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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*  
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August 31, 2016

**VIA ELECTRONIC TRANSMISSION**

The Honorable James B. Comey, Jr.  
Director  
Federal Bureau of Investigation  
935 Pennsylvania Avenue, N.W.  
Washington, DC 20535

Dear Director Comey:

On August 16, 2016, the FBI's Acting Assistant Director of its Office of Congressional Affairs, Jason Herring, sent me a letter stating that the FBI was providing the Judiciary Committee "a number of documents related to [the Hillary Clinton email] investigation." The letter stated that these documents were "being provided for review by Committee Members and appropriately-cleared staff in light of the Committee's oversight responsibilities." Unfortunately, given the large number of unclassified documents it unnecessarily bundled with classified documents, the manner in which the FBI provided them is inconsistent with Executive Order 13526, "Classified National Security Information," and its implementing regulations regarding classification procedures.

In doing so, the FBI is not following its legal responsibility and is impeding the ability of Judiciary Committee members and staff to work with the unclassified documents. As a result of the improper bundling, the Office of Senate Security ("OSS"), which manages the Committee's classified information in its SCIF, is imposing document controls on the unclassified documents as though they were classified. It is doing so, for the moment, in deference to the FBI's decision to bundle the unclassified documents together with classified documents and in order to promote comity between the Executive and Legislative Branches. Thus, Committee members and staff are currently prevented from removing *unclassified* documents from the SCIF to the Committee's offices.

However, it is improper to bundle unclassified information with classified information in this manner in an attempt to impose controls on unclassified documents as though they were classified. It also raises serious Constitutional separation of powers issues when the imposition of such document controls interferes with the independent oversight function the Judiciary Committee exercises to review unclassified law enforcement matters. Accordingly I am writing to ask that you direct your FBI staff to correct its mistake by providing directly to the Committee, not to the Office of Senate Security,

all of the unclassified FBI documents (and the unclassified portions of the classified FBI documents) from the August 16 set.

The numerous documents the FBI provided to the Judiciary Committee were transmitted in two large binders. The majority of the documents containing the substance of the FBI's investigation<sup>1</sup> are entirely unclassified, and a number of others have the vast majority of their paragraphs portion-marked as unclassified, with only a very small number marked as classified. Under the regulations governing the transmission of classified information, it is true that a transmittal document is to indicate on its face the highest classification level of any classified information enclosed, as the binders did.<sup>2</sup> However, as explained below, that transmittal document does not mean that, after transmission of the group of documents, each document is, regardless of its own classification, then up-classified to the highest classification level of any of the documents with which it was transmitted.

After my staff reviewed the materials and determined that many of the documents were unclassified in full and many other documents were largely portion-marked as unclassified with only a few classified paragraphs, I wrote to the Director of Senate Security on August 17, 2016, asking that OSS segregate, as it has done on similar occasions in the past, the unclassified materials and provide the Committee with a copy for retention in the Committee's offices.<sup>3</sup> I noted that "it is regrettable that the FBI has imposed the burden of this task on [OSS] by improperly comingling so much unclassified material with classified material." The next day, the Director of Senate Security informed me that "[t]he material delivered by the FBI on August 16 ... was provided with a handling restriction that **all of the material be retained in OSS.**"

In other words, the Office of Senate Security informed me that honoring the FBI's instruction requires it to maintain a large volume of unclassified information in a SCIF. After my staff sought clarification from the FBI, Mr. Herring sent an email stating: "The unclassified portions should not be segregated or removed from Senate security." Although Mr. Herring characterized the FBI's restrictions on the *unclassified* documents as a "condition" of producing them voluntarily, no one at the FBI sought to negotiate these restrictions with the Committee prior to delivering the documents, and the Committee did not agree to them. Rather, the restrictions were unilaterally announced by the FBI, and the specific instruction against separating the unclassified documents from the set did not come until eight days after the documents were delivered.

Moreover, the FBI's action is entirely contrary to the executive order and regulations governing the handling of classified information. Under the law, the unclassified materials in the August 16 production should have been produced directly to the Committee, with only a classified addendum submitted to the Office of Senate Security. Executive Order 13526 states:

The classification authority shall, whenever practicable, use a classified addendum **whenever classified information constitutes a small portion**

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<sup>1</sup> In addition to documents memorializing interviews and a summary memorandum, the binders also include a large number of the many classified emails sent or received via Secretary Clinton's non-governmental server.

<sup>2</sup> 32 C.F.R. § 2001.24

<sup>3</sup> While I have also called for the FBI to publicly release the unclassified information, that is a separate issue. This letter concerns how the Committee is able to access and store the documents for use by Committee members and staff. In fact, the primary investigative counsel who has investigated this issue does not hold a security clearance and is, under the current arrangement, being improperly precluded from reviewing the unclassified documents.

**of an otherwise unclassified document** or prepare a product to allow for dissemination **at the lowest level of classification possible or in unclassified form.**<sup>4</sup>

Moreover, Section 1.7(a) of Executive Order 13526 specifically states:

**In no case shall information** be classified, continue to **be maintained as classified**, or fail to be declassified **in order to:**

- (1) conceal violations of law, inefficiency, or administrative error;
- (2) prevent embarrassment to a person, organization, or agency;
- ...
- (4) **prevent or delay the release of information that does not require protection in the interest of the national security.**

By definition, “UNCLASSIFIED is a marking that indicates the information did not meet the threshold for classification as defined in EO 13526[.]”<sup>5</sup> i.e., it is information that does not require protection in the interest of the national security.<sup>6</sup> As such, Executive Order 13526 mandates that “in no case” shall it “be maintained as classified,” and accordingly prohibits FBI’s attempt to require the unclassified materials in the August 16 production to be maintained in a SCIF as though classified.<sup>7</sup>

Indeed, the purpose of providing separate classification markings for individual documents and for portions of a document is to prevent classification from delaying appropriate review: “Classification and control markings shall be applied appropriately to each portion of information **to ensure that the information is available without unnecessary delay or restrictions.**”<sup>8</sup>

In short, the FBI has no authority to require unclassified material be maintained in a SCIF. It was improper for FBI to bundle unclassified materials with classified ones in an attempt to do so. In asking OSS to indefinitely impose document controls over a significant amount of *unclassified* information as though it were classified, the FBI is asking the Senate to cooperate in a scheme that is contrary to clear requirements of Executive Order 13526.

Please correct this mistake by sending the unclassified material requested above directly to the Judiciary Committee by no later than September 2, 2016. Thank you for your prompt attention to this important matter. If you have any questions, please contact Patrick Davis of my Committee staff at (202) 224-5225.

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<sup>4</sup> Executive Order 13526 § 1.6(g). The same standard applies to derivative classifiers as well. Executive Order 13526 § 2.1(c).

<sup>5</sup> *Intelligence Community Authorized Classifications and Control Markings, Register and Manual* 26, Office of the Director of National Intelligence.

<sup>6</sup> See Executive Order 13526 § 1.1(a)(4).

<sup>7</sup> In addition to the executive branch authorities on this issue, nothing in the Senate Resolution that created the Office of Senate Security, S. Res. 243, 100-1, gives OSS the authority to impose document controls on unclassified documents over Committee members or staff. Rather, the Senate only empowered OSS “to develop, establish, and carry out policies and procedures with respect to ... the receipt, control, transmission, storage, destruction or other handling of **classified information** addressed to the United States Senate, the President of the Senate, or Members and employees of the Senate.” Moreover, nothing in the Office of Senate Security’s own Security Manual includes any such authorities or procedures for exerting document control on unclassified materials.

<sup>8</sup> *Supra* n.5.

Sincerely,



Charles E. Grassley  
Chairman  
Committee on the Judiciary

cc: The Honorable Patrick J. Leahy  
Ranking Member  
Senate Committee on the Judiciary

Michael DiSilvestro  
Director  
Office of Senate Security

The Honorable Michael Horowitz  
Inspector General  
United States Department of Justice