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United States Senate

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

December 14, 2017

The Honorable Christopher Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue
Washington, DC 20535

Dear Director Wray:

The Committee on Homeland Security and Governmental Affairs is continuing its oversight of the Office of Special Counsel's (OSC) Hatch Act investigation of former Federal Bureau of Investigation (FBI) Director James Comey. I write to request additional material concerning the public statements made by Director Comey in reference to the FBI's investigation of former Secretary of State Hillary Clinton's use of a private email server. I appreciate your cooperation with this request.

On November 17, 2017, the FBI produced documents that it had previously transmitted to OSC as part of OSC's Hatch Act investigation of Director Comey.¹ These documents help to inform the Committee's understanding of both OSC's and the FBI's investigations. However, these documents raise additional questions about both investigations.

The FBI's production included early drafts of Director Comey's public statement, ultimately delivered on July 5, 2016, clearing Secretary Clinton of criminal wrongdoing in her use of a private email server.² On May 2, 2016, Director Comey emailed a draft statement to FBI Deputy Director Andrew McCabe, FBI General Counsel James Baker, and FBI Chief of Staff James Rybicki—a full two months before the FBI had completed over a dozen interviews, including its interview with Secretary Clinton.³ The drafting of this statement began before the FBI immunized key witnesses to the investigation, including Cheryl Mills and Heather Samuelson.⁴ The immunity agreements with Ms. Mills and Ms. Samuelson, executed on June

¹ Letter from Gregory A. Brower to Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security and Governmental Affairs (Nov. 17, 2017).

² Documents FBI produced to the Committee on Nov. 17, 2017 marked SJC 000028-000271 [herein after "FBI documents"]. For clarity, I have attached the entire document containing track-changed edits to Director Comey's original draft July 5 statement. This document is marked SJC 000031-000037.

³ FBI documents, *supra* note 2 at SJC 000140.; Letter from Sen. Charles Grassley, Chairman, S. Comm. on Judiciary, to Christopher Wray, Director, Federal Bureau of Investigation, Aug. 30, 2017. The FBI conducted an interview of Secretary Clinton on July 2, 2016.

⁴ Comm. review of Justice Dep't immunity agreements with Cheryl Mills & Heather Samuelson, (Sept. 27, 2016).

10, 2016, also included side agreements requiring the FBI to destroy evidence on devices turned over to the FBI.⁵

According to documents produced by the FBI, FBI employees exchanged proposed edits to the draft statement. On May 6, Deputy Director McCabe forwarded the draft statement to other senior FBI employees, including Peter Strzok, E.W. Priestap, Jonathan Moffa, and an employee in the Office of General Counsel whose name has been redacted.⁶ While the precise dates of the edits and identities of the editors are not apparent from the documents, the edits appear to change the tone and substance of Director Comey's statement in at least three respects.⁷

1. Repeated edits to reduce Secretary Clinton's culpability in mishandling classified information

The original draft of Director Comey's remarks included a statement that could be read as a finding of criminality in Secretary Clinton's handling of classified material:

*There is evidence to support a conclusion that Secretary Clinton, and others, used the private email server in a manner that was grossly negligent with respect to the handling of classified information.*⁸

The edited statement deleted the reference to gross negligence—a legal threshold for mishandling classified material⁹—and instead replaced it with an exculpatory sentence:

*Although we did not find clear evidence that Secretary Clinton or her colleagues intended to violate laws governing the handling of classified information, there is evidence that they were extremely careless in their handling of very sensitive, highly classified information.*¹⁰

This change appeared in the statement as Director Comey delivered it on July 5, 2016.¹¹

Further, the original draft of Director Comey's statement connected the volume of classified material on Secretary Clinton's private server with a finding of criminality. It read:

⁵ *Id.*; see also *FBI agreed to destroy laptops of Clinton aides with immunity deal, lawmaker says*, Fox News, Oct. 3, 2016.

⁶ FBI documents, *supra* note 2 at SJC 000028-29.

⁷ *Id.*

⁸ FBI documents, *supra* note 2 at SJC 0000142.

⁹ See 18 U.S.C. § 793.

¹⁰ FBI documents, *supra* note 2 at SJC 000034

¹¹ *Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System*, July 5, 2016, available at <https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system> [hereinafter *Comey July 5 statement*].

*Similarly, the sheer volume of information that was properly classified as Secret at the time it was discussed on email (that is, excluding the “up classified” emails) supports an inference that the participants were grossly negligent in their handling of that information.*¹²

This statement was edited to deemphasize the amount of classified information and, again, to remove a reference to gross negligence. The edited version read:

*In addition to this highly sensitive information, we also found information that was properly classified as Secret by the U.S Intelligence Community at the time it was discussed on email (that is, excluding the ‘up classified emails).*¹³

The edited version also contained a sentence that read, “This is especially concerning because all of these emails were housed on servers not supported by full-time security staff, like those found at the Departments and Agencies of the U.S. Government.”¹⁴ This sentence was not included in the statement as delivered by Director Comey on July 5.¹⁵

¹² FBI documents, *supra* note 2 at SJC 0000142

¹³ FBI documents, *supra* note 2 at SJC 000035

¹⁴ FBI documents, *supra* note 2 at SJC 000035.

¹⁵ Comey July 5 statement, *supra* note 11.

Figure 1: Edits to “extremely careless” in Director Comey’s statement

That’s what we have done. Now let me tell you what we found.

~~Although we did not find clear evidence that Secretary Clinton or her colleagues intended to violate laws governing the handling of classified information, there is evidence that they were extremely careless in their handling of very sensitive, highly classified information. There is evidence to support a conclusion that Secretary Clinton, and others, used the private email server in a manner that was grossly negligent with respect to the handling of classified information. For example, seven email chains concern matters that were classified at the TS SAP level when they were sent and received. These chains involved Secretary Clinton both sending emails about those matters and receiving emails from others about the same matters. There is evidence to support a conclusion that any reasonable~~

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SJC000034

person in Secretary Clinton’s position, or in the position of those government employees with whom she was corresponding about these matters, should have known that an unclassified system was no place for such an email conversation.

~~Although we did not find clear evidence that Secretary Clinton or her colleagues intended to violate laws governing the handling of classified information, there is evidence that they were extremely careless in their handling of very sensitive, highly classified information.~~

~~Similarly, in addition to this highly sensitive information, we also found the sheer volume of information that was properly classified as Secret by the U.S. Intelligence Community at the time it was discussed on email (that is, excluding the “top classified” emails). This is especially concerning because all of these emails were housed on servers not supported by full-time security staff, like those found at Departments and Agencies of the U.S. Government. This supports an inference that the participants were grossly negligent in their handling of that information.~~

In addition, the original draft of Director Comey’s statement stated that the FBI had found evidence of potential violations of the gross negligence statute and of the statute governing misdemeanor mishandling of classified information:

Although there is evidence of potential violations of the statute proscribing gross negligence in the handling of classified information and of the statute proscribing misdemeanor mishandling, my judgment is that no reasonable prosecutor would bring such a case. At the outset, we are not aware of a case where anyone has been charged solely based on the “gross negligence” prohibition in the statute.

In looking back at our investigations in similar circumstances, we cannot find a case that would support bringing criminal charges on these facts. All the cases prosecuted involved some combination of: (1) clearly intentional misconduct; (2) vast quantities of materials exposed in such a way as to support an inference of intentional misconduct; (3) indications of disloyalty to the United States; or (4) efforts to obstruct justice. We see none of that here.¹⁶

The edited version removed Director Comey's specific reference to potential violations of the gross negligence and misdemeanor mishandling statutes. The edits changed the first sentence of the quoted text to read:

Although there is evidence of potential violations of the statutes regarding the handling of classified information, my judgment is that no reasonable prosecutor would bring such a case.¹⁷

A comment bubble accompanying the edit, in which the editor wrote, "we changed none of this text, we simply reordered it. The original text is below, struck out."¹⁸ The editor did not address the deletion of references in the original draft to evidence of potential violations of the gross negligence or misdemeanor statutes.

Director Comey's public remarks on July 5 lacked any specific reference to the FBI finding of evidence potential violations of the "gross negligence" and "misdemeanor mishandling" statutes. Instead, Director Comey stated:

Although there is evidence of potential violations of the statutes regarding the handling of classified information, our judgment is that no reasonable prosecutor would bring such a case. . . .¹⁹

¹⁶ FBI documents, *supra* note 2 at SJC 000036.

¹⁷ FBI documents, *supra* note 2 at SJC 000036.

¹⁸ FBI documents, *supra* note 2 at SJC 000036.

¹⁹ Comey July 5 statement, *supra* note 11.

Figure 2: Edits removing references to evidence of violations of statutes about the use of classified information

In looking back at our investigations in similar circumstances, we cannot find a case that would support bringing criminal charges on these facts. All the cases prosecuted involved some combination of: (1) clearly intentional mishandling of classified information; (2) vast quantities of materials exposed in such a way as to support an inference of intentional misconduct; (3) indications of disloyalty to the United States; or (4) efforts to obstruct justice. All charged cases of which we are aware have involved the accusation that a government employee intentionally mishandled classified information. We see none of that here.

Commented [p6]: We changed none of this text, we simply reordered it. The original text is below, struck-out.

Although there is evidence of potential violations of the statutes regarding the handling of classified information, my judgment is that no reasonable prosecutor would bring such a case. Prosecutors necessarily weigh a number of factors before bringing charges. There are obvious considerations, like the strength of the evidence. But they must be balanced against things like the intent and context of the person's actions. To be clear, this is not to suggest that in similar circumstances, an individual who engaged in this activity would face NO consequences. To the contrary, such individuals are often subject to security or administrative sanctions. But that decision is not what is before me now.

Although there is evidence of potential violations of the statute proscribing gross negligence in the handling of classified information and of the statute proscribing misdemeanor mishandling, my judgment is that no reasonable prosecutor would bring such a case. At the outset, we are not aware of a case where anyone has been charged solely based on the "gross negligence" prohibition in the statute. In looking back at our investigations in similar circumstances, we cannot find a case that would support bringing criminal charges on these facts. All the cases prosecuted involved some combination of: (1) clearly intentional misconduct; (2) vast quantities of materials exposed in such a way as to support an inference of intentional misconduct; (3) indications of disloyalty to the United States; or (4) efforts to obstruct justice. We see none of that here.

Commented [p7]:

Accordingly, although the Department of Justice makes final decisions on matters such as this, I am completing the investigation by expressing to Justice my view that no charges are appropriate in this case.

SJC000036

2. Edits to remove reference to the Intelligence Community's role in identifying vulnerabilities related to Secretary Clinton's private email server

Director Comey's original statement acknowledged the FBI had worked with its partners in the Intelligence Community to assess potential damage from Secretary Clinton's use of a private email server. The original statement read:

[W]e have done extensive work with the assistance of our colleagues elsewhere in the Intelligence Community to understand what indications there might be of compromise by hostile actors in connection with the private email operation.²⁰

The edited version removed the reference to the intelligence community:

²⁰ FBI documents, *supra* note 2 at SJC 000142.

[W]e have done extensive work to understand what indications there might be of compromise by hostile actors in connection with the personal e-mail operation.²¹

Director Comey delivered this edited statement in his July 5 remarks.²² It is unclear why FBI staff removed the reference to working with the Intelligence Community during the editing process for Director Comey's statement.

3. *Edits to downgrade the likelihood that hostile actors had penetrated Secretary Clinton's private server*

Finally, the original draft of Director Comey's statement included a conclusion that it was "reasonably likely" that hostile actors had penetrated Secretary Clinton's private server. Director Comey's original statement read:

With respect to potential computer intrusion by hostile actors, we did not find direct evidence that Secretary Clinton's personal email system, in its various configurations since 2009, was successfully hacked. But, given the nature of the system and of the actors potentially involved, we assess that we would be unlikely to see such direct evidence. We do assess that hostile actors gained access to the private email accounts of individuals with whom Secretary Clinton was in regular contact from her private account. We also assess that Secretary Clinton's use of a private email domain was both known by a large number of people and readily apparent. Given the combination of factors, we assess it is reasonably likely that hostile actors gained access to Secretary Clinton's private email account.²³

This statement was edited to downgrade the assessment that it was "reasonably likely" that hostile actors had gained access to Secretary Clinton's private email account. Instead, the edited statement simply read it was "possible" that those events occurred—the formulation Director Comey ultimately used in his public statement on July 5.²⁴ Director Comey's July 5 statement ultimately read:

With respect to potential computer intrusion by hostile actors, we did not find direct evidence that Secretary Clinton's personal e-mail domain, in its various configurations since 2009, was successfully hacked. But, given the nature of the system and of the actors potentially involved, we assess that we would be unlikely to see such direct evidence. We do assess that hostile actors gained access to the private commercial e-mail accounts of people with whom Secretary Clinton was in regular contact from her personal account. We also assess that Secretary Clinton's use of a personal e-mail domain was both known by a large number of people and readily apparent. She also used her personal e-mail extensively while outside the United States, including sending and receiving work-related e-mails in

²¹ FBI documents, *supra* note 2 at SJC 000034.

²² Comey July 5 statement, *supra* note 11.

²³ FBI documents, *supra* note 2 at SJC 0000143.

²⁴ FBI documents, *supra* note 2 at SJC 000035.

*the territory of sophisticated adversaries. Given that combination of factors, we assess it is possible that hostile actors gained access to Secretary Clinton's personal e-mail account.*²⁵

The edited statement contains a comment bubble at the conclusion of the changed paragraph; however the FBI redacted the comment.²⁶

Figure 3: Edits on “reasonably likely” that hostile actors gained access to Secretary Clinton’s personal email account

With respect to potential computer intrusion by hostile actors, we did not find direct evidence that Secretary Clinton’s personal email system, in its various configurations since 2009, was successfully hacked. But, given the nature of the system and of the actors potentially involved, we assess that we would be unlikely to see such direct evidence. We do assess that hostile actors gained access to the private commercial email accounts of individuals with whom Secretary Clinton was in regular contact from her personal private account. We also assess that Secretary Clinton’s use of a private personal email domain was both known by a large number of people and readily apparent. Given that combination of factors, we assess it is reasonably likely possible that hostile actors gained access to Secretary Clinton’s private personal email account.

Commented [p5]:

So that’s what we found.

Although it is not readily apparent from the draft statement, media reports suggest that Mr. Strzok changed the language from “grossly negligent” to “extremely careless” in the draft statement.²⁷ Mr. Strzok also participated in the FBI’s interview of Secretary Clinton on July 2, 2016.²⁸ Other documents produced by the Justice Department show during the FBI’s investigation of Secretary Clinton, Mr. Strzok described then-candidate Trump as an “idiot” and that his candidacy would be “good for Hillary.”²⁹ On March 4, 2016, he wrote that “Hillary should win 100,000,000-0” in a hypothetical election with Trump.³⁰ In addition, while exchanging text messages with Lisa Page in August 2016, Mr. Strzok wrote: “I want to believe the path you threw out to consideration in Andy’s office—*that there’s no way he gets elected—but I’m afraid we can’t take that risk.* It’s like an insurance policy in the unlikely event you die before you’re 40”³¹

²⁵ Comey July 5 statement, *supra* note 11.

²⁶ FBI documents, *supra* note 2 at SJC 000035.

²⁷ Laura Jarrett and Evan Perez, *FBI agent dismissed from Mueller probe changed Comey’s description of Clinton to ‘extremely careless’*, CNN, Dec. 4, 2017, <http://www.cnn.com/2017/12/04/politics/peter-strzok-james-comey/index.html>.

²⁸ Fed. Bureau of Investigation, 302 of FBI interview with Hillary Clinton, July 2, 2016, *available at* <https://vault.fbi.gov/hillary-r.-clinton/Hillary%20R.%20Clinton%20Part%2002%20of%2016/view>.

²⁹ Letter from Stephen E. Boyd, Ass’t Attn’y Gen. for the Office of Legislative Affairs, U.S. Dep’t of Justice, to Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security and Governmental Affairs, Dec. 12, 2017. Mr. Boyd’s letter was accompanied by a production of 375 text message communications between Mr. Strzok and Lisa Paige, another FBI employee dated August 16, 2015 to December 1, 2016 [herein after referred to as “text messages.” Text messages at 8-9; text messages at 10.

³⁰ Text messages at 11

³¹ Text messages at 43 (emphasis added).

In summary, the edits to Director Comey's public statement, made months prior to the conclusion of the FBI's investigation of Secretary Clinton's conduct, had a significant impact on the FBI's public evaluation of the implications of her actions. This effort, seen in light of the personal animus toward then-candidate Trump by senior FBI agents leading the Clinton investigation and their apparent desire to create an "insurance policy" against Mr. Trump's election, raise profound questions about the FBI's role and possible interference in the 2016 presidential election and the role of the same agents in Special Counsel Mueller's investigation of President Trump. Given these circumstances, the Committee has additional questions about the process by which the FBI edited Director Comey's public statement of July 5, 2016. I respectfully request the following information and material:

1. Please provide the names of the Department of Justice (DOJ) employees who comprised the "mid-year review team" during the FBI's investigation of Secretary Clinton's use of a private email server?
2. Please identify all FBI, DOJ, or other federal employees who edited or reviewed Director Comey's July 5, 2016 statement. Please identify which individual made the marked changes in the documents produced to the Committee.
3. Please identify which FBI employee repeatedly changed the language in the draft statement that described Secretary Clinton's behavior as "grossly negligent" to "extremely careless." What evidence supported these changes?
4. Please identify which FBI employee edited the draft statement to remove the reference to the Intelligence Community. On what basis was this change made?
5. Please identify which FBI employee edited the draft statement to downgrade the FBI's assessment that it was "reasonably likely" that hostile actors had gained access to Secretary Clinton's private email account to merely that an intrusion was "possible." What evidence supported these changes?
6. Please provide unredacted copies of the drafts of Director Comey's statement, including comment bubbles, and explain the basis for the redactions in the material produced to date.

Please provide this information as soon as possible but no later than 5:00 p.m. on December 28, 2017. Any classified information provided in response to this letter should be provided under separate cover through the Office of Senate Security.

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,"³² Additionally, S. Res. 62 (115th Congress) authorizes the Committee to examine "the efficiency and economy of all

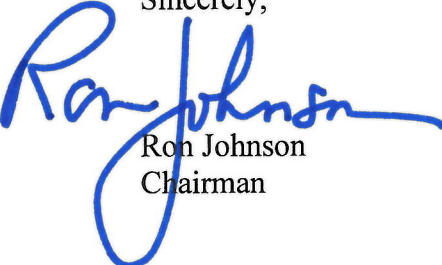
³² S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

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branches of the Government including the possible existence of fraud, misfeasance, malfeasance, collusion, mismanagement, incompetence, corruption, or unethical practices”³³

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

Sincerely,



Ron Johnson
Chairman

cc: The Honorable Claire McCaskill
Ranking Member

Enclosure

³³ S. Res. 62 § 12, 115th Cong. (2017).