain.

10. You have presented no evidence to show anyone within GSA acted on statements you attribute to Doan.

a. If her actions were coercive as you say they were, what did she coerce?

b. What candidate or election would have been supported by the attendance of the President at an event in San Francisco, one subject of discussion following Doan's remark?

c. If you are able to identify such a candidate, why did you not identify that candidate or election in your report?

d. What candidate or election would have been supported by the attendance of Senator Martinez (who is not up for election in 2008) at an event in Florida, another subject of discussion that followed Doan's remark?

e. If you are able to identify one, please explain why you did not identify that candidate or election in your report.

11. The statements you attribute to Doan are ambiguous. She may have said "what can we do to help," or "what can we do to help our guys," or "help our candidates."

a. As her statements were addressed to Scott Jennings, couldn't this mean what can we do legally, and within the dictates of the Hatch Act to help our candidates?

b. Couldn't this have meant what can we do after work, on our own time, to help the administration?

c. Why did you fail to consider these alternative meanings to ambiguous statements?

d. The ambiguous statements you attribute to her may have been rhetorical. Why did you rule this out?

12. Your Report fails to identify the appropriate standard of evidence for analyzing whether Doan violated the Hatch Act.

a. What standard of evidence did you use?

b. Why did you not set forth in the report the standard of evidence that you used?

c. What standard of evidence should the President use in analyzing the materials you submitted – preponderance of the evidence or substantial evidence? Some other standard?

d. Why didn't you tell the President?

e. Which standard of evidence is used before the Merit Systems Protection Board?

f. If the standard you are asking the President to use is different from that which the Merit Systems Protection Board would use, please explain.

13. In Special Counsel v. Acconcia, No. CB-1216-06-0007-T-1, 2007 M.S.P.B. LEXIS 404 (Feb. 26, 2007), the respondent was charged with soliciting a political contribution from a subordinate employee, by inviting that subordinate employee to a fundraiser for a candidate for partisan political office, and by engaging in political activity while in a government building. The MSPB penalty was 45 days.

In Special Counsel v. Collier, 101 M.S.P.R. 391 (2006), the respondent – a USDA veterinarian – was found to have violated the Hatch Act for soliciting political contributions for a county commissioners race in North Carolina. The penalty was 30 days.

In Special Counsel v. McEntee, No. CB-1216-02-0007-T-1, 2003 M.S.P.B. LEXIS 560 (Sept. 8, 2003), the respondent was a candidate for election while employed at the FAA. The MSPB found removal from office at the FAA was deemed too harsh. The penalty was 30 days.

In Special Counsel v. Rivera, 61 M.S.P.R. 440 (1994), the respondent a GS-13 attorney with the SEC was found to have sent fundraising letters at work inviting people to a Colorado Hispanic Bar Association fundraiser for Roger Candelaria who was running for District Attorney in southern Colorado. He was warned not to continue this by his supervisor, but he continued. The penalty was 60 days.

a. In your Doan report, why didn't you cite any of these cases as precedent for your recommended punishment?

b. You recommend the President punish Doan to the fullest extent, i.e. removal from office. What cases can you refer us to show that such a recommendation is consistent with MSPB and federal court case law?

c. If you are able to cite such precedent, please explain why you did not cite it in your report.

d. With so much case law counseling against removal from office, does the Doan matter raise special considerations that have not heretofore been considered by the MSPB?

14. Solicitation cases warranting removal "have involved the coercion of subordinate employees, the most pernicious of the political activities prohibited by the Hatch Act." Special Counsel v. Malone, 84 M.S.P.R. 342, 366 (1999). The Merit System Protection Board (MSPB) has summarized that generally removal is only called for when the violation "occurred under circumstances demonstrating a deliberate disregard of the Act." Malone at 364-5. According to Malone, the MSPB generally considers six factors as aggravating or mitigating: 1) the nature of the offense and the extent of the employee's participation; 2) the employee's motive and intent; 3) whether the employee received the advice of counsel regarding the activities; 4) whether the employee ceased the activities; 5) the employee's past employment record; and 6) the political coloring of the employee's activities. Malone at 364, citing Special Counsel v. Riviera, 61 M.S.P.R. 440, 444 (1994).

a. Why did OSC fail to analyze the six factors identified in Malone?

b. In Doan's case, it appears that five of these factors are mitigating. If you disagree, why?

15. At the July 12 hearing, you claimed that lack of cooperation could be considered an aggravating factor and suggested that Doan's conduct during the investigation was such a factor. This again raises serious ethical questions regarding the disclosure of a material aspect of your investigation that had an impact on the result that was not explained in the report itself.

a. Please cite the MSPB or federal court precedent for your claim that that lack of cooperation can be an aggravating factor in an OSH Hatch Act investigation.

b. Please explain why, if lack of cooperation was an aggravating factor, you did not include any findings of fact or legal conclusions in your report that such aggravation influenced the results of the investigation.

c. Please explain what ethical standard permits you to make any public disclosure of considerations that influenced your decision that are not included in your decision.

Please respond no later than August 3, 2007. If you have any questions regarding this request, please contact the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,

Tom Davis
Ranking Member

cc: The Honorable Henry A. Waxman