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United States Senate

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

CHRISTOPHER R. HIXON, STAFF DIRECTOR
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December 19, 2017

The Honorable Emily W. Murphy
Administrator
General Services Administration
1800 F Street, NW
Washington, DC 20405

Dear Administrator Murphy:

I write concerning allegations that General Services Administration (GSA) personnel, prior to your confirmation as Administrator,¹ failed to recognize and protect the privileged and confidential nature of materials generated during the presidential transition and provided them to the Special Counsel's Office without the consent of or notice to the transition entity that owns these records, Trump for America, Inc. (TFA), a private 501(c)(4) entity.² These allegations raise concerns that GSA personnel disregarded federal statutes governing presidential transitions, thereby potentially undermining the framework for future presidential transitions. As chairman of the Senate committee with jurisdiction over presidential transitions,³ I appreciate your assistance with this matter.

The Presidential Transition Act of 1963, as amended, is meant to facilitate the peaceful and efficient transfer of executive power, something that is often referred to as a "hallmark of American democracy."⁴ While the Act provides GSA a prominent role in the transition process, GSA acts merely as a facilitator of office space, supplies, and services.⁵ The Act permits presidential transition teams to operate as a private entity rather than a government component.⁶ The National Archives and Records Administration considers records of the presidential transition team to be private records—not federal or presidential records.⁷ GSA does not have authority over the transition's operations, its employees, or its records.

¹ General Services Administration, press release, "Senate Confirms Emily Murphy to Head GSA" (Dec. 5, 2017) *available at* <https://www.gsa.gov/about-us/newsroom/news-releases/senate-confirms-emily-murphy-to-head-gsa>.

² Letter from to Sens. Ron Johnson and Claire McCaskill, Chair and Ranking Member, S. Comm. on Homeland Security and Governmental Affairs, and Reps. Trey Gowdy and Elijah Cummings, Chair and Ranking Member, H. Comm. on Oversight and Government Reform, from Kory Langhofer, Counsel to Trump for America, Inc., (Dec. 16, 2017).

³ S. Rule XXV(k)(1).

⁴ S. Comm. Rep. No. 114-94, The Presidential Transitions Improvements Act of 2015, at 2, <https://www.congress.gov/114/crpt/srpt94/CRPT-114srpt94.pdf>.

⁵ 3 U.S.C. §102 note.

⁶ 3 U.S.C. § 102 note.

⁷ Memorandum from Laurence Brewer, Chief Records Officer, National Archives and Records Administration to federal agency records officers on guidance relating to president-elect transition team materials (Nov. 16, 2016), *available at* <https://www.archives.gov/records-mgmt/memos/ac09-2017>.

TFA operated as a private 501(c)(4) to support the transition operations of President-elect Trump after his election and prior to his inauguration.⁸ Records generated during the transition are not records owned by GSA.⁹ Rather, transition records are private records, subject to all appropriate confidentiality interests. As the facilitator of the transition process, GSA must recognize that “[a]ny threat of premature disclosure or other inhibition of the candid policy recommendation between agencies and transition teams would greatly impair the quality of transition efforts.”¹⁰

According to the allegations received by the Committee, the GSA’s General Counsel’s office provided records owned by TFA to the Special Counsel’s Office without the consent of or notice to TFA.¹¹ The GSA’s General Counsel’s office allegedly provided these records without the execution of a search warrant or a subpoena; instead, it produced the material voluntarily in response to a request letter.¹² In defending these actions, GSA’s Deputy General Counsel Lenny Loewentritt suggested that GSA maintained a degree of control over the records, stating that transition team members entered into agreements acknowledging possible GSA “monitoring and auditing of devices.”¹³ The GSA General Counsel’s office allegedly did not review the material for privilege or relevancy before providing records to the Special Counsel’s Office.¹⁴ In addition, according to the allegations, the Special Counsel’s Office failed to implement methods—such as “taint teams” or “ethics walls”—to protect any privileged material.¹⁵

The importance of effective and trustworthy presidential transitions to the health of the country cannot be overstated. In 2015, I joined Senator Thomas R. Carper in sponsoring the Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015.¹⁶ This law enacted important updates to transition rules that were meant to strengthen presidential transitions, including compliance with the law. For example, the law directed GSA to designate a Federal Transition Coordinator, tasked with negotiating a memorandum of understanding (MOU) with the transition representative of each eligible candidate on the conditions of access to employees, facilities, and documents of agencies by transition staff.¹⁷

Presidential transition teams also enter into an MOU with the outgoing administration, in part, “to protect the confidentiality of transition information made available to the

⁸ Drew Harwell & Lisa Rein, *Who’s helping pay for President-elect Trump’s transition effort? You are.*, Wash. Post, Nov. 23, 2016.

⁹ Memorandum from Laurence Brewer, *supra* note 7.

¹⁰ U.S. Dep’t of Justice, FOIA Update: FOIA Counselor: Transition Team FOIA Issues (Jan. 1, 1988).

¹¹ Letter from Langhofer, *supra* note 2.

¹² *Id.*

¹³ Chris Geidner, *Key Officials Push Back Against Trump Campaign’s Claim That A Federal Office Illegally Turned Over Emails to Special Counsel*, BuzzFeed News, Dec. 17, 2017, available at https://www.buzzfeed.com/chrisgeidner/the-trump-campaign-claims-a-federal-office-illegally-turned?utm_term=.ywQQG46Dv#.uwdR552NMG.

¹⁴ *Id.*

¹⁵ Letter from Langhofer, *supra* note 2.

¹⁶ Pub. L. 114–136, 130 Stat. 304 (Mar. 18, 2016).

¹⁷ *Id.*

Government.”¹⁸ For example, the MOU between the Bush Administration and the Obama-Biden Transition Project stated:

It will likely be necessary for members of the [presidential transition team] to share with the Administration information that they wish to be kept confidential. Accordingly, to the extent permitted by law, the Administration agrees to protect the confidentiality of information provided to it on a confidential basis by the [presidential transition team].¹⁹

GSA’s alleged actions could have serious ramifications for presidential transitions in the future. An incoming administration must be ready to govern on day one. Any threat to the close coordination between the transition and outgoing administration could create vulnerabilities to governance, readiness, and national security.²⁰ In minimizing vulnerabilities caused by a transition, the Justice Department has advised “afford[ing] the confidentiality necessary for candid and effective/transition team communications.”²¹ The allegations received by the Committee—namely that GSA turned over TFA privileged material, and that material later become public—could discourage future transitions from trusting GSA to secure its confidential information.

Therefore, in order to understand GSA’s response to the Special Counsel’s request for TFA’s private records, I respectfully request that you please provide the following information:

1. A description of steps taken by GSA to determine the appropriateness of providing privileged TFA documents to the Special Counsel’s Office, including the identity of the GSA staff member who authorized the production of TFA documents to the Special Counsel’s Office, and the identity of the GSA staff member designated as the Federal Transition Coordinator;
2. A copy of the Memorandum of Understanding to which TFA and GSA entered to guide the transition process from the Obama Administration to the Trump Administration;
3. Any training or guidance provided to GSA and career staff assisting presidential transition teams on the private nature of transition team’s records and the legal protections of these private materials;
4. All documents and communications between or among GSA, the Department of Justice, and the Special Counsel’s Office, referring or relating to the production of records generated during the presidential transition for President-elect Donald J. Trump;

¹⁸ Partnership for Public Service, Presidential Transition Guide, Appendix 1.1 Memorandum of understanding between George W. Bush White House and Obama-Biden Transition Project, available at <http://presidentialtransition.org/>.

¹⁹ *Id.*

²⁰ See S. Comm. Rep. No. 114-94, *supra* note 4.

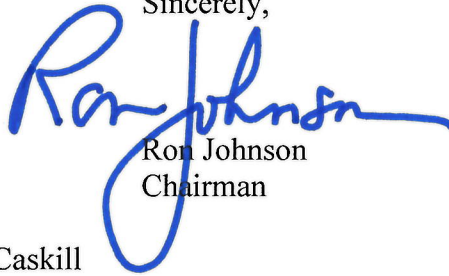
²¹ U.S. Dep’t of Justice, FOIA Update: FOIA Counselor: Transition Team FOIA Issues (Jan. 1, 1988).

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5. All documents and communications between or among GSA and TFA referring or relating to the production of records generated during the presidential transition for President-elect Donald J. Trump; and
6. All documents and communications between GSA employees or contractors referring or relating to the production of records generated during the presidential transition for President-elect Donald J. Trump.

Please provide the requested information no later than 5:00 p.m. on January 3, 2018.
Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ron Johnson", with a large, stylized flourish at the end.

Ron Johnson
Chairman

cc: The Honorable Claire McCaskill
Ranking Member

Enclosure