

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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November 14, 2017

The Honorable Trey Gowdy
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Gowdy:

In light of extremely grave classified and unclassified warnings that have been raised by the Department of Homeland Security Inspector General and others regarding challenges faced by the Transportation Security Administration (TSA) in securing our nation's airports, I respectfully request that the Committee take steps to enforce its subpoena for documents, which TSA has been defying since March.

I also request that the Committee issue subpoenas to compel depositions with three TSA officials—Deputy Administrator Huban Gowadia, Chief Counsel Francine Kerner, and former Acting Assistant Administrator Steven Colon—who have all declined to participate voluntarily in transcribed interviews since May.

My staff have raised these issues previously with your staff. TSA has been deliberately refusing to comply with the Committee's subpoena for months, and after extensive correspondence, it is clear that this impasse will not be resolved without action by the Committee.

If you decline these requests, we will be forced to consider making motions for subpoenas at our Committee's hearing this Wednesday on "Recommendations and Reforms from the Inspectors General." The DHS Inspector General, who will be testifying at Wednesday's hearing, has issued two classified reports in recent weeks warning that many security deficiencies his office identified in 2015 remain unresolved.¹

¹ Department of Homeland Security, Office of Inspector General, *Covert Testing of TSA's Screening Checkpoint Effectiveness (Unclassified Summary)* (Sept. 27, 2017) (online at www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-112-Sep17.pdf); Department of Homeland Security, Office of Inspector General, *FAMS' Contribution to Aviation Transportation Security is Questionable (Unclassified Summary)* (Oct. 24, 2017) (online at www.oig.dhs.gov/sites/default/files/assets/2017-10/OIG-18-04-UNSUM-Oct17.pdf).

Previous Action by the Committee

On March 2, 2017, the Committee held a hearing entitled “Transparency at TSA.” At the hearing, Carolyn Lerner, the Special Counsel, testified that TSA’s refusal to provide information requested by the Office of Special Counsel (OSC) was impairing its ability to fully investigate claims of whistleblower retaliation by TSA officials. She stated: “When TSA doesn’t disclose the reasons why they took an action against the whistleblower, we can’t investigate whether it’s retaliation.”²

In response to questioning from then-Chairman Jason Chaffetz and me, Administrator Gowadia testified that TSA withheld documents from OSC pursuant to verbal guidance from the Acting General Counsel of the Department of Homeland Security, Joseph Maher. Chairman Chaffetz asked Administrator Gowadia, “What information do you believe should be withheld from Congress?” Administrator Gowadia responded:

Sir, I don’t believe information should be withheld from Congress unless there are certain provisions, such as the attorney-client privilege, which, again, my hands are tied by departmental policy. I cannot take unilateral action, because there are ripple effects across the Department.³

On March 6, 2017, Chairman Chaffetz wrote to then-Acting Administrator Gowadia requesting that TSA produce by March 10, 2017, all “documents which OSC requested from TSA between January 1, 2014 and December 31, 2016, but which TSA did not produce or which it produced with redactions,” as well as a privilege log detailing the documents TSA withheld from OSC, all documents relating to the discipline of Steven Colon, and all “guidelines for the application of attorney-client privilege or engaging with OSC.”⁴

On March 10, 2017, DHS Acting General Counsel Joseph B. Maher wrote to Chairman Chaffetz:

In order to protect the full and frank attorney-client communications that occur during the deliberative process, the Department objects to the demand that it produce all privileged communications whether withheld in their entirety or redacted in part. In order to accommodate the oversight interests of the Committee, however, privilege logs identifying information withheld are enclosed for the currently active OSC matters.⁵

² House Committee on Oversight and Government Reform, *Hearing on Transparency at TSA*, 115th Cong. (Mar. 2, 2017).

³ *Id.*

⁴ Letter from Chairman Jason Chaffetz, House Committee on Oversight and Government Reform, to Acting Administrator Huban A. Gowadia, Transportation Security Administration (Mar. 6, 2017) (online at www.oversight.house.gov/wp-content/uploads/2017/03/2017-03-6-JEC-to-Gowadia-TSA-Hearing-Follow-up-due-3-10.pdf).

⁵ Letter from Acting General Counsel Joseph B. Maher, Department of Homeland Security, to Chairman Jason Chaffetz, House Committee on Oversight and Government Reform (Mar. 10, 2017) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/DHS.031017.Response%20to%20Chaffetz%20re%20>

On March 17, 2017, Chairman Chaffetz issued a subpoena to Acting Administrator Gowadia that was delivered to DHS during a meeting with Republican and Democratic Committee staff. The subpoena required the production by March 31, 2017 of the following documents:

1. All documents referenced in the privilege logs the Department of Homeland Security produced to the Committee on March 10, 2017; and
2. All documents and communications referring or relating to the potential discipline of Steve Colon, Office of Chief Counsel.⁶

On March 31, 2017, Mr. Maher responded in a letter stating:

For the reasons explained below, we are not in a position to produce those documents at this time. ... We do not believe that oversight requests are a proper means for discovery by OSC or other non-congressional bodies. ... We are also not in a position at this time to produce documents relating to the ongoing personnel matter that is the subject of the subpoena's second demand.⁷

On May 2, 2017, Chairman Chaffetz and I wrote to Acting Administrator Gowadia warning that, "Your failure to comply with a congressional subpoena may result in serious consequences for you, including penalties pursuant to 2 U.S.C. § 192." We also wrote:

The March 17, 2017, meeting between Committee staff and Department Office of General Counsel staff failed to alleviate concerns about those allegations. Rather the meeting raised further questions regarding the lack of oversight of TSA's Office of General Counsel as it revealed there is little or no process by which the Department ensures the integrity of TSA's legal decisions, such as prohibiting an attorney from reviewing his or her own emails for privileged information. In such cases, there is a substantial risk that an attorney will improperly apply a privilege to shield from disclosure unprivileged emails that are embarrassing or otherwise reveal improper or illegal conduct by the attorney. ... You must comply with your legal obligations immediately. The Committee expressly reserves its right to commence enforcement proceedings if you do not."⁸

hearing%20follow%20up%20due%203-10.pdf).

⁶ Subpoena to Huban A. Gowadia, House Committee on Oversight and Government Reform (Mar. 17, 2017).

⁷ Letter from Acting General Counsel Joseph B. Maher, Department of Homeland Security, to Chairman Jason Chaffetz, House Committee on Oversight and Government Reform (Mar. 31, 2017) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/DHS%20HOCR%20LETTER%203%2031.pdf>).

⁸ Letter from Chairman Jason Chaffetz and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Acting Administrator Huban A. Gowadia, Transportation Security Administration (May 2, 2017) (online at www.oversight.house.gov/wp-content/uploads/2017/05/2017-05-02-JEC-EEC-to-Gowadia-TSA.pdf).

The Chairman and I also requested that then-Acting TSA Administrator Gowadia, then-Acting Assistant TSA Administrator Colon, and TSA Chief Counsel Kerner be made available for transcribed interviews by May 16, 2017.⁹

On May 26, 2017, Mr. Maher wrote to Chairman Chaffetz:

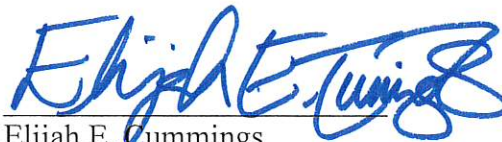
We understand and respect the constitutional authority of the Congress and the Committee in seeking information to inform its legislative activities. But because the Executive Branch, as a co-equal branch with its own constitutional prerogatives, has a deep interest in protecting internal, pre-decisional, deliberative communications, we would like to work with you toward a mutual accommodation of interests.¹⁰

Regarding the Committee's requests for transcribed interviews, Mr. Maher wrote: "While we will make these persons available for meetings, we believe that the level of formality associated with transcribed interviews is unnecessary."¹¹

Conclusion

TSA is continuing to experience repeated failures in its security mission, and the agency has refused to comply with the Committee's subpoena for documents and requests for interviews that are directly relevant to the Committee's ongoing bipartisan oversight of the agency. I thank you for joining me in sending a letter to DHS requesting documents related to the Inspector General's recent findings.¹² However, I urge you to join me in taking action to compel the agency to comply with the Committee's oversight efforts.

Sincerely,



Elijah E. Cummings
Ranking Member

⁹ *Id.*

¹⁰ Letter from Acting General Counsel Joseph B. Maher, Department of Homeland Security, to Chairman Jason Chaffetz, House Committee on Oversight and Government Reform (May 26, 2017) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/HOGR%20response%20052617%20signed.pdf>).

¹¹ *Id.*

¹² Letter from Chairman Trey Gowdy and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Acting Secretary Elaine C. Duke, Department of Homeland Security (Nov. 1, 2017) (online at www.oig.dhs.gov/sites/default/files/assets/2017-10/OIG-18-04-UNSUM-Oct17.pdf).