

United States Senate

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

CHRISTOPHER R. HIXON, STAFF DIRECTOR
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

December 13, 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. According to OSC, non-disclosure agreements it executed at the FBI's request prevent OSC from complying in full with the Committee's oversight. Accordingly, I write to request your assistance in better understanding the FBI's actions.

On November 1, 2016, OSC opened an investigation to determine whether Director Comey violated the Hatch Act when he made public statements about the FBI's investigation of former Secretary of State Hillary Clinton's use of a private email server.¹ Over the ensuing months, OSC conducted an extensive Hatch Act investigation of this matter:

- **November 4, 2016:** OSC asked Director Comey to preserve evidence.²
- **November 14, 2016:** OSC requested information from Director Comey.³
- **December 5, 2016:** The Department of Justice (DOJ) informed OSC that the FBI General Counsel's Office (OGC) was recused from the investigation and that the Executive Office of U.S. Attorneys (EOUSA) would serve as OSC's liaison.⁴
- **December 22, 2016:** EOUSA provided OSC with an initial document production. An email accompanying the production indicated that FBI would not cooperate with OSC's investigation without restrictions on the release of information.⁵
- **January 17, 2017:** OSC executed a non-disclosure agreement (NDA), limiting the release of information concerning the identity of FBI employees.⁶

¹ Letter from Tristan Leavitt, Acting Special Counsel, to Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security and Gov't Affairs, Sept. 21, 2017. OSC ultimately received 32 allegations alleging Director Comey violated the Hatch Act through his handling of the Clinton email investigation.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Non-Disclosure Agreement Re: U.S. Office of Special Counsel ("OSC") Complaint No. HA-17-0515, Jan. 17, 2017 [hereinafter "FBI Identity NDA"]

- **February 15, 2017:** OSC executed a second NDA, which limited the release of information that the FBI deemed to be deliberative in nature.⁷
- **February 23, 2017:** OSC executed a third NDA, limiting the release of information that the FBI deemed to be covered by the attorney-client privilege.⁸ According to OSC, OSC had never before executed NDAs during a Hatch Act investigation.⁹
- **March through April 2017:** EOUSA produced documents and emails to OSC.¹⁰
- **May 1, 2017:** OSC interviewed FBI attorney Trisha Anderson.¹¹
- **May 9, 2017:** OSC interviewed FBI chief of staff James Rybicki.¹²
- **May 9, 2017:** Director Comey is removed from federal service.
- **May 10, 2017:** The date of OSC's scheduled interview with FBI General Counsel James Baker. This interview did not occur.
- **May 18, 2017:** OSC closed its Hatch Act investigation concerning Director Comey.¹³
- **May 31, 2017:** The date of OSC's scheduled interview with Director Comey. This interview did not occur.

On September 8, 2017, I wrote to OSC, requesting the case file of its Hatch Act investigation of former Director Comey.¹⁴ The Committee continues to receive responsive documents from OSC on a rolling basis. However, OSC has informed the Committee that the NDAs prohibit OSC from fully complying with my request.¹⁵ For example, OSC produced a document containing a list of names mentioned in OSC's interview of Mr. Rybicki.¹⁶ OSC redacted five names pursuant to the NDAs.¹⁷ At the Committee's request, OSC asked FBI if the FBI would waive the NDAs with respect to this document and authorize OSC to produce an unredacted document to the Committee.¹⁸ The FBI declined and "specifically requested [OSC] continue to abide by the terms of the NDAs."¹⁹

⁷ Non-Disclosure Agreement Regarding Deliberative Process Privileged Material Re: U.S. Office of Special Counsel ("OSC") Complaint No. HA-17-0515, Feb. 15, 2017 [hereinafter "Deliberative Process NDA"];

⁸ Non-Disclosure Agreement Regarding Attorney Client Privileged Material Re: U.S. Office of Special Counsel ("OSC") Complaint No. HA-17-0515, Feb. 23, 2017 [hereinafter "Attorney-Client NDA"].

⁹ Under the terms of the NDAs, OSC restricted itself from releasing information without "prior written authorization from the Department of Justice. *See* Attorney-Client NDA paragraph 5; *see also*, Deliberative Process NDA paragraph 5; *see also* FBI Identity NDA at ¶ 5. If OSC sought to produce information to Congress, the NDAs required OSC 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." *Id.* at ¶ 7.

¹⁰ *Id.*

¹¹ Letter from Tristan Leavitt to Chairman Johnson, *supra* note 1. *See also* email from OSC staff to Comm. Staff, Sept. 11, 2017.

¹² *Id.*

¹³ *Id.* OSC historically closes Hatch Act investigations of individuals who separate from federal service.

¹⁴ Letter from Sen. Ron Johnson, Chairman, S. Comm. on Homeland Security and Gov't Affairs to Adam Miles, Acting Special Counsel, U.S. Office of Special Counsel, Sept. 8, 2017.

¹⁵ *See*, letter from Tristan Leavitt to Chairman Johnson, *supra* note 1.

¹⁶ "Transcript Request Form" OSC Case Number & Name: HA-17-0515 (Comey, James) submitted to Comm. on Oct. 20, 2107.

¹⁷ *Id.*

¹⁸ Email from OSC staff to Comm. staff, Dec. 12, 2017.

¹⁹ Email from OSC staff to Comm. staff, Dec. 12, 2017.

The FBI's continued reliance upon the NDAs prevents OSC from fully complying with the Committee's inquiry and impedes the Committee's ability to execute its oversight responsibilities. Accordingly, I respectfully request that you please authorize OSC to produce unredacted copies of all material—including transcripts of all OSC interviews with FBI personnel—in relation to OSC's Hatch Act investigation concerning former Director Comey. In addition, to assist the Committee in understanding the FBI's actions in response to OSC's Hatch Act investigation, I respectfully request the following information and material:

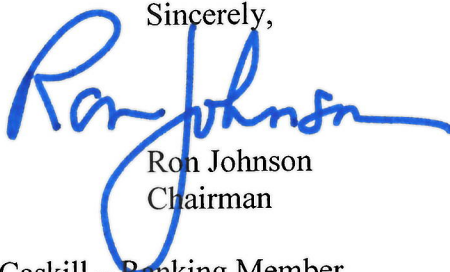
1. Please explain the basis for the recusal of the FBI's Office of General Counsel from OSC's Hatch Act Investigation concerning former Director Comey.
2. Please explain why the Executive Office of U.S. Attorney was chosen to facilitate FBI's cooperation with OSC's investigation.
3. Please explain whether the FBI had any involvement with the conception, drafting, or execution of the non-disclosure agreements with OSC.

Please provide this information as soon as possible but no later than 5:00 p.m. on December 27, 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,"²⁰ 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"²¹

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

²⁰ S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

²¹ S. Res. 62 § 12, 115th Cong. (2017).