

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

Case No. 1:13-cv-1559-EGS

RESPONSE TO NOTICE

In accordance with the Court's June 4, 2015, Order, the Internal Revenue Service ("Service") responds to Judicial Watch, Inc.'s Notice dated June 2, 2015:

Status of Rolling Production

1. At issue in this case are four Freedom of Information Act ("FOIA") requests that Judicial Watch submitted to the Service. The Service has satisfied one of the four requests and is currently responding to the request for certain communications with former Service employee Lois Lerner.

2. The Service has been releasing Lerner communications to Judicial Watch on a rolling basis. To date, the Service has released 17,464 pages of such communications to Judicial Watch, all of which the Service has already produced to the Congressional Committees investigating it.

3. On March 4, 2015, Judicial Watch asked when the Service anticipates completing its rolling production of Lerner communications.

4. By letter dated March 19, 2015, the undersigned Department of Justice attorney informed Judicial Watch that "the Service tentatively estimates that it will be able to complete its review and production of Lerner emails to Judicial Watch by September 2015." (Ex. A.)

Investigation by TIGTA

5. Since June 2014, the Treasury Inspector General for Tax Administration (“TIGTA”) has been conducting a criminal investigation into the circumstances under which Lerner’s hard drive failed and any emails saved locally to her hard drive were lost. (Ex. B.) As part of its investigation, TIGTA is trying to recover any lost emails. (*Id.*)

6. TIGTA is an agency within the Department of the Treasury which is separate and apart from the Service and operates wholly independent of the Service. (Camus Decl., ¶ 4 (Docket No. 26-4).) The Commissioner of Internal Revenue “has no authority or control over TIGTA, the nature or scope of TIGTA investigations, and/or the investigative records and evidence maintained by TIGTA.” (*Id.*, ¶ 5.)

7. As part of its investigation, TIGTA took custody of, *inter alia*, Service disaster recovery tapes which are also referred to as backup tapes. (Def.’s Opp’n to Pl.’s Mot. Seeking Discov., 8 (Docket No. 35); Def.’s Notice (Docket No. 43).) Information stored on those backup tapes is not readily accessible and must be forensically recovered.

8. TIGTA has recently informed the undersigned Department of Justice attorney that it will provide any emails recovered from the tapes to both the Service and the Congressional Committees investigating the Service, subject to: (a) first attempting to remove emails which are duplicates of those which the Service already produced to the Congressional Committees (and are, therefore, duplicates of emails which the Service has already retrieved in connection with responding to the FOIA requests at issue in this case) or duplicates of other recovered emails; and (b) the restrictions on disclosure contained in section 6103 of the Internal Revenue Code (26 U.S.C.). (*See Kane Decl.*, ¶ 9 (Docket No. 26-5).)

9. TIGTA has stated that it will only provide any recovered emails to the Service at an appropriate stage of the investigation, and TIGTA will not honor any requests from the Service to obtain recovered emails at an earlier time. This is necessary to protect the integrity of TIGTA's investigation, which could be impaired by allowing witnesses to conform their responses to documents in the public domain, prematurely revealing the investigation's scope, direction and possible conclusions, etc. (*See Camus Decl.*, ¶¶ 9-11.)

10. The Service has consistently represented to Judicial Watch that "if TIGTA is able to recover any of Lerner's pre-crash emails and return them to the Service in a reasonably searchable format, the Service will promptly inform Judicial Watch and review the emails to determine whether they are responsive to Judicial Watch's FOIA request." (Ex. A; Def.'s Opp'n to Pl.'s Mot. Seeking Discov., 8.)

11. The emails which TIGTA has recovered, and any additional emails that TIGTA may recover and provide to the Service, could affect the Service's ability to complete its review and production of Lerner communications by September 2015. Therefore, the undersigned Department of Justice attorney notes that he has previously cautioned Judicial Watch that the Service's September 2015 "estimate could change based on, *inter alia*, the recovery of additional emails by TIGTA and TIGTA's return to the Service of any such emails." (Ex. A.)

12. Consistent with its prior representations that it would promptly notify Judicial Watch of any recovered emails returned to the Service, the Service filed a Notice on May 7, 2015, informing Judicial Watch and the Court that TIGTA had forensically recovered emails and provided those emails to the Service. (Def.'s Notice (Docket No. 44).)

13. At no time since May 7, 2015, has Judicial Watch contacted the undersigned Department of Justice attorney to request additional information about the forensically-recovered

emails. Instead, Judicial Watch filed a Notice on June 2, 2015, requesting that the Court order the Service to provide additional information about the forensically-recovered emails. *But see* Fed. R. Civ. P. 7(b)(1) (“A request for a court order must be made by motion.”); LCvR 7(m) (prior to filing a nondispositive motion, a party must “discuss the anticipated motion with opposing counsel in a good-faith effort to determine whether there is any opposition to the relief sought and, if there is, to narrow the areas of disagreement”).

14. TIGTA is continuing to conduct its investigation and analyze backup tapes. TIGTA has stated that it is premature to publicly disclose the status of its investigation in greater detail, including disclosing: whether it has turned over all recovered emails to the Service; whether it has completed its analysis of all the backup tapes in its custody; whether any new emails may be recovered or turned over to the Service in the future; and when its investigation will be complete.

See Exhibit 1

Processing and Review of Recovered Emails

15. On April 23, 2015, TIGTA provided approximately 6,400 forensically-recovered emails to the Service.¹ Certain of the emails forensically recovered by TIGTA were not readable, or not entirely readable, as initially provided to the Service. TIGTA subsequently provided some of these documents to the Service in readable form on May 8 and June 1, 2015. To date, TIGTA has not provided any other recovered emails to the Service.

16. Prior to providing the Service with the approximately 6,400 forensically-recovered emails, TIGTA identified and removed emails which appear to be duplicates of those which the

¹ Although Judicial Watch claims that it “is uncontested that the recovered emails . . . cover the time period of Plaintiff’s request,” (Pl.’s Notice, ¶ 5 (Docket No. 45)), some of the recovered emails predate the relevant time period by several years. (See Ex. B; Pl.’s Compl., ¶ 12 (FOIA request sought Lerner communications from January 2010 to May 2013) (Docket No. 1).)

Service has already produced to the Congressional Committees or were duplicates of other recovered emails. Such emails are also duplicates of those the Service has already retrieved in connection with responding to the FOIA requests at issue in this case. The Service is in the process of conducting further manual deduplication of the 6,400 forensically-recovered emails to supplement the automated deduplication conducted by TIGTA. TIGTA also is further reviewing the 6,400 emails to verify that they were not already produced to the Congressional Committees by the Service.

17. The Service expects to begin processing and reviewing the recovered emails immediately following its review and production of Lerner communications which were not forensically recovered. At this time, the Service is unable to estimate when it will finish processing and reviewing the forensically-recovered emails.

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18. Judicial Watch's Notice contains numerous assertions which are irrelevant to its request for relief. The Service reserves the right to challenge those assertions at an appropriate time.

Dated: June 12, 2015

Respectfully submitted,

/s/ Geoffrey J. Klimas
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OF COUNSEL

Acting United States Attorney
VINCENT H. COHEN, JR.

CERTIFICATE OF SERVICE

I certify that on June 12, 2015, I electronically filed the foregoing RESPONSE TO NOTICE with the Clerk of the Court using the CM/ECF system, which shall send notification of that filing to all parties registered to receive such notice, including plaintiff's counsel.

/s/ Geoffrey J. Klimas
GEOFFREY J. KLIMAS



U.S. Department of Justice

Tax Division

Civil Trial Section, Eastern Region

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March 19, 2015

Sent via Email

Ramona R. Cotca
Judicial Watch, Inc.
425 Third Street, SW
Suite 800
Washington, DC 20024

Re: *Judicial Watch, Inc. v. Internal Revenue Service*
No. 1:13-cv-1559 (U.S.D.C. D.C.)

Dear Ms. Cotca:

This letter responds to the two issues raised in your correspondence dated March 4, 2015.

First, you asked about Lois Lerner emails recovered by the Treasury Inspector General for Tax Administration ("TIGTA"). To date, the Internal Revenue Service ("Service") has been reviewing and producing to Judicial Watch, Inc., Lerner emails which the Service has also produced to Congressional committees. (Kane Decl., ¶ 9 (Docket No. 26-5).) The Service is not in possession of any Lerner emails recently recovered by TIGTA. As such, the Service is not presently able to confirm: whether TIGTA has located any emails which were not already produced to Congressional committees; whether TIGTA has located any emails from the time period relevant to Judicial Watch's Freedom of Information Act ("FOIA") request; or whether TIGTA has located any emails regarding the subject matter of Judicial Watch's FOIA request.

The Service has consistently represented that, if TIGTA is able to recover any of Lerner's pre-crash emails and return them to the Service in a reasonably searchable format, the Service will promptly inform Judicial Watch and review the emails to determine whether they are responsive to Judicial Watch's FOIA request. (*See* Def.'s Opp'n to Pl.'s Mot. Seeking Discov., 8 (Docket No. 35).) The Service intends to honor that commitment and will notify Judicial Watch when and if TIGTA provides any recovered emails to the Service.

Second, you asked when the Service expects to finish producing Lerner emails. Throughout the ongoing Congressional investigations, the Service has received Congressional requests resulting in additional documents being added to the Congressional database. (*See id.*, 3.) Those documents are likewise being reviewed to determine whether they are responsive to Judicial Watch's FOIA request. (*Id.*) The IRS Chief Counsel has represented to us that the technology being used by the Service to process Judicial Watch's FOIA request does not readily permit an estimate of the number of pages of potentially responsive Lerner

emails yet to be reviewed. However, they have also represented that there are approximately 990 MB of such information, and the Service tentatively estimates that it will be able to complete its review and production of Lerner emails to Judicial Watch by September 2015. This estimate could change based on, *inter alia*, the recovery of additional emails by TIGTA and TIGTA's return to the Service of any such emails.

Sincerely yours,

A handwritten signature in cursive script that reads "Geoffrey J. Klimas". The signature is written in dark ink and is positioned above the printed name.

GEOFFREY J. KLIMAS
Trial Attorney
Civil Trial Section, Eastern Region

TESTIMONY
OF
TIMOTHY P. CAMUS
DEPUTY INSPECTOR GENERAL FOR INVESTIGATIONS
TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION

OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES
"Recovery of e-mails of former IRS employee Lois Lerner"

February 26, 2015

Chairman Chaffetz, Ranking Member Cummings, and members of the full committee, I've been requested to come here today to provide an update on my agency's efforts thus far in attempting to recover the missing e-mails of former IRS employee Lois Lerner.

On June 13, 2014, in a letter to the Senate Finance Committee, the IRS reported that as it was completing its document production for Congress concerning allegations that the IRS targeted certain 501c (4) applicants, the IRS realized that the production of the e-mails of Lois Lerner, the former director of the IRS Exempt Organizations division, had gaps in the e-mail production. The IRS reported that in its attempts to find missing e-mails, they realized that in June 2011, Lerner's IRS laptop computer suffered a hard drive crash, and therefore some of her e-mails could not be recovered.

The following Monday, on June 16, 2014, TIGTA initiated an investigation into the circumstances surrounding the missing e-mails and the hard drive crash. One week later, on June 23, 2014, TIGTA received a letter from then Chairman Ron Wyden and then Ranking Member Orrin Hatch of the Senate Finance Committee, that requested TIGTA to formally investigate the matter including "perform its own analysis of whether any data can be salvaged and produced to the committee."

The circumstances surrounding the loss of data, the hard drive crash and the manner in which the IRS handled its electronic media, are still under investigation; however, we have periodically updated certain Committees of Congress, including this Committee, concerning our progress in recovering the e-mails, but we have not discussed the investigation itself.

There are two parts of my mission here. One part is attempting to recover the e-mails and second part is to investigate the circumstances surrounding the missing e-mail. Until the investigation is completed, the facts and circumstances as we understand them can and have changed on a daily basis. To avoid speculating and reaching

conclusions that later turn out to be false, as investigators we must avoid drawing any conclusions until all of the facts are in. I owe it to the American people to ensure that we continue to thoroughly and impartially investigate this matter gathering all of the facts and evidence in order to get to the truth. That said, at this time I cannot provide any information on the investigation surrounding the IRS's loss of data and hard drive crashes as that could negatively impact our ability to complete the investigation as well as raise questions into the integrity of the investigative process, but at this time I will provide a progress report on our efforts to recover missing e-mails.

The IRS manages its e-mail for its 91,000 employees by routing the e-mails through Microsoft Exchange Servers that are backed up periodically by using backup tapes. These Microsoft Exchange Servers, also referred to as e-mail servers, are comprised of hundreds of hard drives that are placed into server racks. Up until May 2011, the e-mail server that handled Lois Lerner's e-mail traffic was located at the New Carrollton, Maryland Federal Building. During 2011, the IRS migrated from the e-mail server at the New Carrollton to a new e-mail server located at the IRS' Martinsburg, West Virginia Computing Center. After the IRS migrated its e-mail system to Martinsburg, the IRS turned off the e-mail server at New Carrollton; however, it was left in place, possibly as a precautionary measure should the new e-mail server at Martinsburg fail. IRS employees reported that the New Carrollton e-mail server hard drives were removed from the server, erased, and destroyed.

On June 30, 2014, TIGTA demanded that the IRS provide all backup tapes used to backup Lerner's IRS e-mail account, specifically all backup tapes used for e-mails during the time period of Jan 1, 2008 through Dec 31, 2011. These date ranges were selected to ensure that we obtained any overlap e-mails or accounted for mid-year equipment changes. As a result of this demand, on July 1, 2014, the IRS identified the 744 backup tapes that met this criterion and TIGTA took possession of all of the identified 744 backup tapes.

With regard to nine of the 744 backup tapes, based on how they were configured in the backup machine, the IRS was unable determine the dates they were used. Because of this, IRS technicians believed it was possible the nine tapes had been untouched for years and thus could contain clear data relevant to the investigation. Because TIGTA did not have the unique necessary hardware, these nine tapes were provided to the Federal Bureau of Investigation in order to determine if the tapes contained any data and if they did, to retrieve it. After the FBI analyzed the nine tapes and validated their equipment by reviewing other random backup tapes, they reported their equipment was functioning properly and they reported the nine tapes were blank. TIGTA then provided those same nine tapes to a recognized industry leader on electronic data recovery, and they confirmed the nine tapes were in fact blank.

After confirming the initial nine tapes were blank, and fearing that the remaining 735 tapes were overwritten, TIGTA interviewed the IRS e-mail expert and identified the specific backup tapes that would have contained the earliest copies of Lois Lerner's e-mail box. The backup tapes consisted of five sets of tapes. These five backup sets were created in sequential weeks from November 20, 2012 through December 25,

2012. The five backup sets were expected to produce a total of five separate copies of Lois Lerner's e-mail boxes, or one copy for each week of the backup.

We hand carried three of the five sets of these backup tapes to the industry expert for data recovery and extraction and after their examination and extraction of data, they provided TIGTA with Exchange Database files from this set of tapes. On November 13, 2014, TIGTA searched the database files and identified the first Lois Lerner e-mail box. This mailbox contained Lois Lerner e-mails that date back as far as 2001. The result of this effort validated that the tapes have not been over written and that they contained e-mails that are relevant to the requested time range search for e-mails. TIGTA then processed the remaining sets of backup tapes in the same manner later finding that each of the five backup sets contained one Lerner e-mail box, for a total of five mailboxes, exactly as expected. At the conclusion of the process, TIGTA identified 79,840 Lois Lerner e-mails of which almost 60 percent were duplicates. Removing the duplicates resulted in 32,774 Lois Lerner unique e-mails. It is critically important to note that these 32,774 e-mails need to be compared with the e-mails and documents the IRS has already produced to Congress in order to determine if there are any newly identified e-mails. Currently, we are finalizing the procurement of software to accomplish this match.

As I noted earlier in my testimony, the IRS e-mail system routes e-mail messages through e-mail servers that comprised of hundreds of hard drives. I just completed testimony about the status of our examination of backup tapes associated with the e-mail system, and now I want to discuss the status of the hard drives that were in the e-mail server in May 2011, one month prior to when Lois Lerner's laptop hard drive crashed.

On July 11, 2014, TIGTA discovered that the hard drives from the decommissioned New Carrollton e-mail server were not destroyed as previously reported by the IRS. On the same day, TIGTA secured the 760 hard drives that are believed to be part of the old New Carrollton e-mail server. TIGTA conducted a preliminary examination of a limited selection of the hard drives and determined that based on information that could be seen from these hard drives, these drives are more than likely from the e-mail server that processed Lois Lerner's e-mails in 2011 and prior. It is important to note that the e-mail servers process and keep copies of e-mail traffic on the hundreds of drives that are specifically positioned in server racks. The IRS did not retain a record of the layout indicating where each of the specific hard drives was positioned in the racks. Without understanding the exact order in which the hard drives were placed in the server racks, finding any complete and relevant e-mails would be very difficult and labor intensive, if not impossible. In addition, if any of the hard drives are damaged, it could potentially be impossible to recover any usable e-mails. We recently determined that we are unable to do anything further with the hard drives and we have initiated the process to contract for an initial feasibility analysis of the 760 hard drives by the recognized industry expert in electronic data recovery.

Less than two weeks ago we also learned that there may have been backup tapes older than the original 744 backup tapes we obtained in July 2014. We have taken possession of an additional 424 tapes and we are in the early stages of understanding if

they have been erased and if any of these older tapes contain e-mails or data of interest to the investigation.

In summary, to date we have found 32,774 unique e-mails that were backed up from Lois Lerner's e-mail box. We are in the process of comparing these e-mails to what the IRS has already produced to Congress to determine if we did in fact recover any new e-mails. We are also in the process of having the e-mail server hard drives analyzed to determine if there are any readable e-mails that can be recovered from these hard drives. And finally, we are continuing to determine if there are any other sources that may contain Lois Lerner e-mails.

As I noted earlier, this is an ongoing investigation and I have provided the information that I believe will not hinder our ability to continue our investigation while simultaneously providing the Congress with the progress on the e-mail search.

Thank you.