

DEPARTMENT OF JUSTICE
EXECUTIVE SECRETARIAT CONTROL DATA SHEET

From: UNDERCOFLER, J. CLAYTON, III, PHILADELPHIA, PA
To: AG.
Date Received: 10-06-86 Date Due: 01-30-87 Control #: X6100613827
Subject & Date
09-09-86 LETTER REQUESTING THE STATUS OF HIS 03-03-86 LETTER
ON BEHALF OF CHAPTER 31 OF THE FEDERAL LAW ENFORCEMENT
OFFICERS ASSOCIATION, WITH REGARD TO FEDERAL FORM FD-645
ENTITLED "WARNING & ASSURANCE TO EMPLOYEE REQUIRED TO
PROVIDE INFORMATION" AND OTHER SIMILAR FEDERAL FORMS.
W/ENCLOSED CC OF 03-03-86 LETTER.
SEE E.S. 6031103327 (COPY OF CONTROL ATTACHED)

	Referred To:	Date:	Referred To:	Date:	
(1)	OLC;COOPER	10-06-86	(5)		FILE:
(2)			(6)		
(3)			(7)		PRTY
(4)			(8)		1
	INTERIM BY:		DATE:		OPR:
	Sig. For: AG.		Date Released: 04-01-87		HED

Remarks

CC OAG (RICHARDSON), DAG, AAG.
(1) ADVISE EXEC. SEC. OF THE STATUS OF THIS MATTER.
10-27-86. DUE DATE EXTENDED PER REQUEST OF OLC;GARRETT
FROM 10-17-86 TO 11-04-86. (LH)
01-07-87: DD EXTENDED PER OLC REQUEST FROM 11-04-86.
OLC AWAITING CORRECTED INFO FROM THE DIVISIONS. HP.

Other Remarks:

BOYKIN ROSE 12/3/86

FILE: U

THIS DOCUMENT MUST BE DISPOSED OF BY SHREDDING

u

(9 SEP 86)



U.S. Department of Justice

Office of Legal Counsel

#610-061-3827
#702-130-1879

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

MAR 20 1987

J. Clayton Undercofler III, Esq.
Saul, Ewing, Remick & Saul
3800 Centre Square West
Philadelphia, Pennsylvania 19102

Re: Federal Form FD-645

Dear Mr. Undercofler:

The Attorney General has asked that the Office of Legal Counsel respond to your letters regarding Federal Form FD-645. The Department of Justice does not have the authority to provide definitive or binding legal advice or opinions to private persons. See 18 U.S.C. 511 et seq.; 28 C.F.R. 0.5. For your information, however, we offer the following information.

As you noted, form FD-645 advises federal employees asked to submit to administrative questioning that they may be subject to dismissal for refusing to respond, but that neither their answers nor the fruits of those answers may be used against them in any criminal proceedings. Your initial letter stated that your client was concerned that this purported grant of "immunity" might not be effective on the ground that it is not authorized by the immunity statutes.

Before Form FD-645 was placed in use, the Department of Justice carefully considered its legality and efficacy. Even if this form purported to give immunity without statutory authorization, the Fifth Amendment rights of employees would not be jeopardized. The Supreme Court has held that the Fifth Amendment bars admission of incriminating statements made by an employee who was threatened with dismissal for refusing to answer on self-incrimination grounds. See Minnesota v. Murphy, 465 U.S. 420, 434-435 (1984).

We hope that this information is useful to you and your client.

Sincerely,

Samuel A. Alito, Jr.
Deputy Assistant Attorney General
Office of Legal Counsel

DEPARTMENT OF JUSTICE
ODAG EXECUTIVE SECRETARIAT CONTROL DATA SHEET

From: UNDERCOFLER, J. CLAYTON, III, PHILADELPHIA, PA
To: AG.
Date Received: 10-06-86 Date Due: 10-17-86 Control #: 6100613827
Subject & Date
09-09-86 LETTER REQUESTING THE STATUS OF HIS 03-03-86 LETTER
ON BEHALF OF CHAPTER 31 OF THE FEDERAL LAW ENFORCEMENT
OFFICERS ASSOCIATION, WITH REGARD TO FEDERAL FORM FD-645
ENTITLED "WARNING & ASSURANCE TO EMPLOYEE REQUIRED TO
PROVIDE INFORMATION" AND OTHER SIMILAR FEDERAL FORMS.
W/ENCLOSED CC OF 03-03-86 LETTER.
SEE E.S. 6031103327 (COPY OF CONTROL ATTACHED)

	Referred To:	Date:	Referred To:	Date:	
(1)	OLC;COOPER	10-06-86	(5)		FILE:
(2)			(6)		
(3)			(7)		PRTY
(4)			(8)		1
	INTERIM BY:		DATE:		OPR:
	Sig. For: AG.		Date Released:		HED

Remarks

CC OAG (RICHARDSON), DAG, AAG.
(1) ADVISE EXEC. SEC. OF THE STATUS OF THIS MATTER.

Other Remarks:

FILE:

DEPARTMENT OF JUSTICE
ODAG EXECUTIVE SECRETARIAT CONTROL DATA SHEET

From: UNDERCOFLER, J. CLAYTON & VALENT, THOMAS F., PHILADELPHIA, PA
To: AG.
Date Received: 03-11-86 Date Due: 05-30-86 Control #: 6031103327
Subject & Date

03-03-86 LETTER WRITING ON BEHALF OF CHAPTER 31 OF THE
FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION, PHILADELPHIA,
PENNSYLVANIA, WITH REGARD TO FEDERAL FORM FD-645, ENTITLED
"WARNING AND ASSURANCE TO EMPLOYEE REQUIRED TO PROVIDE
INFORMATION" AND OTHER SIMILAR FEDERAL FORMS. REQUESTING
THAT THE DOJ CAREFULLY EXAMINE THE CONTENT OF THIS AND
SIMILAR FORMS AND PRACTICES EMPLOYED BY VARIOUS FEDERAL LAW
ENFORCEMENT AGENCIES.

Referred To:	Date:	Referred To:	Date:	
(1) CRT;REYNOLDS	03-11-86	(5) OLC;COOPER	04-18-86	FILE:
(2) CIV;WILLARD	03-24-86	(6) OPR;SHAHEEN	05-08-86	
(3) CRM;TROTT	03-25-86	(7) OLC;MILLER	05-28-86	PRTY
(4) OAG;RICHARDSON	04-11-86	(8)		1Z
INTERIM BY:		DATE:		OPR:
Sig. For: AG		Date Released:		CYN

Remarks

CC: OAG (RICHARDSON).

(3) RETURN FORM W/COPY OF RESPONSE TO EX. SEC., ROOM 4400A.

(4) SEE NOTE, PLEASE ADVISE EXEC. SEC. WHO SHOULD TAKE
THE LEAD ON THIS CASE. (LCH)

(5) SEE NOTE FROM OAG;RICHARDSON, ASKING OLC TO REVIEW
THE LETTER TO DETERMINE IF A AG RESPONSE IS REQUIRED. (LCH)

Other Remarks:

03-24-86. PER CRT, REFERRED TO CIV FOR ACTION. (CYN)

03-25-86. PER CIV, REFERRED TO CRM FOR ACTION. (CYN)

05-08-86. PER MARC MILLER OF OLC, HE REFERRED THIS TO
CRM/OPR SECTION. HE HAS PROVIDED EX. SEC. W/A COPY OF
HIS COVER MEMO TO OPR. DUE DATE EXD. FROM 04-25 TO

05-16-86. (CYN)

05-28-86. OPR RETURNED TO OLC W/THEIR COMMENTS. (CYN)

FILE:

USA

LAW OFFICES OF
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September 9, 1986

Honorable Edwin Meese, III
Attorney General of the United States
Room 5111 Main Justice Building
10th and Constitution Avenue, N.W.
Washington, DC 20530

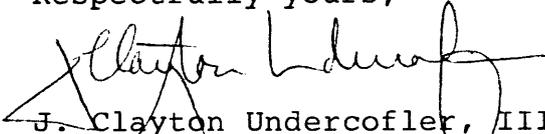
Re: Federal Form FD-645-Warning and Assurance
to Employee Required to Provide Information
and Other Similar Forms

Dear Attorney General Meese:

On March 3, 1986, I wrote as counsel for Chapter 31, Federal Law Enforcement Officers Association, with regard to Federal Form FD-645 entitled Warning and Assurance to Employee Require to Provide Information and other similar federal forms. Chapter 31 has yet to receive a reply to that letter, and in the likelihood that there may have been some administrative problems, I am enclosing herewith a duplicate copy of that letter.

We would very much appreciate hearing from your office or from the appropriate attorney within the United States Department of Justice.

Respectfully yours,


J. Clayton Undercofler, III

JCU/dm
Enc.

LAW OFFICES

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DEX 2100 (215) 875 7234

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1904-1975RICHARD L. LEVY
1911-1979

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J. CLAYTON UNDERCOFLER III
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March 3, 1986

Honorable Edwin Meese, III
Attorney General of the United States
Room 5111 Main Justice Building
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

Re: Federal Form FD-645-Warning and Assurance to
Employee Required to Provide Information and Other
Similar Forms

Dear Attorney General Meese:

We are writing on behalf of Chapter 31 of the Federal Law Enforcement Officers Association, Philadelphia, Pennsylvania, with regard to Federal Form FD-645 entitled Warning and Assurance to Employee Required to Provide Information and other similar federal forms. Our purpose in writing is to request that the Department of Justice carefully examine the content of this and similar forms and the practices employed by various federal law enforcement agencies in connection with interviews or inquiries conducted pursuant to the authority purportedly granted by these forms. It is the concern of Chapter 31 that while the purposes of employee inquiries, when properly conducted, are clearly in the interest of the Department of Justice and federal law enforcement agencies generally, there is a substantial question with regard to the validity of the assurances contained in Form FD-645 and related forms. It is because of these questions that Chapter 31 believes that individual law enforcement agents may be placed in jeopardy which is unwarranted and certainly has never been contemplated by the Department of Justice.

In particular, Form FD-645 (copy attached) provides that an employee who is requested to submit to an interview with regard to the performance of his/her official duties is required to answer such questions and that the failure to answer questions may result in disciplinary action. The authority for such action and for the express requirement that questions must be answered is a passage in the form which provides:

"neither your answers nor any information or evidence gained by reason of your answers can be used against you in any criminal proceeding. . . ."

In a nutshell, the FBI with regard to Form FD-645 (or other agency with a similar form) is purporting to grant use immunity to an employee with regard to the inquiry which is being conducted.

Pursuant to the holdings of Lefkowitz v. Cunningham, 431 U.S. 801 (1977), Lefkowitz v. Turley, 414 U.S. 70 (1973), and related cases, it has been established that employee inquiries such as these may be conducted when in fact the protections of the Fifth Amendment to the United States Constitution have been preserved through a grant of immunity. No question is raised in this letter as to the validity of the teachings of these cases. Rather, this letter calls into question the authority of a federal agency to grant use immunity when in fact 18 U.S.C. §6001 et seq. grants that authority only to the Attorney General or his authorized designee and the Courts. Hence, the question is whether the immunity which is referenced in this form exists in an official sense, whether there has been any liaison between the Department of Justice and the various agencies for purposes of granting immunity in a blanket fashion, whether there is any procedure for the grant of individual immunity with regard to each individual inquiry, whether immunity granted by this form is completely enforceable in both federal and local courts, and whether such a grant of immunity is consistent with the division of responsibility between the Department of Justice and law enforcement agencies.

The concern of Chapter 31 is that since the purported grant of immunity does not appear to be consistent with 18 U.S.C. §6001, et seq., the "immunity" would not be effective. Moreover, since it is not informal immunity as that term has developed, i.e., the joint execution of a letter agreement providing for immunity, it is in fact illusory.

Moreover, there is a concern that because of the wording of the form which directs the inquiry at the specific employment relationship, there would be attempts to use incriminating testimony in a prosecution on a rationale that the answer containing the incriminating information was not responsive to an employment related question or went beyond the scope of the question. An obvious example can be seen if one assumes that a law enforcement agent was questioned as to his use of an official vehicle on a weekend and, when asked whether or not he was in possession of or using the vehicle, said that he had used the vehicle. When further asked whether his use was in the course of official business, he responded that it was not, inasmuch as he was committing a crime. In the event of such a response, the question arises whether or not there would be an attempt to prosecute. Under the forms and procedures as they now exist, the answer to this question is most unclear. Certainly in the course of any normal criminal investigation, law enforcement agents are not empowered to grant immunity to witnesses. Rather, resort must be made to a United States Attorney's Office or to the Department of Justice. Nonetheless, in the course of an official agency investigation conducted on an internal basis, there appears to be presumed a blanket agency authority to grant some form of immunity to its agents when it may not do so with regard to the public.

Because we do not believe there is authority outside the Courts to grant immunity to anyone, we respectfully request that consideration be given to a careful review of this employment immunity grant procedure in order that we may assure members of our chapter that indeed they have not been stripped of the protection of the Fifth Amendment and that if required to execute this form they have full use immunity as defined by 18 U.S.C. §6002.

Respectfully yours,

J. Clayton Undercofler

Counsel for Chapter 31,
Federal Law Enforcement Officers
Association

Thomas F. Valent

President, Chapter 31,
Federal Law Enforcement Officers
Association

JCU/20478-#1

CIVILIAN EMPLOYEE ADMINISTRATIVE WARNING

Place: _____

I, _____
have been advised by Special Agent(s) _____
that I am suspected of _____

I have also been advised that:

- (1) I am going to be asked a number of specific questions concerning the performance of my official duties;
- (2) I have the duty to reply to these questions; Department of the Navy disciplinary proceedings resulting in my discharge may be initiated as a result of my answers. However, neither my answers nor any information or evidence which is gained by reason of such statements can be used against me in any criminal proceedings; and
- (3) I am subject to dismissal if I refuse to answer or fail to respond truthfully and fully to any questions.

I understand the warning as related to me and as set forth above.

Signature: _____

Date & Time: _____

Witnessed: _____

Date & Time: _____

At this time, I, _____
desire to make the following statement. This statement is made with an understanding of the warning as set forth above.