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ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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December 13, 2013

The Honorable Darrell E. Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to respectfully request that you abandon the unnecessary and confrontational subpoena you issued earlier this week to the MITRE Corporation demanding sensitive contractor security documents relating to the Healthcare.gov website. Instead, I propose that the Committee work in a bipartisan manner to accept the reasonable accommodations offered yesterday by the Department of Health and Human Services (HHS), including full access to these unredacted documents for all Members of the Committee at their convenience.

Failure to Consult with Committee Members before Issuing Subpoena

As you know, I spent much of this week traveling to South Africa as part of our nation's delegation to honor Nelson Mandela. When I returned to the office yesterday, I was surprised to learn that you had issued a subpoena while I was away demanding that MITRE produce copies of unredacted Security Control Assessments by noon today. This unilateral action contradicted your commitment to consult with me and other Committee Members before issuing subpoenas—a promise you made at our Committee's first business meeting with you as Chairman:

I am going to take your thoughts on why you object seriously. To be honest, I will ask other members of my committee, am I doing the right thing, and seek their guidance. ... I will also undoubtedly talk to other members on your side and say, am I nuts? Am I wrong? Is this somehow a subpoena that is outside the mainstream? So I don't intend on simply writing subpoenas endlessly.¹

When I returned from South Africa, I was also troubled to learn that your staff refused a request from my staff to wait 48 hours before issuing your subpoena until I could return to

¹ Transcript of Organizational Meeting, House Committee on Oversight and Government Reform (Jan. 25, 2011).

Washington, review the matter, and raise any concerns I might have. These actions leave the impression that you were rushing to issue the subpoena before I returned to the United States.

Software Code and Other Sensitive Information in Subpoenaed Documents

Had you consulted with me before issuing the subpoena, I would have highlighted repeated warnings from MITRE security officials that the documents you are demanding include software code and other technical information that is highly sensitive and that MITRE officials believe could give hackers a roadmap to compromise the security of the website and the personal information of American citizens.

On November 5, 2013, in response to the Committee's request, MITRE produced six password protected Security Control Assessments relating to Healthcare.gov, along with a cover letter that warned about their sensitivity. The letter stated:

Given the very sensitive nature of these security assessments, we have redacted portions that could jeopardize the security and privacy of information on the site if inadvertently disclosed. The redacted information includes code and other technical information that could be used to hack the system. Even with the redactions, the information provided should still be considered sensitive and may pose a security risk to the confidentiality of consumer information accessible through Healthcare.gov if disclosed.²

On November 22, 2013, MITRE produced to the Committee a series of emails and an additional Security Control Assessment in a password encrypted file, along with another cover letter reiterating its concerns about the sensitivity of these documents. The letter stated:

As previously explained, the security assessments performed by MITRE contain sensitive information that, if disclosed, could jeopardize the security of personal and private consumer information on the HealthCare.gov site. We have redacted from the enclosed preliminary SCA report its most sensitive portions. This includes software code and other technical information that could be used to hack the HealthCare.gov system. Kindly note, however, even with the redactions, the information provided may pose a security risk to the confidentiality of consumer information, if disclosed.³

In response to your demand for copies of the unredacted Security Control Assessments, Alfred Grasso, the President and CEO of MITRE, wrote to you directly on December 4, 2013.

² Letter from Kathleen Golden, Government Relations Manager, MITRE Corporation, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Nov. 5, 2013) (emphasis in original).

³ Letter from Sol Glasner, Vice President, General Counsel, MITRE Corporation, to Counsel for Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Nov. 22, 2013) (emphasis in original).

Mr. Grasso again expressed significant concerns about protecting “sensitive information which could pose a threat to the confidentiality of personal citizens’ information if disclosed.”⁴

HHS has also warned that the documents you are demanding contain sensitive technical information that could undermine the security of the website if disclosed. On December 4, 2013, HHS wrote:

[S]ome of the information you have requested, if further disclosed, could imperil the security of personal and private consumer information on the Healthcare.gov website and/or undermine the security posture of the Data Services Hub. ... The type of information about which we are concerned could include a variety of computer security-related information that may not appear to be sensitive by itself, but could be sensitive when aggregated with other information.⁵

Nevertheless, in order to accommodate the Committee’s oversight interests while protecting the sensitivity of this information, both MITRE and HHS offered to remove the redactions and provide the Committee with access to the information as part of an in person review—an offer the Committee accepted last week.

Full Access to Information Already Provided to Committee Staff

On Friday, December 6, 2013, both Republican and Democratic Committee staff reviewed the complete, unredacted Security Control Assessments at HHS headquarters. During that review, Committee staff confirmed that there were no “open high” findings in the part of the website that launched on October 1, 2013. Committee staff also confirmed that the redactions made by MITRE security officials did in fact protect sensitive information that could be used by those seeking to damage the website or gain access to personal information.

Despite the fact that Committee staff were able to review these unredacted documents in full last Friday, you nevertheless proceeded to issue your unilateral subpoena on Monday, December 9, 2013.⁶ One day later, during a nationally televised appearance on Fox News, you seemed to dismiss warnings from MITRE officials about the sensitivity of the information

⁴ Letter from Alfred Grasso, President and Chief Executive Officer, MITRE Corporation, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Dec. 4, 2013).

⁵ Letter from Jim R. Esquea, Assistant Secretary for Legislation, Department of Health and Human Services, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Dec. 4, 2013).

⁶ Subpoena to Alfred Grasso, President and Chief Executive Officer, MITRE Corporation (Dec. 9, 2013).

contained in these documents. Instead, you claimed that any issues identified in the documents by now should be “stale” and that “there are hackers every day going after this website.”⁷

Given that MITRE has produced to the Committee redacted copies of the Security Control Assessments, and since both Republican and Democratic Committee staff now have reviewed all of the content beneath those redactions, it is unclear why you are demanding physical possession of the unredacted documents themselves.

Record of Leaking Sensitive Information without Consultation

Since you became Chairman of the Committee in 2011, you and your staff have engaged in a reckless pattern of leaking sensitive information and documents to promote political narratives that turn out to be inaccurate after further investigation. You have ignored repeated requests to consult first with Committee Members, law enforcement officials, and agency experts to understand how your disclosures might harm our national interests. As a result, under your leadership the Committee has become a virtual revolving door of leaks and misinformation. For example:

- Release of Documents Relating to Libyan Nationals: Three days before the Presidential Debate in October 2012, your office released sensitive documents from the Benghazi investigation that included information about Libyans working with the United States. You ignored warnings from the State Department in a letter on October 9, 2012, that these documents contained “sensitive information, including information about the security of U.S. diplomatic missions overseas, foreign government information, and personal privacy information, the unauthorized release of which could cause damage to national security and foreign relations.”⁸ Instead, you stated: “Congress doesn’t recognize and will not recognize “for official use only,” “sensitive.” Those are not classified. We would note it, but we would continue. Anything below secret is in fact just a name on a piece of paper. And I think it is important to understand that. So if you have seen papers that say “for official use only,” “State Department sensitive,” that is crap.”⁹
- Release of Document Sealed by Federal Court: During the Committee’s investigation of Operation Fast and Furious, your office leaked a document that was covered by a court-

⁷ *Happening Now*, Fox News Live (Dec. 10, 2013) (online at <http://ctv4.criticalmention.com/playerpage/player?shareid=168837&partnerToken=8a368b49429025990142dd322bba4356&clientId=0>).

⁸ Letter from David S. Adams, Assistant Secretary Legislative Affairs, Department of State, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Oct. 9, 2012).

⁹ Transcribed Interview of Acting Regional Security Officer David Oliveira (Oct. 9, 2012).

ordered seal that prohibited its public release.¹⁰ After refusing my requests to consult with the Justice Department prior to releasing documents from this ongoing criminal investigation, your staff later explained that this was an accidental release and that they were not aware that the document had been sealed by a federal court—a result that could have been avoided had you checked with federal prosecutors first.¹¹

- Release of Sensitive Security Information on Airport Security: Prior to a hearing on airport security in July 2011, your office leaked a document containing Sensitive Security Information (SSI).¹² This document had been produced in response to a Committee request and was clearly marked as SSI.¹³ The Department of Homeland Security objected to this leak on July 13, 2011, explaining that the “purpose of SSI is to protect the traveling public by ensuring that security information is not made available to those who seek to do our country harm.”¹⁴ In response, you argued that the SSI designation “does not apply to journalists, members of the public, and Congress.”¹⁵
- Release of Information from Court-Sealed Wiretaps: On June 28, 2012, while speaking on the floor of the House during contempt proceedings against Attorney General Eric Holder, you entered into the record letters that quoted from wiretap applications under seal. Although the federal wiretapping statute passed by Congress in 1968 prohibits the unauthorized disclosure of information contained in wiretap applications, it provides an exception when a federal judge authorizes the disclosure after a showing of good cause.¹⁶

¹⁰ *What Attorney General Holder Won't Tell on Controversial Gun Operation, Documents Do*, House Committee on Oversight and Government Reform (May 4, 2011) (online at <http://oversight.house.gov/release/what-attorney-general-holder-wont-tell-on-controversial-gun-operation-documents-do/>).

¹¹ Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (June 13, 2011) (online at <http://democrats.oversight.house.gov/press-releases/cummings-warns-issa-against-reckless-actions-requests-information-about-issas-plans-for-atf-investigation-5336/>).

¹² *25,000 Airport Security Breaches Since 2001: Congress*, ABC News (July 13, 2011) (online at <http://abcnews.go.com/Blotter/25000-tsa-security-breaches-2001-government-report/story?id=14056038>).

¹³ Letter from Nelson Peacock, Assistant Secretary, Legislative Affairs, Department of Homeland Security, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (July 15, 2011).

¹⁴ Letter from Joseph B. Maher, Deputy General Counsel, Department of Homeland Security, to Chairman Jason Chaffetz, Subcommittee on National Security, Homeland Defense, and Foreign Operations (July 13, 2011).

¹⁵ Letter from Chairman Darrell E. Issa, House Committee on Oversight and Government Reform to The Honorable Janet Napolitano, Secretary, Department of Homeland Security (July 15, 2011).

¹⁶ 18 U.S.C. § 2518(1), § 2518(8)(b).

Your failure to make a showing of good cause or even consult with the District Court prior to making this information public disregarded the purpose underlying the law Congress passed. Although you suggested that the wiretap applications showed that the Attorney General and senior Justice Department officials authorized “gun-walking” in Operation Fast and Furious, the wiretap applications showed no such thing.¹⁷

- Release of Emails Relating to MITRE Security Control Assessments: Just last week, on December 3, 2013, your office leaked to CNN emails that had just been produced to the Committee by MITRE relating to security testing for the Healthcare.gov website.¹⁸ You released these emails without consulting with me or HHS about the potential sensitivity of these documents. It does not appear that you took any official action associated with this leak (such as a letter or even a press release), but that your staff simply emailed the documents to a reporter as soon as they received them in an attempt to create yet another inaccurate political narrative.

Request to Establish Committee Protocols for Releasing Sensitive Documents

On November 6, 2013, after receiving initial warnings from MITRE officials about the sensitivity of their documents, I sent you a letter requesting that the Committee establish protocols for handling sensitive documents related to this investigation. I wrote:

In light of the potential for ill-meaning individuals to use this information to damage the website or compromise the security of confidential consumer information, I propose that we meet to develop common guidance for our Committee Members on the proper safeguarding of these documents.¹⁹

In my letter, I raised specific concerns about the sensitivity of the documents produced by MITRE:

The documents themselves also indicate the highly sensitive nature of the information they contain. In addition to being password protected, the documents are marked with the header: “CMS Sensitive Information—Requires Special Handling.”²⁰

For these reasons, I suggested that we work together on guidance for all Committee Members on how to protect these documents and the information they contain:

¹⁷ House Committee on the Judiciary, *Hearing on Oversight of the United States Department of Justice* (June 7, 2012).

¹⁸ *The Lead with Jake Tapper*, CNN (Dec. 3, 2013) (online at <http://mms.tveyes.com/PlaybackPortal.aspx?SavedEditID=a0e815d4-a577-4712-85ed-6509ad5c1b92>).

¹⁹ Letter from Ranking Member Elijah E. Cummings to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Nov. 6, 2013).

²⁰ *Id.*

I am proposing that we work in a careful and deliberate manner to understand fully the risks involved with our potential actions and that we act in a concerted and bipartisan manner to obtain the information we need while protecting American consumers.²¹

You did not respond to my letter, and you did not establish protocols for handling sensitive documents the Committee obtains. Since you became Chairman in 2011, the Committee has never voted to adopt any procedures governing the release of subpoenaed documents.

Conclusion

I have made clear many times that I strongly support the Committee's right to relevant information necessary to perform its oversight functions. But in this case, the Committee has already obtained the information at issue. Both Republican and Democratic Committee staff have reviewed these documents in their full unredacted form, and HHS has offered to make them available for review by all Members of the Committee at their convenience.

The fundamental concern raised by security experts at MITRE is that by demanding physical copies of these documents and then unilaterally releasing them publicly, you would cause significant damage to the website and jeopardize the security of personal and private consumer information. Since you disregarded my request to establish Committee protocols for safeguarding this information—and since you dismissed MITRE's security concerns on national television—I have serious concerns that your actions could lead to precisely this result.

Yesterday, HHS sent a letter to the Committee making a number of very constructive proposals that recognize our Committee's oversight interests while protecting the security of the website:

[W]e are willing to discuss further accommodations, such as providing the documents in a secure reading room at the Committee's offices, which would be open to all Committee Members and staff during business hours until the Committee completes its review. The Committee could also be permitted to invite an independent security expert (or experts) to examine the unredacted SCAs *in camera*. To the extent Committee staff would like to use the documents during interviews with agency officials, we could discuss making the unredacted SCAs available for that purpose, with an agreement regarding appropriate handling of those sections of the resulting transcript. In addition, the Department's cyber-security experts are available to brief Committee staff on the unredacted SCAs, and to explain with particularity the security risks were this information to become available to potential hackers and other malicious cyber actors. We are available to entertain other

²¹ *Id.*

proposals from the Committee and to expeditiously work out the details of a mutually agreeable arrangement.²²

Given the sensitivity of these documents, I request that the Committee accept these reasonable offers from HHS to accommodate the Committee's interests rather than insisting on an unnecessary and confrontational subpoena.

If you reject this offer and insist that MITRE produce these unredacted documents to the Committee pursuant to your subpoena, I will have no choice but to invoke House Rule XI clause 2(c)(2) and House Rule XI clause 2(m)(3)(A). As interpreted by the House Parliamentarians, these rules provide that documents received pursuant to a subpoena belong to the Committee and must be handled under procedures adopted by the Committee.²³ Although in previous Congresses, Chairmen and Ranking Members typically consulted with each other prior to the release of subpoenaed documents, in this case you have disregarded my request to establish a protocol for handling these documents. Should you demand MITRE's compliance with your subpoena, I will insist that you abide by the House Rules and not release these documents to anyone who is not a Member of the Committee or a member of its staff until the Committee has an opportunity to vote on their appropriate handling. I will also make the same request for all documents obtained by the Committee under all subpoenas issued during this Congress.

I continue to hope that we can work together on an alternative that respects the sensitivity of these documents while still allowing the Committee to conduct its legitimate oversight functions. Thank you for your consideration of this request.

Sincerely,



Elijah E. Cummings
Ranking Member

²² Letter from Jim R. Esquea, Assistant Secretary for Legislation, Department of Health and Human Services, to Chairman Darrell E. Issa, House Committee on Oversight and Government Reform (Dec. 12, 2013).

²³ See also Letter to Rep. Dan Burton, Chairman of the House Committee on Government Reform, from Minority Members (Mar. 10, 1997) ("The Parliamentarian's advice makes it clear that it is the Committee—not the chair acting on its own—that must decide how the documents received during the investigation will be handled.") (emphasis in original).