U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

October 23, 2015

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman and Congressman Cummings:

We write to inform you about the Department of Justice's criminal investigation into whether any IRS officials committed crimes in connection with the handling of tax-exemption applications filed by Tea Party and ideologically similar organizations. Consistent with statements from the Department of Justice (the Department) throughout the investigation, we are pleased to provide additional information regarding this matter now that we have concluded our investigation. In recognition of not only our commitment to provide such information in this case, but also the Committee's interest in this particular matter, we now provide a short summary of our investigative findings.

In collaboration with the FBI and Treasury Inspector General for Tax Administration (TIGTA), the Department's Criminal and Civil Rights Divisions conducted an exhaustive probe. We conducted more than 100 witness interviews, collected more than one million pages of IRS documents, analyzed almost 500 tax-exemption applications, examined the role and potential culpability of scores of IRS employees, and considered the applicability of civil rights, tax administration, and obstruction statutes. Our investigation uncovered substantial evidence of mismanagement, poor judgment, and institutional inertia, leading to the belief by many tax-exempt applicants that the IRS targeted them based on their political viewpoints. But poor management is not a crime. We found no evidence that any IRS official acted based on political, discriminatory, corrupt, or other inappropriate motives that would support a criminal prosecution. We also found no evidence that any official involved in the handling of tax-exempt applications or IRS leadership attempted to obstruct justice. Based on the evidence developed in this investigation and the recommendation of experienced career prosecutors and supervising attorneys at the Department, we are closing our investigation and will not seek any criminal charges.

The Investigation

The Department's probe began in May 2013, following a TIGTA audit report revealing the IRS's mishandling of tax-exempt applications filed by groups it suspected to be involved in political activity. *See* TIGTA Audit Report, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, Ref. No. 2013-10-053 (May 14, 2013). TIGTA's audit report revealed that the IRS coordinated the review of applicants for tax-exemption under Internal Revenue Code Sections 501(c)(3) and 501(c)(4), which limit the amount of political activity in which such groups can engage. According to the audit report, one way in which the IRS identified groups for coordinated review was through politically focused keywords, such as "Tea Party," "9/12 Project," and "Patriots," and the inventory of applications identified for coordinated review was internally referred to as the "Tea Party cases." These applications were subjected to heightened scrutiny, including burdensome and unnecessary information requests, which caused significant processing delays. Although TIGTA's audit report detailed no evidence or allegation of discriminatory intent, its findings were unsettling and prompted the Department of Justice to initiate a criminal investigation. Our probe, which was managed by an experienced team of career prosecutors and supervising attorneys from the Criminal Division's Public Integrity Section and Civil Rights Division's Criminal Section, in partnership with seasoned law enforcement agents from the FBI and TIGTA, spanned the better part of two years. As explained below, our investigation confirmed the TIGTA audit report's core factual findings and examined in detail what motivated the decisions leading to the IRS's handling of these tax-exempt applications.

At the investigation's outset, the Department took careful steps to preserve the possibility of criminal prosecution in the face of potential Fifth Amendment issues. Under the Fifth Amendment, statements obtained from federal employees under threat of termination—a common occurrence in administrative investigations like the TIGTA audit—as well as evidence derived from those statements, cannot be used against such employees in a criminal prosecution. *Garrity v. New Jersey*, 385 U.S. 493, 497-98 (1967); *Kastigar v. United States*, 406 U.S. 441, 460 (1972). We therefore formed two teams – a prosecution team principally responsible for the criminal investigation, and a filter team responsible for shielding the prosecution team from statements and information that risked contaminating an otherwise viable criminal prosecution. Before the prosecution team was given access to fruits of the audit report, the filter team reviewed prior statements by IRS employees to TIGTA auditors to assess whether a court might deem them compelled under the Fifth Amendment, and evaluated the statements and evidence derived from these prior statements to determine whether they could be traced to sources independent from any potentially compelled statements. This prophylactic measure was further necessitated by IRS leadership's order to its employees to cooperate in the parallel Congressional investigation, raising concerns that a court could deem statements given to Congressional committees to have been compelled. In early October 2013, we determined that the filter procedure was no longer necessary and that any potential prosecution supported by the evidence would not be frustrated by a Fifth Amendment challenge.

The prosecution and filter teams conducted over 100 interviews. Top-level IRS officials, including former IRS Commissioner Douglas Shulman, former Acting IRS Commissioner

Steven Miller, and former Exempt Organizations Director Lois Lerner, voluntarily participated in extensive interviews with the prosecution team, as did their close advisors and career managers and line-level revenue agents directly involved in processing tax-exempt applications. Some key witnesses were interviewed multiple times. No person interviewed during the investigation was made promises of non-prosecution in order to obtain their statements.

Throughout the investigation, not a single IRS employee reported any allegation, concern, or suspicion that the handling of tax-exempt applications—or any other IRS function—was motivated by political bias, discriminatory intent, or corruption. Among these witnesses were several IRS employees who were critical of Ms. Lerner's and other officials' leadership, as well as others who volunteered to us that they are politically conservative. Moreover, both TIGTA and the IRS's Whistleblower Office confirmed that neither has received internal complaints from IRS employees alleging that officials' handling of tax-exempt applications was motivated by political or other discriminatory bias.

In addition to conducting interviews, we also collected and reviewed voluminous relevant documents. On May 31, 2013, the Department served the IRS with a demand that it preserve all documents potentially material to the investigation, with the same obligations and subject to the same potential sanctions that would apply had the IRS been served a federal grand jury subpoena. The IRS produced more than one million pages of unredacted documents and asserted no privileges against disclosure. The Department shared Congress's frustration with the IRS's revelation in June 2014 that its document collection and preservation process was susceptible to potentially catastrophic loss. Specifically, the IRS revealed that its electronic backup system for emails was vulnerable to the crash of a single employee's hard drive, which could result in the permanent loss of that employee's email archive. Indeed, this is what occurred with respect to Ms. Lerner, whose hard drive crashed in June 2011, causing the destruction of her email archives. Our confidence in the IRS's data collection process was further undermined by the four-month delay in its disclosure of this information, as well as TIGTA's discovery that, in March 2014, IRS information technology employees inadvertently destroyed more than 400 electronic backup tapes that may have contained copies of Ms. Lerner's emails.

Despite these shortcomings, we are confident that we were able to compile a substantially complete set of the pertinent documents. The IRS collected documents from more than 80 employees—many more employees than were regularly and directly involved in the matters under investigation—making exceedingly remote the chance that a hard drive crash or other technical failure experienced by any particular employee could cause the permanent loss of any relevant email or other document. Moreover, we did not rely exclusively on the IRS to collect documents. We also searched Ms. Lerner's entire computer and Blackberry, obtained the complete email boxes of IRS employees central to the investigation (as opposed to obtaining only those emails the IRS deemed responsive), and performed office searches of some officials. We also obtained documents directly from several witnesses. Our extensive witness interviews revealed no indication of any missing material documents, and no IRS witness reported seeing any documents that have since gone missing or are otherwise unaccounted for. Finally, as discussed more below, our investigation revealed no evidence that the IRS's document collection

and retention problems, Ms. Lerner's hard drive crash, or the IRS's delayed disclosure regarding these matters were caused by a deliberate attempt to conceal or destroy information.

The Department also obtained and reviewed the IRS's tax-exempt-application files for nearly 500 groups that applied for status between 2009 and the release of the Audit Report in May 2013, which were subject to the IRS's coordinated review regarding political activity. According to an analysis by the FBI, nearly 70 percent of the applications coordinated for review were submitted by right-leaning groups, including the Tea Party, confirming the TIGTA audit's finding that such groups were disproportionately impacted by the IRS's coordinated review of applications. We identified groups suffering the most significant of the impacts of these procedures and obtained interviews with representatives of eleven of them. Some of these interviews were obtained through lawyers, including a firm representing as many as 50 individual organizations. Although not all of these represented organizations agreed to be interviewed, their lawyers either informed us that the information provided by organizations whose representatives did agree to be interviewed was sufficient to further the Department's criminal investigation, or provided detailed information about their clients' interactions with the IRS. In addition, we had the benefit of reviewing the detailed complaints filed in civil cases lodged in the District of Columbia and Southern District of Ohio, as well as reviewing public testimony from applicants who appeared before Congress to describe their interactions with the IRS.

Investigative Findings

In order to bring criminal charges, we must have evidence of criminal intent. The Department searched exhaustively for evidence that any IRS employee deliberately targeted an applicant or group of applicants for scrutiny, delay, denial, or other adverse treatment because of their viewpoint. Intentional viewpoint discrimination may violate civil rights statutes, which criminalize acting under color of law to willfully deprive a person of rights protected by the Constitution or federal law. *See* 18 U.S.C. §§ 241, 242. Intentional viewpoint discrimination may also violate criminal tax statutes that prohibit IRS employees from committing willful oppression under color of law, for example by deliberately failing to perform official duties with the intent of defeating the due administration of revenue laws, or by corruptly impeding or obstructing the administration of the Tax Code. *See* 26 U.S.C. §§ 7214(a)(1), 7214(a)(3), 7212(a). These statutes require proof beyond a reasonable doubt that an IRS official specifically intended to violate the Constitution, Tax Code, or another federal law.

As applied to this case, a criminal prosecution under any of these statutes would require proof that an IRS official intentionally discriminated against an applicant based upon viewpoint. It would be insufficient to prove only that IRS employees used inappropriate criteria to coordinate the review of applications, acted in ways that resulted in the delay of the processing applications, or disproportionately subjected some applicants to burdensome or unnecessary questions. Instead, we would have to prove that such actions were undertaken for the very purpose of harassing or harming applicants. Proof that an IRS employee acted in good faith would be a complete defense to a criminal charge; and proof that an IRS employee acted because

of mistake, bad judgment, ignorance, inertia, or even negligence would be insufficient to support a criminal charge.

Our investigation found no evidence that any IRS employee acted with criminal intent. We analyzed the culpability of every IRS employee who played a role in coordinating for review applications or handling them afterwards, from line-level revenue agents and managers in the Cincinnati-based Determinations Unit, to tax law specialists and senior executive officials based in Washington, D.C. Apart from the belief by many tax-exempt applicants affiliated with the Tea Party and similar ideologies that they had been targeted, we found no evidence that any IRS employee intentionally discriminated against these groups based upon their viewpoints. To the contrary, the evidence indicates that the decisions made by IRS employees, though misdirected, were motivated by the desire to treat similar applications consistently and avoid making incorrect decisions. Their plans to treat applications consistently were poorly implemented, due to a combination of ignorance about how to apply section 501(c)(4)'s requirements to organizations engaged in political activity, lack of guidance from subject matter experts about how to make decisions in an area most witnesses described as difficult, and repeated communication and management issues. Moreover, many employees failed to engage in critical thought about the effect their actions (or inactions) would have upon those who applied for tax-exempt status. We found that many IRS employees' failure to give adequate attention to the applications at issue was caused by competing demands on their time and an unwillingness to be held accountable for difficult decisions over sensitive matters. We did not, however, uncover any evidence that any of these employees were motivated by intentional viewpoint discrimination.

As noted above, no IRS employee we interviewed, from those directly involved in decision making to those who were primarily witnesses to the conduct of others, reported having any information suggesting that any action taken by any person in the IRS was done for the purpose of harming or harassing applicants affiliated with the Tea Party or similar groups. These witness accounts are fully supported by contemporaneous internal IRS documents, which do not suggest that there was a partisan political motive for any of the decisions made during the handling of the applications. Moreover, any inference of specific intent that might be drawn from the length of the delay in processing applications, the burdensomeness of the information requests, or the fact that Tea Party and ideologically similar organizations were disproportionately affected by the IRS's coordination efforts, is contradicted by witnesses' explanations of why IRS employees made the decisions that they did, all of which—even if misguided—are inconsistent with criminal intent.

Importantly, our investigation revealed that this was not the first time that the IRS had used inept labels in organizing their review of applications. Prior to the IRS procedures that were the subject of our investigation, the IRS had historically coordinated review of applications based on the applicant's name and affiliations, including using keywords such as "progressive" and "ACORN." This historical practice creates a substantial barrier to establishing criminal intent, and bolsters the conclusion that IRS employees did not believe that coordinating for review applications using words like "Tea Party" could potentially violate the Constitution or the Tax Code, or that this method of coordinating applications for review was discriminatory or

otherwise inappropriate. Moreover, the decision to coordinate the review of applications and the discussions about how to handle them were conducted openly across multiple IRS components and among many different employees with a range of political views, including some who voluntarily identified themselves in interviews as conservative or Republican. Such open discussion of planned actions is inconsistent with criminal intent.

The evidence that we developed demonstrated a disconnect between employees in Cincinnati, who were principally responsible for identifying the applications for review and crafting the burdensome information requests, and employees in Washington, D.C., who were principally responsible for the delay and failure to provide guidance on how to handle the application backlog despite repeated requests that they do so from revenue agents and their supervisors in Cincinnati. As a result, no one person (or group of people) was responsible for the chain of events that resulted in the manner in which applications were ultimately coordinated for review and then delayed. Instead, we found overwhelming evidence that the ill-advised selection criteria, burdensome information requests, and application delays were the product of discrete mistakes by line-level revenue agents, technical specialists, and their immediate supervisors, and that those mistakes were exacerbated by oversight and leadership lapses by senior managers and senior executive officials in Washington, D.C. We developed no evidence that the decisions IRS employees made about how to handle applications, either in Cincinnati or Washington, were motivated by discriminatory intent or other corrupt motive.

The one official who, by virtue of her role as Director of the IRS's Exempt Organizations Division, arguably had the most oversight responsibility for all tax-exempt applications, was Ms. Lerner. Due to her position, and because the U.S. House of Representatives Ways and Means Committee referred civil rights allegations against her to the Department on April 9, 2014, we took special care to evaluate whether Ms. Lerner had criminal culpability. The need for scrutiny of Ms. Lerner in particular was heightened by the discovery and publication of emails from her official IRS account that expressed her personal political views and, in one case, hostility towards conservative radio personalities. We therefore specifically considered whether Ms. Lerner's personal political views influenced her decisions, leadership, action, or failure to take action with respect to tax-exempt applications or any other matter. We found no such evidence.

Our conclusion regarding Ms. Lerner is supported by several factors. First, not a single IRS employee that we interviewed, some of whom were critical of Ms. Lerner's leadership and general management style, and some of whom volunteered that they consider themselves politically conservative, witnessed, alleged, or suspected that Ms. Lerner acted with a political, discriminatory, corrupt, or other inappropriate purpose.

Second, our investigation revealed that when Ms. Lerner became fully aware of and focused on the Cincinnati-based Determinations Unit's use of inappropriate criteria, she recognized that it was wrong, ordered that it stop immediately, and instructed subordinates to take corrective action. In fact, Ms. Lerner was the first IRS official to recognize the magnitude of the problem and to take concerted steps to fix it. To the extent that Ms. Lerner mishandled the oversight of how these tax-exempt applications were processed, it resulted from her failure to digest materials available to her from which she could have identified the problem sooner, and

her delegation of corrective action to subordinates whom she did not adequately supervise to assure that her directions were implemented sufficiently.

Third, although Ms. Lerner exercised poor judgment in using her IRS email account to exchange personal messages that reflected her political views, we cannot show that these messages related to her official duties and actions with respect to the handling of these tax-exempt applications. In fact, we uncovered no email or other communication showing that Ms. Lerner exercised her decision-making authority in a partisan manner generally, or in the handling of tax-exempt applications specifically, and no witness we interviewed interpreted any email or other communication they exchanged with Ms. Lerner in such a manner.

Finally, our investigation uncovered no evidence that Ms. Lerner intentionally caused her hard drive to crash or that she otherwise endeavored to conceal documents or information from IRS colleagues or this investigation. Moreover, it bears noting that Ms. Lerner cooperated fully with our investigation, voluntarily sitting for approximately 12 hours of interviews with no promise of immunity, producing emails and documents upon request, and disclosing passwords to her IRS Blackberry to assist in searching its contents.

We also carefully considered whether any IRS official attempted to obstruct justice with respect to their reporting function to Congress, the collection and production of documents demanded by the Department and Congress, the delayed disclosure of the consequences of Ms. Lerner's hard drive crash, or the March 2014 erasure of electronic backup tapes. *See, e.g.*, 18 U.S.C. §§ 1503, 1512, 1515, 1519. At a minimum, these statutes would require us to prove a deliberate attempt to conceal or destroy information in order to improperly influence a criminal or Congressional investigation. We uncovered no evidence of such an intent by any official involved in the handling of tax-exempt applications or the IRS's response to investigations of its conduct.[1] Although the IRS's decision to delay the disclosure of the consequences of Ms. Lerner's hard drive crash for more than four months undermined confidence in its judgment, it was not criminal. The evidence shows that IRS attorneys and officials spent that time exercising due diligence to determine what had occurred, mitigating heavily against criminal intent. Similarly, the evidence shows that IRS officials in Washington were unaware of the March 2014 erasure of electronic backup tapes until it was brought to their attention by TIGTA in June 2015. Although those backup tapes should have been protected from erasure due to the Department's preservation demand, there is no evidence that any IRS employee intended to conceal the backup tapes from our investigation or realized that erasing them might violate the preservation demand.

---

[1] TIGTA has developed evidence that, in June 2015, GS Grade 4 employees and their supervisor working at the IRS's Enterprise Computing Center may have made misleading statements to TIGTA about the manner in which electronic server hard drives were inventoried. There is no evidence suggesting that the employees were involved in the handling of tax-exempt applications, intended to conceal information about the IRS's handling of tax-exempt applications, or that they acted at the behest of any of the IRS employees involved in the handling of tax-exempt applications. Rather, the evidence suggests that the employees failed to inventory the server hard drives properly and later sought to avoid being held accountable for that failure. The Criminal Division's Public Integrity Section and the Civil Rights Division's Criminal Section determined that the possibly misleading statements had no adverse impact on the Department's criminal investigation of the handling of tax-exempt applications. TIGTA has informed the Department that it intends to refer this matter to a U.S. Attorney's Office.

There is no basis for any obstruction of justice charge arising from the IRS's data collection and preservation protocol.

Conclusion

The IRS mishandled the processing of tax-exempt applications in a manner that disproportionately impacted applicants affiliated with the Tea Party and similar groups, leaving the appearance that the IRS's conduct was motivated by political, discriminatory, corrupt, or other inappropriate motive. However, ineffective management is not a crime. The Department of Justice's exhaustive probe revealed no evidence that would support a criminal prosecution. What occurred is disquieting and may necessitate corrective action – but it does not warrant criminal prosecution.

We hope this information is helpful. We have made a substantial effort to provide detailed information regarding our findings in this letter, and would be pleased to offer a briefing to address any questions you may have on this matter. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Peter J. Kadzik
Assistant Attorney General