

December 16, 2017

The Hon. Ron Johnson, Chairman
The Hon. Claire McCaskill, Ranking Member
U.S. Senate Committee on Homeland Security &
Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

The Hon. Trey Gowdy, Chairman
The Hon. Elijah Cummings, Ranking Member
U.S. House Committee on Oversight &
Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Re: Unauthorized Review of Private, Privileged Materials by the Special Counsel's Office

Dear Senators and Representatives:

I write on behalf of Trump for America, Inc. ("TFA"), also known as the Presidential Transition Team ("PTT"), for the following purposes:

1. To inform the Committees of unlawful conduct that undermines the Presidential Transition Act of 1963, as amended, and will impair the ability of future presidential transition teams to candidly discuss policy and internal matters that benefit the country as a whole. More specifically, we write to inform you that (a) career staff at the General Services Administration ("GSA") have unlawfully produced TFA's private materials, including privileged communications, to the Special Counsel's Office; and (b) although the Special Counsel's Office was aware that the GSA did not own or control the records in question, the Special Counsel's Office has extensively used the materials in question, including portions that are susceptible to claims of privilege, and without notifying TFA or taking customary precautions to protect TFA's rights and privileges; and
2. To request that Congress act immediately to protect future presidential transitions from having their private records misappropriated by government agencies, particularly in the context of sensitive investigations intersecting with political motives.

I. TFA's Nature and Function

The Presidential Transition Act of 1963, as amended, contemplates the creation and operation of a private nonprofit organization to facilitate presidential transitions. *See* 3 U.S.C. § 102 note 2(h)(3)(A). For the 2016 presidential transition, TFA was the nonprofit organization that facilitated the orderly transition of executive authority from President Barack Obama to President Donald J. Trump. Its activities were funded partially through congressional appropriations and partially through dollar-limited private contributions. *See id.* note 6(c), 7(a). TFA is a private and independent nonprofit organization; it is not controlled by and does not share employees with the White House, the GSA, or other federal agencies. In fact, most PTT personnel are volunteers, acting in their personal capacity, to advance TFA's nonprofit mission of peacefully and efficiently transferring executive power.

The GSA played a statutorily defined role in supporting TFA and the 2016 transition. Specifically, the GSA "provided [to TFA] . . . [s]uitable office space appropriately equipped with furniture, furnishings, office

machines and equipment, and office supplies.” *Id.* note 3(a)(1). The GSA also hosted email services for TFA, and is statutorily required to “ensure that any computers or communications services provided . . . are secure.” *Id.* note 3(h)(2)(B)(ii).

Presidential transitions occupy a unique legal space. Although they undertake executive or quasi-executive functions and have certain rights associated with executive authority, they are not federal agencies. The authority supporting this conclusion includes the following:

- The Presidential Transition Act of 1963, as amended, provides that a presidential transition must be organized as a “separate fund” and operated as a private social welfare corporation pursuant to section 501(c)(4) of the Internal Revenue Code. *See* 3 U.S.C. § 2 note § 3(h)(3)(A). If presidential transition teams were governmental agencies, this requirement would be unnecessary. *See generally* Internal Revenue Service, 1990 Exempt Organization CPE, *available at* <https://www.irs.gov/pub/irs-tege/eotopice90.pdf> (discussing tax exemption for governmental entities).
- The U.S. Department of Justice has for nearly 30 years maintained that presidential transition entities are not “agencies” within the meaning of the Freedom of Information Act. This interpretation was most recently affirmed during the Obama Administration. *See* U.S. Dep’t of Justice, *FOIA Counselor: Transition Team FOIA Issues*, *FOIA Update*, Vol. IX, No. 4 (Jan. 1, 1988, rev. Sept. 1, 2016), *available at* <https://www.justice.gov/oip/foia-update-foia-counselor-transition-team-foia-issues>.
- The National Archives recently advised that “[t]he materials that [presidential transition team] members create or receive are not Federal or Presidential records, but are considered private materials.” Again, this advice was promulgated during the Obama Administration. *See* National Archives and Records Administration Bulletin A.C. 09.2017, *Memorandum from Laurence Brewer, Chief Records Officer for the U.S. Government, to Federal Agency Records Officers*, Nov. 16, 2016, *available at* <https://www.archives.gov/records-mgmt/memos/ac09-2017>.
- The Presidential Transition Act contemplates that the White House, the GSA, and other federal agencies will enter, and the GSA for many years has entered, into arms-length contracts with eligible presidential candidates to assist the presidential transition process. *See, e.g.*, Memorandum of Understanding between the GSA and Hillary Clinton, Aug. 5, 2016; Memorandum of Understanding between the GSA and Donald J. Trump, Aug. 1, 2016 (“MOU”); Memorandum of Understanding between the GSA and the Romney Readiness Project, Sept. 17, 2012; Memorandum of Understanding between the Obama-Biden Transition Project and the GSA, Nov. 5, 2008. If presidential transition teams were federal agencies, such contracts would be unnecessary.
- The MOU provided that the GSA would delete “all data on [computing] devices” used by the PTT. *See* MOU ¶ pp. 3, 10. This is both (a) is consistent with memoranda of understanding that the GSA executed with Hillary Clinton and Mitt Romney and (b) would be unlawful if presidential transition records were public records.
- The agreement between the Obama White House and TFA expressly stated that the parties intended to “protect the confidentiality of transition information made available to the Government.” *See* Memorandum of Understanding Regarding Transition Procedures, Identification, of Transition

Contacts, and Access to Non-Public Government and Transition Information ¶ 3, Nov. 8, 2016. Such a confidentiality provision would be unlawful if TFA were a government agency.

- TFA has always secured the central indicia of organizational ownership and control, including personnel decisions, the execution of contracts with third parties without federal procurement regulations, and, crucially, the generation and maintenance of internal documents and records.

In the 54 years since Congress first codified a statutory scheme governing the transition process, the fundamental structure and character of presidential transition teams have remained unchanged: They are private organizations controlled and managed by the President-Elects and their authorized designees, not by outgoing Presidents, their executive agencies, or other governmental entities. Indeed, if transition teams were part of the federal government, which until Inauguration Day is led by the outgoing President, it would subvert the very purpose of a transition team. Communications infrastructure and other platforms supplied by the GSA to a presidential transition team (*e.g.*, email accounts) are solely for the convenience and assistance of the transition team; they plainly are not a mechanism for a federal agency to commandeer the confidential documents of a private, nonprofit organization.

For these reasons, during the mandatory onboarding orientation for all PTT personnel, TFA informed new PTT staffers and volunteers that PTT emails are properly considered private records.

II. Improper Disclosure, Review, and Use of PTT Materials

After Inauguration Day on January 20, 2017, TFA wound down the bulk of its activities, vacated the premises provided by the GSA, and returned to the GSA the computer and telephone equipment that TFA had used during the transition period. Shortly thereafter, the GSA asked TFA for direction on the disposition of PTT data. TFA directed the GSA to handle PTT data in a manner consistent with the MOU and the reported disposition of data from President Obama's presidential transition in 2008; computing devices were to be restored to original settings and reissued to federal personnel and, to the extent that PTT records were not required for the winding down of TFA's affairs, the PTT email archives were no longer to be preserved.

Approximately two months later, TFA became aware of certain requests concerning PTT records. TFA promptly instructed the GSA, as the custodian of certain TFA records including PTT emails hosted on GSA servers, and others to preserve PTT records. Because of TFA's prompt reaction, all PTT emails have been preserved.

In order to comply with congressional document production requests, TFA ordered from the GSA electronic copies of all PTT emails and other data. Career GSA staff initially expressed concern that providing copies of PTT emails to TFA might violate a document preservation request that the GSA had received from the Special Counsel's Office. This issue was resolved decisively on June 15, 2017 after a series of emails and telephone calls between TFA's legal counsel and Richard Beckler and Lenny Loewentritt, the newly appointed General Counsel for the GSA and the career Deputy General Counsel for the GSA, respectively. After discussion and consideration of the issue, Mr. Beckler acknowledged unequivocally to TFA's legal counsel, in the presence of Mr. Loewentritt, that TFA owned and controlled the PTT emails and data pursuant to the Presidential Transition Act, and that the GSA had no right to access or control the records but was simply serving as TFA's records custodian. Mr. Beckler assured legal counsel for TFA, again in the presence of Mr. Loewentritt, that any requests for the production of PTT

records would therefore be routed to legal counsel for TFA. In the meantime, Mr. Beckler agreed to maintain all computer equipment in a secure, locked space within GSA facilities. There are multiple surviving witnesses to this conversation, including me. Additionally, we understand that the following day, June 16, 2017, Mr. Beckler personally informed the Special Counsel's Office that PTT records are not owned or controlled by the GSA, and that the Special Counsel's Office should communicate with TFA if it desired to obtain PTT records.

It is our understanding that Mr. Beckler was hospitalized and incapacitated in August 2017. Notwithstanding Mr. Beckler's June 16, 2017 instruction to the Special Counsel's Office concerning the ownership and control of PTT records, the Special Counsel's Office, through the Federal Bureau of Investigation ("FBI"), sent to the GSA two requests for the production of PTT materials while Mr. Beckler was hospitalized and unable to supervise legal matters for the GSA. Specifically, on August 23, 2017, the FBI sent a letter (*i.e.*, not a subpoena) to career GSA staff requesting copies of the emails, laptops, cell phones, and other materials associated with nine PTT members responsible for national security and policy matters. On August 30, 2017, the FBI sent a letter (again, not a subpoena) to career GSA staff requesting such materials for four additional senior PTT members.

Career GSA staff, working with Mr. Loewentritt and at the direction of the FBI, immediately produced all the materials requested by the Special Counsel's Office – without notifying TFA or filtering or redacting privileged material. The materials produced by the GSA to the Special Counsel's Office therefore included materials protected by the attorney-client privilege, the deliberative process privilege, and the presidential communications privilege. It is our understanding that Mr. Beckler passed away without returning to the GSA, and that career GSA staff (including Mr. Loewentritt) never consulted with or informed Mr. Beckler or his successor of the unauthorized production of PTT materials.

The unauthorized production of PTT materials by career GSA staff violates (a) the GSA's duties to TFA pursuant to the GSA's previous acknowledgement concerning TFA's rightful ownership and control of PTT materials; (b) the statute requiring the GSA to "ensure that any computers or communications services provided to an eligible candidate . . . are secure," 3 U.S.C. § 102 note 3(h)(2)(B)(ii); and (c) the Fourth Amendment's prohibition on a government actor (*e.g.*, Mr. Loewentritt), or a private actor working at the request of a government official, failing to obtain a warrant for the search or seizure of private property in which the owner has a reasonable expectation of privacy, *see Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971).

We understand that the Special Counsel's Office has subsequently made extensive use of the materials it obtained from the GSA, including materials that are susceptible to privilege claims. Additionally, certain portions of the PTT materials the Special Counsel's Office obtained from the GSA, including materials that are susceptible to privilege claims, have been leaked to the press by unknown persons. Moreover, the leaked records have been provided to the press without important context and in a manner that appears calculated to inflict maximum reputational damage on the PTT and its personnel, without the inclusion of records showing that PTT personnel acted properly – which in turn forces TFA to make an impossible choice between (a) protecting its legal privileges by keeping its records confidential and (b) waiving its privileges by publicly releasing records that counteract the selective leaks and misguided news reports. In short, since the GSA improperly provided them to the Special Counsel's Office, the PTT's privileged materials have not only been reviewed privately by the Special Counsel's Office without notification to TFA – they have also been misused publicly.

We discovered the unauthorized disclosures by the GSA on December 12 and 13, 2017. When we learned that the Special Counsel's Office had received certain laptops and cell phones containing privileged materials, we initially raised our concerns with Brandon Van Grack in the Special Counsel's Office on December 12, 2017. Mr. Van Grack confirmed that the Special Counsel's Office had obtained certain laptops, cell phones, and at least one iPad from the GSA – but he assured us that the Special Counsel's investigation did not recover any emails or other relevant data from that hardware. During this exchange, Mr. Van Grack failed to disclose the critical fact that undercut the importance of his representations, namely, that the Special Counsel's Office had simultaneously received from the GSA tens of thousands of emails, including a very significant volume of privileged material, and that the Special Counsel's Office was actively using those materials without any notice to TFA.¹ Mr. Van Grack also declined to inform us of the identities of the 13 individuals whose materials were at issue. We followed up with Mr. Van Grack the next day after learning of the unauthorized disclosure of PTT emails to ask what procedures, if any, had been implemented to protect privileged PTT communications from unauthorized and improper review. Mr. Van Grack declined to respond at the time, but contacted us on December 15, 2017 to inform us that the Special Counsel's Office had, in fact, failed to use an “ethical wall” or “taint team” and instead simply reviewed the privileged communications contained in the PTT materials. Mr. Van Grack also acknowledged on the December 12, 2017 telephone call that, even before we contacted him, the Special Counsel's Office had been aware of the importance and sensitivity of the privilege issues that we raised.

III. Statutory Amendments Are Necessary to Protect Future Presidential Transitions

The GSA's malfeasance in this matter necessitates a legislative response. As described above, career GSA staff subverted a congressional directive to support and assist presidential transitions with “secure” communications into a license to seize and misappropriate privileged documents and records. Whether born of a gross misunderstanding of the Presidential Transition Act or a deliberate attempt to violate the rights of TFA, the actions of career GSA staff underscore the need for immediate statutory amendments to protect future presidential transitions from bureaucratic arrogations and political interference. To this end, we respectfully propose two statutory amendments.

1. Timely Notice to Presidential Transition Teams of Document Production Requests

Although the Presidential Transition Act does not abridge – and indeed, fully preserves – control of internal documents and records by transition entities and their private boards of directors, the GSA's conduct underscores the need for more robust statutory protections. In furtherance of Congress' clear intent that the GSA's role is to support and assist – not usurp – transition functions, the Presidential Transition Act should fortify safeguards for presidential documents and records that may be stored in GSA computer systems. Specifically, Congress should provide that if the GSA receives any request or demand for a transition entity's documents – including but not limited to subpoenas or other legal process issued by courts or law enforcement agencies – it must provide to the presidential transition team notice and an opportunity to respond, object, or intervene before it reviews or produces any such documents or materials.

¹ On two other occasions after the GSA improperly provided PTT records to the Special Counsel's Office, legal counsel for TFA had stated to the Special Counsel's Office that the Special Counsel's Office had never requested or received PTT records. On both occasions, as on the December 12, 2017 telephone call with Mr. Van Grack, the Special Counsel's Office failed to correct the record or disclose that, at the time of those discussions, the Special Counsel's Office was already in possession of and had accessed a significant volume of privileged PTT materials.

2. Limitations on the Government's Access to Potentially Privileged Materials

As discussed above, the GSA's unlawful production of TFA's internal records was exacerbated by the Special Counsel's Office failure to preserve and respect the legal privileges that attach to a large number of those documents. More generally, however, the GSA's and the Special Counsel's Office's misconduct in this matter demonstrates why investigators and government attorneys, who in many cases are not entirely neutral, should not be trusted to decide without proper oversight which records belonging to private parties are privileged.

In theory, investigators and attorneys can establish "ethical walls" or "taint teams" to review potentially privileged materials, and then pass only non-privileged materials on to the investigators and attorneys who are primarily responsible for a case. This process ostensibly prevents the investigators and attorneys primarily responsible for enforcement decisions from basing their decisions on private, privileged materials.

In practice, however, this procedure is fraught with the potential for both intentional misconduct and innocent mistakes – to the severe detriment of the individuals or entities whose privileged communications fall into the hands of adverse government officials or witnesses. *See generally United States v. North*, 920 F.2d 940, 942 (D.C. Cir. 1990) (noting that witnesses' exposure to inadmissible evidence can impermissibly "taint their trial testimony irrespective of the prosecution's role in the exposure"). For this reason, "[f]ederal courts have taken a skeptical view of the government's use of 'taint teams,'" *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006), and have held that "the government's affirmative decision to invoke these [taint team] procedures constitutes a *per se* intentional intrusion" into relationships and communications protected by legal privileges, *see United States v. Neill*, 952 F. Supp. 834, 840–41 (D.D.C. 1997). Because it is "logical to suppose that taint teams pose a serious risk to holders of privilege, and this supposition is substantiated by past experience," *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006), constitutional and policy considerations have prompted many courts to significantly curtail, and at times outright reject, their use.

These concerns are especially acute in investigations that implicate legislative, executive, or judicial functions and the attendant privileges that may attach to them. *See United States v. Rayburn House Office Buildings, Room 2113*, 497 F.3d 654 (D.C. Cir. 2007) (holding that a taint team was inappropriate and violated a congressman's right to independently review and assert legislative privilege over documents). While transition teams and their members are not immune from the lawful search and seizure of their documents and records, it is vital that these investigations be conducted within the parameters of procedural safeguards that preserve legitimate privileges – many of which have a constitutional provenance. *See id.* at 661 (emphasizing the need "to distinguish between the lawfulness of searching a congressional office pursuant to a search warrant and the lawfulness of *the manner in which the search is executed* in view of the protections afforded against compelled disclosure of legislative materials" (emphasis added)).

And as this matter demonstrates, entrusting the implementation of ethical walls and taint teams to investigators and attorneys who may not be entirely neutral, without proper oversight, can result in their failure to implement any process, however flawed, to protect the privileges of private parties. Such failures not only harm the parties whose information is improperly obtained and reviewed, but also the investigators themselves, whose investigation is tainted by the use of privileged materials.

To this end, Congress should provide that, unless exigencies of public safety or national security require otherwise, any federal official or agency in possession of a third party's documents or information (through whatever means) must provide the rightful owner an opportunity to identify and assert privilege, subject to customary judicial oversight, over such materials before the federal official or agency (or any of its agents or designees) may view or access their contents. Such legislative protections are particularly crucial in the context of investigations focusing on political activities or the discharge of legislative, executive, or judicial responsibilities. As recent events have unfortunately illustrated, such inquiries are especially vulnerable to the taint of partisan agendas, political bias, and other malign machinations.

* * *

We hope this letter is useful in discharging your oversight responsibilities, ensuring the integrity of the Special Counsel's investigation, and crafting appropriate legislation.

Please do not hesitate to contact TFA should you have any questions or require additional information.

Respectfully,

/s/ Kory Langhofer

Kory Langhofer

Counsel to Trump for America, Inc.

Cc: Ken Nahigian, TFA Trustee and Executive Director
Charles Gantt, TFA Trustee and Chief Financial Officer