



U.S. Department of Justice

Office of the Deputy Attorney General

Bradley Weinsheimer  
Associate Deputy Attorney General

Washington, D.C. 20530

June 18, 2020

David Z. Seide  
Government Accountability Project  
1612 K Street NW  
Washington, D.C. 20006  
By email: [davids@whistleblower.org](mailto:davids@whistleblower.org)

Dear Mr. Seide:

The Department of Justice (Department) understands that you represent John Elias, a trial attorney in the criminal section of the Department's Antitrust Division, in connection with a subpoena for documents and his testimony before the Committee on the Judiciary of the U.S. House of Representatives (Committee). The Department understands that Mr. Elias has received a subpoena to appear before the Committee on June 24, 2020. I write to inform you of Department policies and to reiterate certain obligations of Mr. Elias concerning such an appearance.

The Department has significant confidentiality interests when it comes to congressional oversight of law enforcement matters, including civil investigative matters. "Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 117 (1984); see *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32–33 (1982) (opinion of Attorney General Smith). Accordingly, while the Department's leaders may explain to a congressional committee the reasons underlying many of the Department's public decisions, the Department generally does not make available to Congress, or to the public at large, documents or other information involving internal deliberations about particular investigations or enforcement actions.

In particular, the Department has a long-standing policy in protecting its line attorneys against appearances before Congress to testify about investigative matters. Such appearances in politicized congressional hearings or staff interviews compromise the independence of the Department's investigative and enforcement functions and threaten to inhibit other line attorneys in their exercise of those functions. As we explained in 2000, "[t]he Department . . . has a strong

institutional interest in ensuring that appropriate supervisory personnel, rather than line attorneys and agents, answer Congressional questions about Department actions.” Letter for Rep. John Linder, Chairman, Subcommittee on Rules and Organization, from Robert Raben, Assistant Attorney General, Office of Legislative Affairs at 6 (Jan. 27, 2000). Years earlier, Attorney General Reno explained that “[p]ermitting Congressional examination of line prosecutors carries substantial danger of chilling the objective exercise of [prosecutorial] discretion and of generating the appearance of political influence on prosecutorial decisions.” Letter for Sen. Orrin Hatch from Janet Reno, Attorney General at 1 (Jan. 5, 1994). The same is true for line attorneys like Mr. Elias who investigate and enforce potential civil or criminal violations. Where congressional committees have expressed interest in the testimony of the Department’s line attorneys, the Department has historically been able to accommodate their legitimate interests by providing testimony or briefings from supervisory personnel or answering questions in writing, and only in rare and exceptional cases has made those attorneys available to provide factual information in non-public interviews or briefings outside the politicized arena of a congressional hearing. The Department here has made offers to accommodate the Committee’s legitimate interests in oversight of the Department, and remains willing to have those discussions, but the Committee so far has rejected these overtures.

Should Mr. Elias appear before the Committee, we expect that he will abide by his obligations under the law, the rules of professional responsibility, and Department policy to refrain from disclosing information relating to sensitive law enforcement information and confidential matters relating to his representation of the United States. Those matters include classified information, sources and methods, grand-jury information protected by Federal Rule of Criminal Procedure 6(e), and the deliberative processes that underlie investigative and enforcement decisions. The information subject to executive privilege in this context most likely will consist of attorney work product, deliberative process information, and information in law enforcement and civil investigative files. *See, e.g., Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 10 (2008) (opinion of Attorney General Mukasey) (“The President may invoke executive privilege to preserve the integrity and independence of criminal investigations and prosecutions.”); *Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (opinion of Attorney General Reno) (discussing the deliberative process, attorney-client, and attorney work product components of executive privilege).

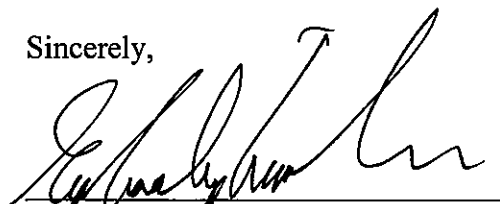
Although Mr. Elias has not advised the Department of the subjects of his intended testimony, Committee staff have apparently advised the press that the Committee will ask Mr. Elias about matters related to the Department’s effort to block a merger between AT&T and Time Warner and a separate investigation into a deal between automakers and the State of California concerning fuel efficiency and emissions standards. The deliberations related to those matters, as well as other associated non-public attorney communications or work product, are likely covered by one or more components of executive privilege and would implicate the rules

of professional responsibility. Disclosing non-public information about investigative and enforcement deliberations without authorization would compromise the confidentiality and integrity of the law enforcement process and would have a chilling effect on Department attorneys going forward.

Absent authorization, an individual attorney such as Mr. Elias lacks authority to reveal confidential deliberative information or attorney work product related to investigative and enforcement matters in response to a congressional subpoena. The balancing of a congressional committee's need for information and the Executive Branch's need for confidentiality occurs through the constitutionally mandated accommodation process between authorized representatives of the Executive Branch and Congress. Accordingly, consistent with appropriate governmental privileges, the Department expects that Mr. Elias will decline to respond to questions seeking such information and advise the Committee to contact the Department's Office of Legislative Affairs should it seek information that he is unable to provide.

Finally, Mr. Elias is not authorized to disclose any records of the Department to Congress with respect to the Committee's request for Mr. Elias to produce documents and communications referring or relating to any documents he produced to the Department's Office of Inspector General, the United States Office of Special Counsel, or a Member of Congress. Such records constitute property of the Department and are subject to restrictions on the unauthorized disclosure of information, including information protected by executive privilege. Department policy requires that the production of such records be coordinated through the Office of Legislative Affairs. *See* Justice Manual §§ 1-8.200, 1-8.210. The Committee's interest in documents relevant to investigations pending with the Office of the Inspector General or the Office of Special Counsel raises concerns of political interference in the autonomy of those investigations. To the extent the Committee has a legitimate interest in seeking such information, its requests should be directed to those offices.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bradley Weinsheimer', written over a horizontal line.

Bradley Weinsheimer  
Associate Deputy Attorney General