

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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September 28, 2016

Mr. Kenneth F. Eichner
Principal
The Eichner Law Firm
3773 Cherry Creek Drive North
West Towers, Suite 900
Denver, Colorado 80209

Dear Mr. Eichner,

The House Committee on Science, Space, and Technology is in receipt of your September 23, 2016, letter informing the Committee that Platte River Networks (“PRN”) and all of its employees would “be ceasing voluntary cooperation” with the Committee.¹ In addition, your letter implicitly refuses to produce documents demanded by the Committee’s September 12, 2016, subpoena *duces tecum*.² To characterize your client’s³ conduct toward the Committee as cooperative is erroneous. Since receiving the Committee’s January 14, 2016, request for production of documents, your client has done nothing but flout the constitutional oversight authority of the U.S. House of Representatives. Following is a litany of examples of obstructionist conduct by you and your client:

- Following receipt of the Committee’s July 12, 2016, request for documents and transcribed interviews of your client, PRN, and its employees, Committee staff attempted to reach out to you through telephone calls, voicemails, and emails, in an effort to glean whether your client intended to respond to the Committee. You made derogatory statements to my staff, criticizing their efforts to reach you via telephone, demanding only to communicate with the Committee in writing, which apparently, in your belief, does not include email.⁴

¹ Letter from Mr. Ken Eichner, Eichner Law Firm, to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. [hereinafter H. Science Comm.], (Sept. 23, 2016).

² *Id.*

³ Although your Sept. 23, 2016, letter is unclear, for the purposes of this letter, the Committee will assume that you represent PRN, Mr. Treve Suazo, its CEO, and all employees in their official capacity only.

⁴ E-mail from Mr. Ken Eichner, Principal, Eichner Law Firm, to Committee Staff (Aug. 6, 2016, 6:47 p.m.).

- Then, when asked, via email, to have a telephone conversation regarding your client's response to the Committee's July 12, 2016, letter, you refused to respond, citing your travels in Europe.⁵
- Over a month after the Committee's July 12, 2016, letter and multiple attempts by Committee staff to communicate with you, you unequivocally refused on behalf of your client to accept electronic service of a Committee subpoena, stating in the subject line of an e-mail, "Platte River Networks REJECTS electronic service," and providing no explanation.⁶ On August 23, 2016, the U.S. Marshals served your client with a subpoena *duces tecum*.
- On September 8, 2016, you claimed PRN had "nothing to produce that is responsive to your subpoena."⁷ This was a misinterpretation of the August 23, 2016, subpoena. As a result of your failure to produce documents, on September 16, 2016, the U.S. Marshals again served your client with a subpoena *duces tecum*.
- On numerous occasions since receiving the Committee's subpoena, you have refused to communicate in good faith and answer valid questions posed by my staff regarding whether your client intends to comply with the subpoena, and whether you intend to make your client available for transcribed interviews.⁸
- Finally, your efforts to obstruct the Committee's investigation culminated in your September 23, 2016, letter in which you threatened to file ethics complaints against my staff.⁹ I note that this is not the first instance in which you have threatened to file such complaints.¹⁰

Your most recent letter accuses the Committee of not following its mandate. Again, this charge is erroneous. As the Committee noted in its September 20, 2016, letter to FBI Director James Comey:

The Science Committee is uniquely positioned to evaluate the "way in which Executive Branch departments and agencies and private entities can

⁵ E-mail from Mr. Ken Eichner, Principal, Eichner Law Firm, to Committee Staff (Aug. 18, 2016, 3:28 p.m.).

⁶ E-mail from Mr. Ken Eichner, Principal, Eichner Law Firm, to Committee Staff (Aug. 19, 2016, 10:33 p.m.).

⁷ Letter from Mr. Ken Eichner, Principal, Eichner Law Firm, to Hon. Lamar Smith, Chairman, H. Science Comm., (Sept. 8, 2016).

⁸ *See, e.g.*, E-mail from Mr. Ken Eichner, Principal, Eichner Law, to Committee Staff (Sept. 2, 2016, 11:42 a.m.); E-mail from Committee staff, to Mr. Ken Eichner, Principal, Eichner Law (Sept. 2, 2016, 2:59 p.m.); E-mail from Committee Staff, to Mr. Ken Eichner, Principal, Eichner Law (Sept. 6, 2016, 4:59 p.m.); E-mail from Committee staff, to Mr. Ken Eichner, Principal, Eichner Law (Sept. 9, 2016, 11:53 a.m.); E-mail from Committee staff, to Mr. Ken Eichner, Principal, Eichner Law (Sept. 9, 2016, 2:36 p.m.); E-mail from Committee staff, to Mr. Ken Eichner, Principal, Eichner Law (Sept. 15, 2016, 4:00 p.m.); E-mail from Committee staff, to Mr. Ken Eichner, Principal, Eichner Law (Sept. 19, 2016, 7:32 a.m.).

⁹ H. Science Comm., *supra* note 1.

¹⁰ E-mail from Mr. Ken Eichner, Principal, Eichner Law, to Committee Staff (Aug. 22, 2016, 11:02 a.m.).

improve their cybersecurity.”¹¹ Under House Rule X, the Science Committee is charged with legislative and authorizing jurisdiction over the National Institutes of Standards and Technology (NIST), which is responsible for updating and promulgating the Framework for Improving Critical Infrastructure Cybersecurity as well as other requirements of the Federal Information Security Modernization Act of 2014, commonly referred to as FISMA. The Committee is concerned that former Secretary Clinton’s unusual server and network arrangement calls for amendments to FISMA. In fact, the Committee is considering an update to FISMA – the Cybersecurity Responsibility and Accountability Act of 2016 – this week during a markup scheduled for September 21, 2016. Depending upon the findings of the current investigation related to former Secretary Clinton’s server and network additional legislation may be necessary.¹²

As articulated above, your conclusions related to the legislative and oversight jurisdiction of the Committee are incorrect.¹³

Also incorrect is your attempt to assert the Fifth Amendment privilege as a basis for resisting production of PRN’s records. The Fifth Amendment is a personal privilege applicable only to personal records, *not* the records of a corporate or other collective entity like PRN.¹⁴ Pursuant to the collective-entity doctrine, PRN is not shielded from producing documents for two reasons: (i) the subpoena was directed to Mr. Suazo in his official capacity as chief executive officer of PRN, and (ii) the subpoena seeks the records of PRN and not Mr. Suazo’s personal records.¹⁵

¹¹ Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. James B. Comey, Director, Fed. Bureau of Investigation (Sept. 20, 2016) (cover letter accompanying H. Science Comm. Subpoena to Director Comey (Sept. 20, 2016) (citing Statement of Hon. Lamar Smith, Chairman, U.S. House Comm. on Science, Space, & Technology during the U.S. House Comm. on Oversight & Gov’t Reform Committee Hearing: *Examining Preservation of State Department Records*, Sept. 13, 2016 (remarks as prepared for delivery).

¹² Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. James B. Comey, Director, Fed. Bureau of Investigation (Sept. 20, 2016) (cover letter accompanying H. Science Comm. Subpoena to Director Comey (Sept. 20, 2016) (citing Statement of Hon. Lamar Smith, Chairman, U.S. House Comm. on Science, Space, & Technology during the U.S. House Comm. on Oversight & Gov’t Reform Committee Hearing: *Examining Preservation of State Department Records*, Sept. 13, 2016 (remarks as prepared for delivery).

¹³ Your argument related to the Fourth Amendment is unclear since you failed to address how a congressional subpoena is an invalid search or seizure.

¹⁴ See *Bellis v. United States*, 417 U.S. 85, 88 (1974) (“an individual cannot rely upon the [Fifth Amendment] privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally.”); see also *id.* at 90 (“[N]o artificial organization may utilize the personal privilege against compulsory self-incrimination”); see also *Fisher v. United States*, 425 U.S. 391, 411 (1976) (“This Court has also time and again allowed subpoenas against the custodian of corporate documents or those *belonging* to other collective entities such as unions and partnerships” (emphasis added)); *United States v. White*, 322 U.S. 694, 699 (1944) (“Such records and papers [of collective entities] are not the private records of the individual members or officers of the organization.”).

¹⁵ See, e.g., *Amato v. United States*, 450 F.3d 46, 50-51 (1st Cir. 2006) (“[T]he collective-entity doctrine focuses on . . . the status of the records, i.e., corporate or individual [R]epresentatives of collective entities . . . possess no Fifth Amendment privilege to refuse to produce records that belong to collective entities, including corporate

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Your recent letter also attempts to attribute to the Science Committee the conduct of a separate body and a separate House Committee. The actions of other Committees of the U.S. Congress do not provide a valid legal basis for PRN to defy the Science Committee subpoena. I am unaware of any court decision (and you have cited none) limiting the power of more than one legislative body or committee to investigate the same set of facts or holding that an investigation by one committee preempts or negates a simultaneous investigation by a different committee with jurisdiction.

Documents already provided to the Committee by other corporations involved in work related to former Secretary Clinton's private server demonstrate that your client is in custody of responsive documents. If your client continues to refuse to provide responsive documents, the Committee will consider holding PRN and its CEO Mr. Suazo in contempt. Please respond to the Committee on or before October 4, 2016, providing a final answer regarding whether your client will comply with the September 16, 2016, subpoena *duces tecum*. In your response please clarify exactly who you represent and in what capacity – official or personal.

If you have any questions about this request, please contact Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,



Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Minority Member

records.”); *In re Grand Jury Proceedings*, 727 F.2d 941, 944 (10th Cir. 1984) (*Bellis* “repeated[ly] emphasi[zed] . . . the absence of an ownership interest” in the documents, which were “not subject to the exclusive control of the person to whom the subpoena was issued”).