U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535-0001

AUG 16 2016

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am writing in response to your letters to Director Comey dated May 17, 2016 and July 6, 2016 regarding the FBI's investigation of former Secretary of State Hillary Clinton's use of a private email server. As Director Comey said in his statement on July 5, 2016, due to intense public interest in the FBI's investigation into this matter, we believe it is important to address your questions and explain our recommendation as to the appropriate resolution of this investigation. For the same reasons, the FBI will be making a document production responding to your interest in this matter.

The FBI conducted this investigation, as it does all investigations, in a competent, honest, and independent way. We had an investigative team of agents and analysts supported by technical experts, lawyers, and others from several divisions in the FBI. The investigative team worked for close to a year conducting interviews, reviewing emails, and completing technical examinations of recovered equipment. In addition, the FBI's technical team conducted extensive analysis to understand what, if any, indications there might be of a compromise of Secretary Clinton's electronic devices by hostile actors.

After nearly a year of gathering and analyzing evidence from numerous sources, the FBI made a recommendation to the Department of Justice. Although the prosecutors make the ultimate decision about whether or not charges are appropriate based on the evidence, the FBI frequently makes recommendations and engages in conversations with the prosecutors regarding the appropriate resolution of an investigation, given the evidence. The fact that the FBI made a recommendation was not unusual; the fact that it was shared publicly was.

Our investigation looked at whether there was evidence that classified information was improperly stored or transmitted on Secretary Clinton's private email system, in violation of a federal statute (18 U.S.C. § 793) that makes it a felony to mishandle classified information either intentionally or in a grossly negligent way, or another statute (18 U.S.C. § 1924) that makes it a misdemeanor to knowingly remove classified information from appropriate systems or storage facilities. We also considered a statute (18 U.S.C. § 2071) making it illegal to willfully and unlawfully conceal, remove, or destroy a federal record. Ultimately, the FBI did not recommend

prosecution based on an assessment of the facts and a review of how these statutes have been charged in the past.

As the Director testified, cases prosecuted by the Department of Justice under the relevant statutes involved some combination of: (1) clearly intentional and willful mishandling of classified information; (2) significant quantities of material 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. One or more of these factors was present in the cases against David Petraeus, Sandy Berger, and Bryan Nishimura. For instance, Petraeus provided vast quantities of highly sensitive, compartmented information that he knew to be classified to a person without an appropriate clearance or a need to know the information and, when confronted, he lied to the FBI. Berger removed clearly marked, highly classified information from the National Archives by secreting the documents in his clothing. These cases included clear evidence of knowledge and intent which illustrates an important distinction from what the FBI found in this investigation. Nishimura, a Naval Reservist stationed in Afghanistan, removed hundreds of marked classified documents, without authorization, from classified U.S. military information systems, which he then placed onto several personally-owned, unauthorized devices. Nishimura later lied to investigators about onto which devices he had placed classified information, and destroyed a large quantity of classified material he had maintained in his home. Despite this destruction, a subsequent search of his house recovered 256 marked classified documents which he was not authorized to store.

The fact that Secretary Clinton received emails containing "(C)" portion markings is not clear evidence of knowledge or intent. As the Director has testified, the FBI's investigation uncovered three instances of emails portioned marked with "(C)," a marking ostensibly indicating the presence of information classified at the Confidential level. In each of these instances, the Secretary did not originate the information; instead, the emails were forwarded to her by staff members, with the portion-marked information located within the email chains and without header and footer markings indicating the presence of classified information. Moreover, only one of those emails was determined by the State Department to contain classified information. There has been no determination by the State Department as to whether these three emails were classified at the time they were sent.

Nor is the fact that Secretary Clinton emailed former Deputy Chief of Staff Jacob Sullivan asking him to remove "identifying heading[s]" from a document and "send nonsecure" as a "nonpaper" sufficient evidence to show that she knowingly or willfully mishandled classified information. As we understand the common State Department use of the term, "non-paper" refers to a document authorized for distribution to a foreign government that is without explicit attribution to the U.S. Government and would not contain classified information. In their interviews with the FBI, both Secretary Clinton and Sullivan indicated their understanding that this was an instruction to remove classified information from the talking points, in order to send the resulting unclassified document through non-secure means. Moreover, the FBI investigation determined that a secure fax was successfully sent subsequent to this message, and no evidence was recovered indicating that the unclassified "non-paper" was ever created or sent over the unclassified email system.

During the course of its investigation, the FBI conducted numerous interviews, including one of John Bentel, then-Director of S/ES-IRM, the State Department official referenced in the State Department OIG report as having discouraged employees from raising concerns about Secretary Clinton's use of personal email. In his FBI interview, Bentel denied that State Department employees raised concerns about Secretary Clinton's email to him. The FBI ultimately considered the inconsistencies between Bentel's statements to the FBI and his subordinates' reported statements to investigators with the Department of State Inspector General to be outside the scope of its investigation, and, further, ones which had been appropriately addressed by the Department of State Inspector General.

During the course of the investigation, the FBI interviewed Department of State security employees and reviewed documents regarding cyber security, including the Boswell memorandum, which outlined an increase in cyber actors targeting the personal email accounts of State Department employees.[1] As Secretary Clinton did not believe she would or did receive classified emails on her personal email system, it is unclear that a warning of this nature would have had any impact on her conduct or intent.

Title 18, United States Code, Section 793 on its face makes it a felony to cause national defense information to be removed, lost, stolen, or destroyed through gross negligence. Even at the time the statute was passed, there were concerns in Congress about the inclusion of this provision. Additionally, with respect to this statute, there are concerns about the constitutional implications of criminalizing such conduct without requiring the government to prove that the person knew he or she was doing something wrong, which is reflected in the Justice Department's history in charging this specific subsection of the statute (18 U.S.C. § 793(f)). Our understanding is the Department has only charged one person with mishandling national defense information through gross negligence in the 99-year history of the statute, and in that case, the charge was dismissed when the defendant pled guilty to making false statements in violation of 18 U.S.C. § 1001. Moreover, in that case, there were indications of espionage and disloyalty to the United States. As the Director testified, he believed that to prosecute Secretary Clinton or others within the scope of the investigation for gross negligence would be inconsistent with how the Department has interpreted and applied the statute since Congress enacted it.

As the Director stated, the FBI did find evidence that Secretary Clinton and her colleagues were extremely careless in their handling of certain, very sensitive, highly classified information. The term "extremely careless" was intended to be a common sense way of describing the actions of Secretary Clinton and her colleagues. The Director did not equate "extreme carelessness" with the legal standard of "gross negligence" that is required by the statute. In this case, the FBI assessed that the facts did not support a recommendation to prosecute her or others within the scope of the investigation for gross negligence.

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[1] The FBI interviewed former Secretary of State Hillary Clinton on July 2, 2016. Although there had been contact with Secretary Clinton's attorneys during the course of the investigation, we did not request an interview until June 2016 after sufficient facts were gathered to properly inform the interview, which is common in investigations of this nature.

However, as the Director has explained, this is not to say that someone else who engaged in this type of conduct would face no consequences for handling classified information in a similar manner if they were still a government employee. For example, there are potentially severe administrative consequences within the FBI for security violations involving the mishandling of classified information, up to and including security clearance revocation and dismissal. The FBI is in the process of providing relevant information to other U.S. Government agencies to conduct further security and administrative reviews they deem appropriate for their respective employees. If someone who engaged in this type of conduct applied for a job at the FBI, the facts and circumstances surrounding this activity would be a significant factor in a suitability review for a security clearance and employment at the Bureau.

As the Director noted in his statement, the FBI made its recommendation concerning this matter to the Justice Department independent of any consultation with the Attorney General or any White House officials, and the investigation was conducted without any improper political influence of any kind. For this reason, the FBI does not believe the appointment of a Special Counsel is warranted. In addition, the FBI would refer you to the Department of Justice for any explanation of legal agreements that may or may not have been made with potential witnesses, as well as other judgments or decisions made by Department of Justice officials.

Lastly, concerning questions related to whether other matters may be under investigation, consistent with prior statements, the FBI neither confirms nor denies the existence of non-public investigations.

Thank you for your continued interest in this important matter, and, as always, we appreciate your continued support for the men and women of the FBI. The production of documents related to this matter will be provided under separate cover letter consistent with required protocols for the transmission of classified documents.

Sincerely,

Jason V. Herring
Acting Assistant Director
Office of Congressional Affairs

1 - The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510