

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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November 18, 2014

Honorable John P. Holdren, Director
Mr. Todd Park, U.S. Chief Technology Officer
Office of Science and Technology Policy
Executive Office of the President
725 17th Street NW
Washington, DC 20502

Dear Dr. Holdren and Mr. Park,

For over a year, the Committee on Science, Space, and Technology (Committee) has patiently and persistently sought information from the Office of Science and Technology Policy (OSTP) regarding its role in Helathcare.gov. As stated in our October 31, 2013, letter to Mr. Park, our interests began with the “lack of privacy standards for personal information passing through the Healthcare.gov website and the threat posed to Americans if hackers on the Internet gained access to such information.”

The Committee sought further information about the role of Mr. Park and OSTP in this regard in a letter in December 2013 and received some limited information in January 2014. In July of 2014, the Committee received additional documents from the House Committee on Oversight and Government Reform (OGR) that they had obtained through their own inquiries. These documents suggested a much more extensive role by Mr. Park and OSTP personnel in the Healthcare.gov website than was previously conveyed to the Committee. Consequently, the originally stated interest was expanded after the Committee received these documents that demonstrated Mr. Park’s *actual* role was decidedly different than what he testified to before OGR on November 13, 2013.

Over the course of the past year, the Committee repeatedly asked for Mr. Park to testify before the Committee. Unfortunately, these requests were re-buffed. Instead, OSTP offered for Mr. Park to brief the Committee on his role and responsibilities. This briefing would not be open to the public, but an opportunity for the Committee members to hear directly from Mr. Park. We had set a mutually agreed upon time for the briefing on September 10th, but OSTP reneged on its offer the night before after it learned that the briefing would be transcribed.

After multiple unsuccessful attempts to secure Mr. Park’s testimony, the Committee was left no other choice but to subpoena both Mr. Park and all documents and communication that establish his

actual involvement with Healthcare.gov. That subpoena demanded the production of any and all documents including communications that:

“...are related to the HealthCare.gov website, including but not limited to documents related to its hardware, software, design, testing, user capacity, operation, privacy protections, security, and problems, and also including but not limited to related contracts, reports, data submissions (including by contractors and insurers), and the federal data hub.”

I. Jurisdiction & Legislative Purpose.

Under House Rule X (1)(p), this Committee and its corresponding Subcommittee have jurisdiction over the OSTP and the National Institute for Standards and Technology (NIST). This Committee authorized the creation of the OSTP in 1976. This Committee has the authority to oversee the agencies responsible for setting cyber privacy and security policies and standards for the rest of the federal government including OSTP and NIST. In addition, under House Rule XI, the Committee is permitted to “conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities.”

As for the Committee’s legislative purpose, OSTP, through the Office of the White House Counsel (OWHC), has requested that we explain what our legitimate interests are for seeing the subpoenaed documents in an un-redacted format. The Committee’s jurisdiction over the Federal Information Security Management Act and the National Institute of Standards and Technology conveys to this Committee oversight over the security and implementation of HealthCare.gov.

The U.S. Supreme Court has unequivocally established that Congress’ power to conduct investigations and oversight is so essential to the legislative function that it may be implied from the general vesting of all legislative powers in Congress. In *McGrain v. Daugherty*, the Supreme Court described the power of inquiry, with the accompanying process to enforce it, as “an essential and appropriate auxiliary of to the legislative function.” (*McGrain*, 273 U.S. at 174-5.) The Court also noted that “[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.” (*Id.*)

In *Eastland v. United States Serviceman’s Fund*, the Court stipulated that the “scope of [Congress’s] power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.” (*Eastland*, 421 U.S. at 504 n.15 (quoting *Barenblatt*, 360 U.S. at 111). The Court has also described Congressional power as “broad,” “indispensable,” and “encompassing inquiries concerning the administration of existing laws as well as proposed or possible needed statutes.” (*Watkins*, 354 U.S. at 187.)

Absent an express statutory restriction, federal courts have held that executive agencies may not refuse to provide information to Congress, even if such information is confidential, proprietary, or otherwise barred from being disclosed to the public. (*F.T.C. v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970 (D.C. Cir. 1980); *Exxon Corp.*, 589 F.2d at 585-6; *Ashland Oil*, 548 F.2d at 979).

Based on the issues surrounding its rollout, Congress has a responsibility to review the standards that were used to ensure its security and functionality to the American people. However, to properly conduct our legislative and oversight responsibilities, we have to depend on the veracity of those that have provided Congress with information. Any misinformation given to Congress impedes our constitutional ability to formulate a response. Based on emails and other documents received by the Committee, we have reason to believe that OSTP's correspondence to the Committee and Mr. Park's testimony before OGR has not been forthcoming about Mr. Park's involvement in Healthcare.gov and such misinformation impedes this Committee's ability to conduct oversight and respond to the problems associated with the website.

II. OSTP's Failure to Comply

Since the duly issued and served subpoena on September 19, 2014, the Committee has received thousands of documents. However, responsiveness is not measured by the number of pages produced, but by completely fulfilling the requests from Congress. Sending multiple copies of long documents, many with questionable redactions, is not cooperating with the process but is a tactic used to confuse and delay the Committee's oversight. OSTP's response to this legitimate exercise of Congressional oversight authority has been disappointing. Instead of prompt compliance, there has been a pattern of dilatory tactics from the onset of this oversight inquiry.

The subpoena itself is broad in the sense of the types of documents sought, but quite narrow in that they all focus on Todd Park's role with Healthcare.gov. Considering OSTP failed to provide all of the documents the Committee requested last December, it is the Committee's hope that the detailed list of documents sought will in full faith complete the inquiry in its entirety. Unfortunately, the breadth of the subpoena was in no small part a direct response to the lack of cooperation from OSTP and Congress' inability to get straight forward answers to legitimate oversight inquiries. Since the issuance of the subpoena almost two months ago, the Committee has gone to great lengths to accommodate OSTP by further prioritizing not only the subject matter, format, and date range of the subpoena, but also agreeing to an *in camera* review on more than one occasion with the OWHC in order to help receive documents in a somewhat timely fashion. It has therefore been disheartening to see the OWHC use this accommodation to exclude documents the Committee had clearly indicated it was interested in and again failed to produce the documents to the Committee in an un-redacted format.

While some progress has been made, despite nearly two months of effort, there are still specifically identified responsive emails that have yet to be provided even in a redacted format. Of those redacted documents that have been turned over, on numerous occasions my staff requested that they be produced in an un-redacted format or as an additional accommodation requested a detailed list of the documents identifying why they are redacted and providing not only a description of the redacted portion but also a legitimate legal basis for its redaction. Unfortunately, the OWHC has not been able to accommodate these requests thus far.

III. The claim of "Executive Branch confidentiality interest" is Without Merit

To date, OSTP and OWHC have asserted only a generalized claim of a “long-standing Executive Branch confidentiality interest” as the rationale for refusing to provide some of the requested material. Congress also has a “long-standing legislative interest in oversight” and is entitled to review duly subpoenaed documents. As we have expressed multiple times, “Executive Branch confidentiality interests” are not a legal basis for withholding subpoenaed information from Congress. OSTP and OWHC have failed to provide a detailed privilege log identifying the documents being withheld in full or in part, and the legal basis that would justify applicability of a privilege to the withheld information. A general assertion of “Executive Branch confidentiality interests,” in the face of a duly authorized Congressional subpoena, is neither a constitutionally protected privilege nor even a recognized common law privilege. The general interests discussed have historically been in response to a Congressional *request* for information. However, at least since its drafting in 1989 by Assistant Attorney General William Barr, the Executive Branch distinguishes the generalized claim of “Executive Branch confidentiality interests” in response to a Congressional request much differently than in response to a duly authorized Congressional subpoena.

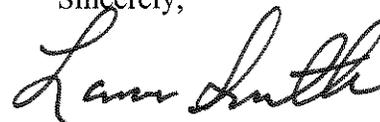
“While the considerations that support the concept and assertion of executive privilege apply to any congressional request for information, the privilege itself need not be claimed formally vis-s-vis Congress **except** in response to a lawful subpoena...” Memorandum for Congressional Requests for Confidential Executive Branch Information, June 19, 1989) (Emphasis added)

If it is OSTP’s position that “Executive Branch confidentiality interests” outweigh Congressional oversight and legislative interests, then we request that you inform the Committee whether executive privilege is being asserted by the President and whether the basis of that assertion is some form of “deliberative process” or “presidential communication.” If executive privilege is in fact asserted, then the Committee is entitled to a written summary of the redacted portions so that we can determine our next course of action.

IV. Compliance with Duly Authorized Subpoena

Given that the Committee began this oversight well over a year ago and the subpoena was issued nearly two months ago, the time for accommodation and dilatory tactics must come to an end. The Committee demands, through the authority of the aforementioned duly authorized Congressional subpoena, that any and all responsive documents, and in particular those that have been specifically identified by Committee staff, be turned over to this Committee immediately in an un-redacted format.

Sincerely,



Lamar Smith
Chairman

Cc: Rep. Eddie Bernice Johnson
Ranking Member