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July 22, 2014

The Honorable James M. Cole
Deputy Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Cole:

The Committee on Oversight and Government Reform continues to examine the Internal Revenue Service's targeting of conservative tax-exempt applicants. On July 17, 2014, you testified during a hearing of the Subcommittee on Economic Growth, Job Creation and Regulatory Affairs that the Department of Justice is investigating why IRS Commissioner John Koskinen delayed informing Congress, the Justice Department, and the American public about Lois Lerner's missing e-mails.¹ The Committee has obtained information that senior IRS leadership knew in February 2014 that e-mails on Ms. Lerner's hard drive were unrecoverable. The IRS's failure to disclose in a timely manner that it had destroyed evidence critical to congressional and criminal investigations is further reason that a special prosecutor is needed to thoroughly and independently investigate all facets of the IRS targeting.

During the Subcommittee's hearing, you testified that the Justice Department learned about the destroyed Lois Lerner e-mails "from the press accounts that were in the paper following the IRS's notification to the Congress."² You further testified that the Department would investigate Commissioner Koskinen's failure to inform Congress and the Justice Department about the destroyed e-mails in a timely manner. You testified:

Rep. JORDAN: So you said earlier that, relative to Mr. Koskinen, it depends – it depends on whether there was a problem with the fact that the commissioner at the IRS knew in April and waited two months to tell us, the American people and, more importantly, you. So you are going to investigate that aspect as well, just like you would for a private citizen?

¹ "Examining the Justice Department's Response to the IRS Targeting Scandal." *Hearing before the Subcomm. on Economic Growth, Job Creation & Reg. Affairs of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (2014) (testimony of James Cole, Deputy Attorney General, Dep't. of Justice).

² *Id.*

Mr. COLE: All the issues related to those emails will be wrapped up in the investigation that we do.

Rep. JORDAN: Including the delay?

Mr. COLE: Including the delay.

Rep. JORDAN: So the delay in the – the fact that the commissioner at the Internal Revenue Service delayed telling the Congress, the American people, the FBI and the Justice Department is a matter that you are going to investigate?

Mr. COLE: We are going to look into what the circumstances were around that, yes.³

Information recently obtained pursuant to the Committee's Constitutional oversight obligations may be useful for the Department's criminal investigation.

On July 17, 2014, the Committee conducted a transcribed interview of Thomas Kane, the IRS Deputy Associate Chief Counsel for Procedure and Administration.⁴ During the interview, Mr. Kane testified that senior leadership in the IRS became aware of problems with Lois Lerner's e-mails in early February 2014.⁵ According to Mr. Kane, on February 2, 2014, Catherine Duval, Counselor to the Commissioner, noticed a discrepancy in the number of e-mails gathered from Ms. Lerner's account.⁶ The IRS had gathered 16,000 e-mails from the period after April 2011 and "less than 100" from the period before April 2011.⁷

After becoming aware of the discrepancy in the number of e-mails, Mr. Kane asked a subordinate, Paul Butler, to look into the cause of the discrepancy.⁸ Two days later, on February 4, 2014, senior IRS leadership learned that Ms. Lerner's hard drive had crashed in 2011 from her former administrative assistant, Dawn Marx.⁹ Mr. Kane testified:

Q And so do you remember precisely when you became aware of the hard drive crash?

A We were – Paul Butler had talked to someone who worked for Lois at about the time when the emails had a great discrepancy and was told by her that there had been a hard drive crash at that particular point in time.

³ *Id.* (questioning by Rep. Jordan).

⁴ Transcribed interview of Thomas Kane, Internal Revenue Serv., in Wash., D.C. (July 17, 2014).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*; Letter from Leonard Oursler, Internal Revenue Serv., to Ron Wyden & Orrin Hatch, S. Comm. on Finance encl. 3 at 6 (June 13, 2014).

⁸ Transcribed interview of Thomas Kane, Internal Revenue Serv., in Wash., D.C. (July 17, 2014).

⁹ *Id.*

Q Do you know the name of the person that Mr. Butler spoke with?

A Dawn Marx. Marx with an "x."

Q Do you know, sir, when Ms. Marx informed Mr. Butler about the hard drive crash?

A February 4th.

Q Of 2014?

A Correct.

Q And why does that date stand out to you in your memory?

A The date stands out to me because we first found out about it on February 2nd, and it was only 2 days afterwards.

Q So it didn't take long then for you to figure out what happened?

A It didn't take us long to figure out that it was reported that there was a hard drive crash at or about the time that the discrepancy in the emails took place.

Q And upon learning on February 4th of the hard drive crash, who did you communicate that to?

A That was relayed to Kate [Duval].

Q By who?

A I would have been the one to do it, yes.¹⁰

According to Mr. Kane, senior IRS leadership became aware in mid-February 2014 that Ms. Lerner's hard drive had been recycled and that any e-mails on the hard drive were "unrecoverable."¹¹ Mr. Kane testified:

¹⁰ *Id.*

¹¹ *Id.*

Q And do you recall when Mr. Butler gave you that information, the hard drive had been recycled?

A I don't recall a specific date or time period, or time, but it certainly would have been within the period of time when he was actively interacting with the IT people, in early to mid February.

Q Do you have an understanding now as to what that term, "recycled," means?

A I do have some knowledge as to what happened to the hard drive.

Q What happened to the hard drive?

A After the CI forensic analysis determined that it was – that the material on it was unrecoverable, it was returned to the IT people, who at some point in time degaussed it to make sure that if there was anything else on it, particularly from a 6103 perspective, that it would not be recovered. It was then sent to New Carrollton again. A lot of our IT functions are housed out there, and they have a recycling function out there where material is eventually recycled to an outside contractor. And I have no idea what the outside contractor does with these materials.

Q And, sir, do you know the identity of the outside contractor to which the hard drive was recycled?

A I have been told that the contractor for this purpose was UNICOR, U-N-I-C-O-R.¹²

From mid-February 2014 to April 2014, the IRS attempted to recover some of destroyed Lois Lerner e-mails by other means.¹³ However, it is clear from this testimony that the IRS knew no later than mid-February 2014 that a portion of Ms. Lerner's e-mails had been destroyed. The IRS did not notify Congress or the Justice Department, however, for another four months.

Ms. Duval serves as the Counselor to the Commissioner. In this position, Ms. Duval acts as "the Commissioner's lead person on congressional document production requests."¹⁴ Together with Chief Counsel William Wilkins, Deputy Chief Counsel Christopher Sterner, Legislative Affairs Director Leonard Oursler, and Mr. Kane, Ms. Duval participates in a daily

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

meeting to strategize about the IRS's response to congressional and criminal investigations.¹⁵ Mr. Kane testified that he personally interacts with Ms. Duval "several times a day" exclusively on the IRS's response to document production issues.¹⁶

It is unknown at this point when and how Ms. Duval informed Commissioner Koskinen about the details of the problems with Ms. Lerner's e-mails. It is clear, nonetheless, that senior leaders within the IRS knew that all information from Ms. Lerner's hard drive was unrecoverable no later than mid-February 2014. Despite this awareness, Commissioner Koskinen failed to mention any problems with Ms. Lerner's e-mails during his March 26, 2014, testimony before the Committee.¹⁷ Likewise, Ms. Duval failed to mention any issues with the IRS producing all of Lois Lerner's e-mails during a meeting with bipartisan Committee staff on April 4, 2014.¹⁸

As the Committee continues its fact-finding into Commissioner Koskinen's failure to inform Congress and law-enforcement officials in a timely manner about the destroyed Lois Lerner e-mails, we believe that the appointment of a special prosecutor is warranted. We strongly encourage the Attorney General to appoint an independent special prosecutor to thoroughly investigate why Commissioner Koskinen delayed informing Congress, the Justice Department, and the American people about the destruction of critical evidence to congressional and criminal investigations. Thank you for your attention to this matter.



Darrell Issa
Chairman

Sincerely,



Jim Jordan
Chairman
Subcommittee on Economic Growth,
Job Creation and Regulatory Affairs

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable Matthew A. Cartwright, Ranking Minority Member
Subcommittee on Economic Growth, Job Creation and Regulatory Affairs

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ "Examining the IRS Response to the Targeting Scandal": Hearing before the H. Comm. on Oversight & Gov't Reform, 113th Cong. (2014).

¹⁸ Committee staff meeting with Catherine Duval & Leonard Oursler, Internal Revenue Serv. (Apr. 4, 2014)