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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

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September 8, 2017

Mr. Adam Miles
Acting Special Counsel
U.S. Office of Special Counsel
1730 M Street, NW
Washington, DC 20036

Dear Mr. Miles:

I write to seek information about the Office of Special Counsel's (OSC) investigation concerning former FBI Director James Comey.¹ I respectfully request your cooperation with this inquiry.

In November 2016, OSC opened an investigation to determine whether Mr. Comey violated the Hatch Act in the course of the FBI's investigation into former Secretary of State Hillary Clinton's private email system.² As part of its investigation, the OSC requested information from Mr. Comey in November 2016, but it is unclear whether Mr. Comey provided any information to OSC.³ During the investigation, OSC apparently reviewed documents from the FBI and interviewed two FBI officials, Trisha Anderson and former FBI chief of staff Jim Rybicki, in May 2017.⁴ OSC's investigation ran about seven months, until OSC closed its investigation following Mr. Comey's departure from the FBI.⁵

During its investigation of Mr. Comey, OSC executed at least three non-disclosure agreements (NDA) relating to FBI information obtained during the course of OSC's investigation.⁶ The NDAs—signed only by an employee of OSC—covered information about the identities of FBI employees interviewed, information deemed to be “deliberative,” and information deemed to be “protected by attorney client privilege.”⁷ By the terms of the NDAs, OSC restricted itself from releasing information without “prior written authorization from the Department of Justice.”⁸

¹ U.S. Office of Special Counsel Complaint No. HA-17-0515.

² Comm. staff email with the Office of Special Counsel (Sep. 1, 2017).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Comm. staff email with the Office of Special Counsel (Sep. 6, 2017).

⁷ Non-Disclosure Agreement Re: U.S. Office of Special Counsel (“OSC”) Complaint No. HA-17-0515, Jan. 17, 2017 [herein after FBI Identity NDA]; Non-Disclosure Agreement Regarding Deliberative Process Privileged Material Re: U.S. Office of Special Counsel (“OSC”) Complaint No. HA-17-0515, Feb. 15, 2017 [herein after Deliberative Process NDA]; Non-Disclosure Agreement Regarding Attorney Client Privileged Material Re: U.S. Office of Special Counsel (“OSC”) Complaint No. HA-17-0515, Feb. 23, 2017 [herein after Attorney-Client NDA].

⁸ See Attorney-Client NDA paragraph 5, *supra* note 8; see also, Deliberative Process NDA paragraph 5, *supra* note 10; see also FBI Identity paragraph 5 NDA, *supra* note 13.

If OSC sought to produce information to Congress, the NDAs require the agency to redact the protected information and provide the FBI an opportunity “to review a read-through version of the redacted report and any other records [OSC] intends to release to propose additional redactions that may be necessary to protect [the specified] information and any other law enforcement sensitive information before making such disclosure.”⁹

Any reliance upon these non-disclosure agreements to withhold information from the Committee would be inappropriate. The Supreme Court has long recognized Congress’s right—rooted in the Constitution—to oversee and investigate the operations of the federal government. The congressional power of inquiry and the processes to enforce it are “an essential and appropriate auxiliary of the legislative function.”¹⁰ “The scope of [Congress’s] power of inquiry,” in the words of the Supreme Court, “is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”¹¹ Courts consistently hold that an agency may not deny Congress information on the basis of an NDA or confidentiality clause.¹² In addition, the Consolidated Appropriations Act of 2017 states that no funds may be used to enforce an NDA if the agreement does not expressly exempt the disclosure of information to Congress.¹³ OSC’s NDAs in this matter do not contain the required language.

The Committee has conducted oversight of the FBI’s investigation into Secretary Clinton’s use of a private email system.¹⁴ The information in OSC’s possession could further explain the scope, course, and nature of the FBI’s investigation. In particular, the information may shed light on the FBI’s decision-making process during the FBI’s investigation, the FBI’s interactions with other federal entities, the FBI’s distinction between “extreme carelessness” and “gross negligence,” and the potential harm done by Secretary Clinton’s use of a private email server. Information obtained by the Committee in this matter could also inform the Committee’s oversight of Hatch Act compliance by federal agencies and personnel. In addition, the revelation about the NDAs raise questions about OSC’s practices and procedures, as well as OSC’s use of NDAs in other matters.

⁹ *Id.* at paragraph 7. Contrarily, the NDAs included language that nothing in the NDAs “prevents OSC from disclosing [protected] information to the President of the United States, FBI Director Comey, or other officials within the Department of Justice as part of any report of OSC’s findings or recommendations.” *Id.* at paragraph 8.

¹⁰ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

¹¹ *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504, n. 15 (1975) (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1959)).

¹² See Morton Rosenberg, *When Congress Comes Calling* 83 (2017).

¹³ Pub. L. 115-31 § 744 (2017).

¹⁴ See letter from Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security and Governmental Affairs, to James Comey, Director, Federal Bureau of Investigation, Nov. 7, 2016; letter from Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security and Governmental Affairs, to James Comey, Director, Federal Bureau of Investigation, July 15, 2016.

For these reasons, I respectfully request the following information and material in unredacted form:

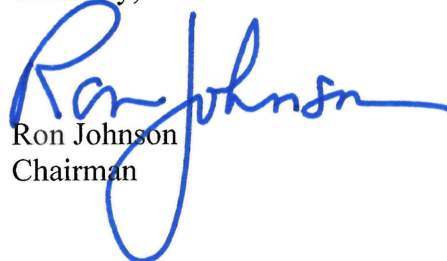
1. Has OSC ever executed an NDA limiting the release of information obtained in a Hatch Act investigation? If so, when?
2. Please explain why OSC executed NDAs for purposes of its Hatch Act investigation of former FBI Director Comey.
3. Please explain which federal entities participated in any manner in OSC's Hatch Act investigation of former FBI Director Comey.
4. Please produce all documents and communications referring or relating to the OSC's Hatch Act investigation of former FBI Director Comey (case number HA-17-0515), including but not limited to the full, unredacted transcripts of OSC's interviews of Trisha Anderson and Jim Rybicki.
5. Please produce all communications between OSC and other federal entities referring or relating to the OSC's Hatch Act investigation of former FBI Director Comey (case number HA-17-0515).

Please provide this information as soon as possible but no later than 5:00 p.m. on September 21, 2017.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate "the efficiency, economy, and effectiveness of all agencies and departments of the Government,"¹⁵ Additionally, S. Res. 62 (115th Congress) authorizes the Committee to examine "the efficiency and economy of all branches of the Government including the possible existence of fraud, misfeasance, malfeasance, collusion, mismanagement, incompetence, corruption, or unethical practices"¹⁶

Thank you for your attention to this matter. If you have any questions about this request, please contact Brian Downey or Kyle Brosnan of the Committee staff at (202) 224-4751.

Sincerely,


Ron Johnson
Chairman

¹⁵ S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

¹⁶ S. Res. 62 § 12, 115th Cong. (2017).

Mr. Adam Miles
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cc: The Honorable Claire McCaskill
Ranking Member

Enclosure