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Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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LAWRENCE J. BRADY
STAFF DIRECTOR

September 30, 2013

The Honorable Daniel I. Werfel
Principal Deputy Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

Dear Mr. Werfel:

The Committee on Oversight and Government Reform continues to investigate the Internal Revenue Service's inappropriate treatment of certain applicants for tax-exempt status. Through the course of the Committee's investigation, we have uncovered a troubling pattern of IRS officials sending official documents to non-official e-mail accounts as well as the use of non-official e-mail accounts to conduct official business. In some instances, IRS officials have sent taxpayer protected information to non-official e-mail accounts. This not only raises the prospect of violations of the Federal Records Act, but it also raises data security concerns and violates internal IRS policies. Accordingly, we request a briefing about IRS policies to combat against the use of unofficial e-mail accounts for official business and any documents related to such policies.

As you informed the Committee in your September 16, 2013, letter, "IRS policy prohibits using non-official e-mail accounts for any government or official purposes."¹ Yet, it appears that multiple IRS officials violated that policy. To date, the Committee has discovered that at least four senior IRS officials have used non-official e-mail accounts in the course of their official business. In response to a Committee request, Lois Lerner produced over 1,600 pages of e-mails and documents housed in a non-official e-mail account related to official business.² Moreover, nearly 30 pages of this material contained confidential taxpayer information, including a summary of an entire application for tax-exempt status,³ that the IRS instructed Ms. Lerner's counsel to redact because it is prohibited from disclosure pursuant to 26 U.S.C. §6103.⁴ In addition, the materials produced by Ms. Lerner revealed that Judith Kindell and Nikole Flax also used non-official e-mail accounts to conduct official business. Specifically, Ms. Kindell sent

¹ Letter from Daniel I. Werfel to Chairman Darrell Issa (Sept. 16, 2013).

² See Letter from William W. Taylor, III to Chairman Darrell Issa (Sept. 6, 2013).

³ Lerner-ORG-001607-001618.

⁴ See Letter from William W. Taylor, III to Chairman Darrell Issa (Sept. 6, 2013).

confidential taxpayer information protected by 26 U.S.C. §6103 to a non-official e-mail account and to Ms. Lerner's non-official e-mail account.⁵ Similarly, Ms. Flax and Ms. Lerner used their respective non-official e-mail accounts to discuss official business.⁶ Finally, documents produced by the IRS show former IRS Commissioner Douglas Shulman received e-mails related to official business on his non-official e-mail account.⁷ This rampant use of non-official e-mail by four senior IRS officials to conduct official business suggests that such use is a systemic problem throughout the IRS.

This is also a concern to the Committee because federal taxpayer information (FTI) cannot be shared on non-secure, non-official systems. According to IRS policies, only agency-owned computers, media, and software should be used to receive, process, access, and store FTI.⁸ This policy exists to ensure that FTI is protected and secure; however, this policy is frustrated when IRS officials send information over non-secure, non-official e-mail accounts. Ms. Lerner even recognized this fact, stating, "I left names as XXXX, YYYY, ZZZZ and AAA because this isn't secure" when sending an official e-mail over a non-official account.⁹ Yet, as stated earlier, nearly 30 pages of documents produced by Ms. Lerner included FTI, and Ms. Kindell appears to have sent such information over an unsecure system as well. It is especially disconcerting that senior IRS officials would send FTI over non-official e-mail because the Committee has learned that such officials are likely to have IRS issued laptops. Indeed, the IRS Affordable Care Act Director of Services and Enforcement, Sarah Hall Ingram, testified:

Q Is it common for senior leadership to have IRS-issued laptops?

A Oh, yes. And, in fact, after the flood of the IRS main building, whenever that was, a couple years ago, the use of laptops and the efficient use of -- the IT people say it's easier to service than replace them -- has become quite standard for most employees.¹⁰

The transmission of FTI on unsecure systems also undercuts assurances given to the Committee by former Commissioner Shulman who testified that the IRS "takes data security very, very seriously. And we have an excellent track record of protecting the American taxpayers' basic income data."¹¹

Moreover, the use of non-official e-mail accounts to conduct official business implicates federal records requirements. Specifically, the use of a non-official e-mail account to conduct government business raises the prospect that records -- as defined by the Federal Records Act -- are not captured by official government e-mail archiving systems. It also creates difficulties in

⁵ Lerner-ORG-000205-000224.

⁶ Lerner-ORG-000640-000647.

⁷ IRS1031.

⁸ IRS Publication 1705 pg. 26, available at <http://www.irs.gov/pub/irs-pdf/p1075.pdf>.

⁹ Lerner-ORG-000631.

¹⁰ Transcribed Interview of Sarah Hall Ingram, Internal Revenue Serv., in Wash., D.C. at 213-214 (Sept. 23, 2013).

¹¹ *IRS: Enforcing Obamacare's New Rules and Taxes: Hearing before the H. Comm. on Oversight & Govt. Reform*, 112th Cong. (2012).

fulfilling the IRS's obligations under the Freedom of Information Act. In addition, use of a non-official e-mail account frustrates congressional oversight obligations, and the lack of access to this information prevents the Committee from fully assessing the IRS's actions.

Finally, it appears that at least one IRS employee was not forthcoming to the IRS about information responsive to the Committee's investigation in their personal possession. The IRS informed the Committee that it asked IRS employees to notify the IRS if documents responsive to the Committee's investigation exist on non-official accounts or devices.¹² In response, Ms. Lerner and Ms. Flax informed the IRS that they had such documents on unofficial accounts or devices.¹³ However, it appears Ms. Kindell did not inform the IRS that she had information responsive to the Committee's request in a non-official e-mail account that she accessed.¹⁴ Disturbingly, this suggests that IRS employees have not been forthcoming to the IRS about documents related to the Committee's investigation in their personal possession and furthers the Committee's concerns.

Your September 16, 2013, letter stated that the IRS is "evaluat[ing] whether personnel action is warranted by the e-mails [previously brought to your attention by the Committee] and any other similar e-mails that [the IRS] identify[ies] or have identified."¹⁵ To understand what the IRS is doing to evaluate this and how the IRS plans to address the Committee's concerns, we request a staff briefing and the following documents by October 15, 2013:

- 1) All documents and communications referring or relating to the IRS's policies on the use of non-official e-mail accounts to conduct official business;
- 2) All documents and communications referring or relating to violations or possible violations of the IRS's policies on the use of non-official e-mail accounts to conduct official business; and
- 3) All documents and communications that the IRS has identified that violated the IRS's policy against using non-official e-mail accounts to conduct official business.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

We request that you provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on October 15, 2013. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn

¹² See Letter from Daniel I. Werfel to Chairman Darrell Issa (Sept. 16, 2013).

¹³ Conference Call with IRS Staff (Sep. 6, 2013).

¹⁴ See *id.*

¹⁵ Letter from Daniel I. Werfel to Chairman Darrell Issa (Sept. 16, 2013).

The Honorable Daniel Werfel
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House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact David Brewer or Katy Rother of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa
Chairman



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

ONE HUNDRED THIRTEENTH CONGRESS

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Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.