

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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May 2, 2017

The Honorable Huban A. Gowadia, Ph.D.
Acting Administrator
Transportation Security Administration
601 S. 12th St.
Arlington, VA 22202

Dear Ms. Gowadia:

On March 17, 2017, pursuant to its authority under House Rule X, the Committee on Government Reform and Oversight (“Committee”) issued to you a subpoena *duces tecum* requiring you appear and produce documents by 12:00 noon on March 31, 2017.¹ You have failed to comply with the subpoena. The Committee has received and reviewed a letter dated March 31, 2017, from the Department of Homeland Security’s (“Department”) Acting General Counsel arguing that it was entitled to withhold responsive documents on the ground that they are protected by the attorney-client privilege. Although the Committee acknowledges the interests underpinning the attorney-client privilege in judicial proceedings, we reject the claim that an assertion of the attorney-client privilege is a legitimate basis for withholding documents in response to a congressional subpoena, noting the letter provides no alternative basis for your failure to comply with the subpoena.

The House of Representatives derives its authority from the United States Constitution and is bound only by the privileges derived therefrom. As the schedule instructions accompanying the subpoena provided, neither the Committee nor the United States House of Representatives recognizes purported non-disclosure privileges associated with the common law.² Further, the mere possibility that a common law privilege may apply in a judicial proceeding is not, in and of itself, a legal justification to withhold documents from this Committee or the Congress.

¹ Subpoena to Huban A. Gowadia (Mar. 17, 2017) [hereinafter Gowadia Subpoena].

² Gowadia Subpoena, Schedule Instructions No. 14.

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 strongly encourage you to consider carefully the implications of continuing to ignore this subpoena. As your interests in this matter may now diverge from the Department's, you may also wish to retain private counsel. Should you choose to retain counsel in this matter, Committee Rule 16(b) requires counsel representing an individual or entity before the Committee or any of its subcommittees, whether in connection with a request, subpoena or testimony, promptly submit the attached notice of appearance to the Committee.

The Committee's need for the information responsive to the subpoena significantly outweighs any other interest. The interests of the investigation into what appears to be the inappropriate conduct at TSA counsels in favor of a full and complete accounting of what has occurred. Separately, it is well established that production of materials to Congress is not deemed a disclosure to the public,³ nor is a compelled production considered a voluntary production for the purpose of waiver.⁴ Accordingly, production to the Committee does not constitute a waiver of applicable privileges in other contexts.⁵

Additionally, your objections are not timely. The schedule instructions required that the Committee be provided no later than March 30, 2017, at 12:00 noon with an explanation of why full compliance is not possible and that a privilege log be provided to the Committee prior to the subpoena compliance date.⁶ Any objections were waived by the failure to follow these requirements.⁷

While ostensibly responding to the subpoena for you, the letter from the Department's Acting General Counsel apparently conflates the Committee's subpoena with pending requests from the Office of Special Counsel (OSC). The legal obligations created by a subpoena from Congress, as outlined above, derive from a different source than TSA's obligations to OSC, namely the Constitution.

The Committee's investigation also serves an entirely different purpose than OSC's inquiry. As Committee staff explained to Office of General Counsel officials on March 17, 2017, the Committee is separately and independently investigating whether TSA is abusing the attorney-client privilege as a means to avoid oversight. This inquiry is part of a larger

³ See, e.g., *Fed. Trade Comm'n v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978); *Ashland Oil v. Fed. Trade Comm'n*, 548 F.2d 977, 979 (D.C. Cir. 1976); *Moon v. Cent. Intelligence Agency*, 514 F. Supp. 836, 840-41 (S.D.N.Y. 1981).

⁴ See, e.g., *Fla. H. of Rep. v. U.S. Dep't of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992); *U.S. v. Zolin*, 809 F.2d 1411, 1415 (9th Cir. 1987), *aff'd in part, vacated in part*, 491 U.S. 554 (1989).

⁵ *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001); *Fla. H. of Rep.*, 961 F.2d at 946; *Owens-Corning Fiberglass Corp.*, 626 F.2d at 970; *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1155-59 (D.C. Cir. 1979); *Exxon Corp.*, 589 F.2d at 589; *Ashland Oil*, 548 F.2d at 979.

⁶ Gowadia Subpoena, Schedule Instructions Nos. 11-12.

⁷ Gowadia Subpoena, Schedule Instructions No. 13.

investigation dating back to the fall of 2015 into TSA's personnel practices.⁸ The Committee's inquiry on this matter—which has included conducting transcribed interviews, holding hearings, and reviewing internal TSA disciplinary and personnel documents from specific cases—continues, as does a line of inquiry into potential misconduct within TSA's Office of Chief Counsel.

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 Chief 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.

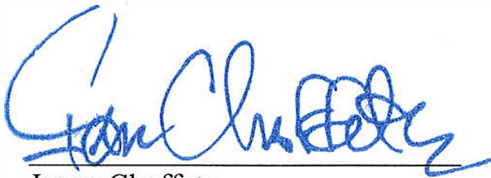
It should be clear that the Committee's subpoena is not an attempt at "discovery by OSC or other non-congressional bodies," as it was termed in the March 31 letter. Rather, the Committee issued the subpoena to further its own investigation and to obtain answers to specific, longstanding questions. You must comply with your legal obligations immediately. The Committee expressly reserves its right to commence enforcement proceedings if you do not.

⁸ See letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Nov. 10, 2015); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Dec. 3, 2015); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Jan. 7, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Feb. 2, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Feb. 19, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov't Reform, Hon. John L. Mica, Chairman, H. Subcomm. on Transportation & Public Assets, and Hon. Tammy Duckworth, Ranking Mem., H. Subcomm. on Transp. & Public Assets, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Mar. 15, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, and Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Apr. 26, 2016); *Examining Management Practices and Misconduct at TSA: Part I: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (Apr. 27, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, and Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov't Reform, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (May 12, 2016); *Examining Management Practices and Misconduct at TSA: Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (May 12, 2016); letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Oversight & Gov't Reform, Hon. Elijah E. Cummings, Ranking Mem., H. Comm. on Oversight & Gov't Reform, Hon. John L. Mica, Chairman, H. Subcomm. on Transportation & Public Assets, Hon. Tammy Duckworth, Ranking Mem., H. Subcomm. on Transp. & Public Assets, Hon. Mark Meadows, Chairman, H. Subcomm. on Gov't Operations, Hon. Gerald E. Connolly, Ranking Mem., H. Subcomm. on Gov't Operations, and Hon. Charles E. Grassley, Chairman, S. Comm. on the Judiciary, to Hon. Peter V. Neffenger, Adm'r, Transp. Sec. Admin. (Aug. 12, 2016).

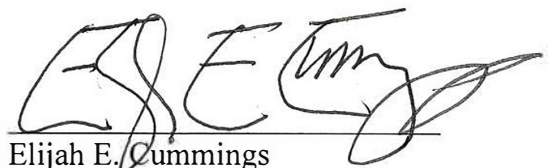
Additionally, in furtherance of the Committee's investigation, please make yourself and the following Department employees available for transcribed interviews as soon as possible, but no later than May 16, 2017:

- 1) Steven Colon, Acting Assistant Administrator, Office of Professional Responsibility, TSA; and
- 2) Francine Kerner, Chief Counsel, TSA.

Sincerely,



Jason Chaffetz
Chairman



Elijah E. Cummings
Ranking Member

Enclosure

cc: The Honorable Rodney Frelinghuysen, Chairman
Committee on Appropriations, U.S. House

The Honorable Nita Lowey, Ranking Member
Committee on Appropriations, U.S. House

The Honorable Michael McCaul, Chairman
Committee on Homeland Security, U.S. House

The Honorable Bennie Thompson, Ranking Member
Committee on Homeland Security, U.S. House

The Honorable Carolyn N. Lerner, Special Counsel
Office of Special Counsel

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
115TH CONGRESS**

NOTICE OF APPEARANCE OF COUNSEL

Counsel submitting: _____

Bar number: _____ **State/District of admission:** _____

Attorney for: _____

Address: _____

Telephone: (_____) _____ - _____

Pursuant to Rule 16 of the Committee Rules, notice is hereby given of the entry of the undersigned as counsel for _____ in (select one):

All matters before the Committee

The following matters (describe the scope of representation):

All further notice and copies of papers and other material relevant to this action should be directed to and served upon:

Attorney's name: _____

Attorney's email address: _____

Firm name (where applicable): _____

Complete Mailing Address: _____

I agree to notify the Committee within 1 business day of any change in representation.

Signature of Attorney

Date