

May 20, 2023

Via Electronic Transmission

The Honorable Daniel Werfel
Commissioner
Internal Revenue Service

Dear Commissioner Werfel:

We represent Supervisory Special Agent (SSA) Gary Shapley. Five days ago, you were copied on a letter to various committees of Congress warning that the IRS had removed our client's entire team of investigators from a criminal tax case in an apparent act of retaliation aimed at some of those employees who had expressed concerns about the Department of Justice (DOJ) improperly allowing politics to infect its decisions.

This action was inconsistent with your testimony to the House Committee on Ways and Means that there would be "no retaliation" against whistleblowers at the IRS. It was our understanding that although the IRS executed the reprisal, it did so on behalf of DOJ officials who had the motive to retaliate because it was the propriety of their own actions that had been called into question by the protected disclosures.

Yesterday, we became aware that even after receiving the May 15 letter to Congress, the IRS has inexplicably decided to initiate additional reprisals against these special agents, apparently for a protected disclosure directly to you. This is unacceptable and contrary to the law, which clearly prohibits it.

Our client learned that one of the agents he supervises—the case agent on the case our client is blowing the whistle on—sent you an email in which he wrote:

As I'm sure you were aware, I was removed this week from a highly sensitive case...after nearly 5 years of work.

* * *

There is a human impact to the decisions being made that no one in the government seems to care about or understand...[T]o ultimately be removed for always trying to do the right thing[] is unacceptable in my opinion...[M]y leadership above my direct manager—who was also removed—didn't even give me the common courtesy of a phone call, did not afford me the opportunity of understanding why this decision was made, and did not afford me an opportunity to explain my case. If this is how our leadership expects our leaders to lead, without considering the

human component, that is just unacceptable and you should be ashamed of yourselves.

* * *

For the last couple years, my SSA and I have tried to gain the attention of our senior leadership about certain issues prevalent regarding the investigation. I have asked for countless meetings with our chief and deputy chief, often to be left out on an island and not heard from. The lack of IRS-CI senior leadership involvement is deeply troubling and unacceptable...[W]hen I said on multiple occasions that I wasn't being heard and that I thought I wasn't able to perform my job adequately because of the actions of the USAO and DOJ, my concerns were ignored by senior leadership[.]. The ultimate decision to remove the investigatory team...without actually talking to that investigatory team, in my opinion was a decision made not to side with the investigators but to side with the US Attorney's Office and Department of Justice who we have been saying for some time has been acting inappropriately.¹

In response to making his good faith expression of reasonable concerns—concerns shared by our client—the case agent had a right to expect that his email would be taken seriously, considered, and addressed professionally without retribution, as the law requires.

Instead, the IRS responded with accusations of criminal conduct and warnings to other agents in an apparent attempt to intimidate into silence anyone who might raise similar concerns. Specifically, the Assistant Special Agent in Charge emailed the case agent suggesting, without any basis, that he might have illegally disclosed 6(e) grand jury material in his email to you.² While such a claim is utterly baseless and without support in the law or facts of this matter,³ the language of the response suggests the case agent may have been referred for investigation, an even more intimidating form of reprisal likely to chill anyone from expressing dissent. Furthermore, the Acting Special Agent in Charge issued a contemporaneous email to supervisors—including our client—admonishing employees to obey “the chain of command,” writing: “There should be no instances where case related activity discussions leave this field office without seeking approval from your direct report.”⁴

As Commissioner, you are responsible by statute for preventing prohibited personnel practices, such as whistleblower retaliation.⁵ As the May 15 letter you received made clear, the salary of government officials can be withheld if they “prohibit[] or prevent[], or attempt[] or threaten[] to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress[.]”⁶ This includes requiring that an employee “seek[] approval from [their]

¹ Email from case agent to Deputy Commissioner for Services and Enforcement Douglas O'Donnell, et al., May 18, 2023, 9:58 AM (Exhibit A).

² Email from Assistant Special Agent in Charge Lola Watson to case agent, May 19, 2023, 1:20 PM (Exhibit B).

³ Rule 6(e)(2) of the Federal Rules of Criminal Procedure prohibits certain enumerated persons from disclosing “a matter occurring before a grand jury.” Clearly, none of the assertions the IRS has complained of indicate any matters occurring before any grand jury, such as testimony occurring before the grand jury or grand jury deliberations.

⁴ Email from Acting Special Agent in Charge Kareem Carter, May 19, 2023, 1:23 PM (Exhibit C).

⁵ 5 U.S.C. § 2302(c)(3).

⁶ Consolidated Appropriations Act, 2023, Pub. L. 117–328, Div. E, Sec. 713.

direct report.” Our legal team has experience ensuring this provision was enforced against other agencies.⁷

Furthermore, agencies may not adopt nondisclosure policies which “prohibit[] or restrict[] an employee...from disclosing to Congress, the Special Counsel, [or] the Inspector General...any information that relates to any violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or any other whistleblower protection[.]”⁸ Agency communications which purport to “implement or enforce any nondisclosure policy” are therefore required by statute to include the following statement notifying employees that no nondisclosure policy can modify their statutory rights and responsibilities, including the rights to communicate with Congress and blow the whistle:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”⁹

No appropriated funds may be used to enforce a disclosure policy which does not comply with these requirements,¹⁰ and attempting to enforce such a policy is a prohibited personnel practice.¹¹

Finally, we would reiterate that 18 U.S.C. § 1505 makes it a crime to obstruct an investigation of Congress. Under 26 U.S.C. § 6103(f)(5), the House Committee on Ways and Means and the Senate Committee on Finance have been apprised of matters related to the case on which our client is in the process of scheduling congressional interviews related to this case.

⁷ See Government Accountability Office, B-325124.2, *Department of Housing and Urban Development—Application of Section 713 of the Financial Services and General Government Appropriations Act, 2012 (Reconsideration)*, Apr. 5, 2016 (available at <https://www.gao.gov/assets/b-325124.2.pdf>); press release, “Goodlatte, Chaffetz and Grassley Urge HUD to Hold Employees Accountable Following GAO Report,” Apr. 5, 2016 (available at <https://judiciary.house.gov/media/press-releases/goodlatte-chaffetz-and-grassley-urge-hud-to-hold-employees-accountable>); letter from Charles E. Grassley, Jason Chaffetz, and Bob Goodlatte to Julian Castro, Jun. 22, 2016; letter from Charles E. Grassley, Jason Chaffetz, and Bob Goodlatte to Ben Carson, May 3, 2017 (available at [https://www.judiciary.senate.gov/imo/media/doc/2017-05-03%20CEG%20JC%20BG%20to%20HUD%20\(GAO\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2017-05-03%20CEG%20JC%20BG%20to%20HUD%20(GAO).pdf)); letter from Aaron Santa Anna to Charles E. Grassley, Jason Chaffetz, and Bob Goodlatte, Jun. 19, 2017 (available at https://www.judiciary.senate.gov/imo/media/doc/06-19-17%20Santa%20Anna,%20Aaron%20to%20CEG%20re%20GAO%20Legal%20Opinion%20Financial%20Services%20and%20General%20Government%20Appropriations%20Act_Redacted.pdf).

⁸ 5 U.S.C. § 2302(b)(13)(B).

⁹ 5 U.S.C. § 2302(b)(13)(A).

¹⁰ Consolidated Appropriations Act, 2023, Pub. L. 117–328, Div. E, Sec. 743.

¹¹ 5 U.S.C. § 2302(b)(13).

The IRS must immediately cease and desist intimidating our client for simply exercising his Constitutional right to petition Congress¹² and his statutory right against retaliation for doing so.¹³ Please immediately issue corrective guidance clarifying the aforementioned supervisor communications lest they chill the disclosures of other IRS whistleblowers who may wish to come forward.

Cordially,

[/Tristan Leavitt/](#)
Tristan Leavitt
President
Empower Oversight

[/Mark D. Lytle/](#)
Mark D. Lytle
Partner
Nixon Peabody LLP

ATTACHMENTS

cc: The Honorable Janet Yellen
Secretary, U.S. Department of the Treasury

The Honorable Russell George
Inspector General for Tax Administration, U.S. Department of the Treasury

The Honorable Henry Kerner
Special Counsel, Office of Special Counsel

¹² First Amendment, United States Constitution.

¹³ 5 U.S.C. § 2302(b)(8)(C).

Exhibit A

[REDACTED]

From: [REDACTED]
Sent: Thursday, May 18, 2023 9:58 AM
To: O'Donnell Douglas W <[REDACTED]@irs.gov>; Werfel Daniel I <[REDACTED]@irs.gov>; Lee James C <[REDACTED]@ci.irs.gov>; Ficco Guy A <[REDACTED]@ci.irs.gov>; Batdorf Michael T <[REDACTED]@ci.irs.gov>; Carter Kareem A <[REDACTED]@ci.irs.gov>; Watson Lola B <[REDACTED]@ci.irs.gov>
Subject: [REDACTED] Investigation-Removal of Case Agent
Importance: High

My Respective IRS Leadership –

First off, I apologize for breaking the managerial chain of command but the reason I am doing this is because I don't think my concerns and/ or words are being relayed to your respective offices. I am requesting that you consider some of the issues at hand.

As I am sure you were aware, I was removed this week from a highly sensitive case out of the [REDACTED] USAO after nearly 5 years of work. I was not afforded the opportunity of a phone call directly from my SAC or ASAC, even though this had been my investigation since the start.

I can't continue to explain how disappointed I am by the actions taken on behalf of our agency. I want to echo that I love my job, I love my agency and I am extremely appreciative of the job and position that I have had over the last 13 years.

There is a human impact to the decisions being made that no one in the government seems to care about or understand. I had opened this investigation in 2018, have spent thousands of hours on the case, worked to complete 95% of the investigation, have sacrificed sleep / vacations / gray hairs etc., my husband and I (identifying me as the case agent) were publicly outed and ridiculed on social media due to our sexual orientation, and to ultimately be removed for always trying to do the right thing, is unacceptable in my opinion. Again, my leadership above my direct manager -who was also removed - didn't even give me the common courtesy of a phone call, did not afford me the opportunity of understanding why this decision was made, and did not afford me an opportunity to explain my case. If this is how our leadership expects our leaders to lead, without considering the human component, that is just unacceptable and you should be ashamed of yourselves. I am continually asking myself, is this the kind of culture we want within the IRS and that I want to be a part of.

For the last couple years, my SSA and I have tried to gain the attention of our senior leadership about certain issues prevalent regarding the investigation. I have asked for countless of meetings with our chief and deputy chief, often to be left out on an island and not heard from. The lack of IRS-CI senior leadership involvement in this investigation is deeply troubling and unacceptable. Rather than recognizing the need to ensure close engagement and full support of the investigatory team in this extraordinarily sensitive case, the response too often had been that we were isolated (even when I said on multiple occasions that I wasn't being heard and that I thought I wasn't able to perform my job adequately because of the actions of the USAO and DOJ, my concerns were ignored by senior leadership). The ultimate decision to remove the investigatory team from [REDACTED] without actually talking with that investigatory team, in my opinion was a


decision made not to side with the investigators but to side with the US Attorney's office and Department of Justice who we have been saying for some time has been acting inappropriately.

I appreciate your time and courtesy in reviewing this email. Again, I can only reiterate my love for my work at CI and a great appreciation for my colleagues – and a strong desire for CI to learn from and be strengthened by my difficult experience. I never thought in my career that I would have to write an email like this, but here I am. Thank you again for your consideration with me.



[REDACTED]
Special Agent
International Tax & Financial Crimes Group (ITFC)
Washington DC Field Office
Cell: [REDACTED]

Exhibit B



From: Watson Lola B <[REDACTED]>
Sent: May 19, 2023 1:20 PM
To: [REDACTED] <[REDACTED]@ci.irs.gov>
Subject: Reminder - Chain of Command

Good Afternoon Special Agent [REDACTED],

We acknowledge your email received yesterday morning. You have been told several times that you need to follow your chain of command. IRS-CI maintains a chain of command for numerous reasons to include trying to stop unauthorized disclosures. Your email yesterday may have included potential grand jury (aka 6e material) in the subject line and contents of the email, and you included recipients that are not on the 6e list.

In the future, please follow previously stated directives and this written directive that no information should be sent to the DFO, Deputy Chief, Chief or any other executive without being sent through my office and the SAC office.

Lola Watson
Assistant Special Agent in Charge
Washington DC Field Office
IRS-Criminal Investigation
[REDACTED] ***(Cell)***

Exhibit C

From: [Carter Kareem A](#)
To: [*CI-SEA-WDC ASAC](#); [*CI-SEA-WDC SSA](#); [REDACTED]; [REDACTED]
Subject: REMINDER - Field Office Chain of Command
Date: Friday, May 19, 2023 1:23:40 PM

ASACs/SSAs/SIAs-

As I've previously stated in staff meetings, chain of command is important to the successful communication and operation within a field office. Following chain of command prevents confusion, conflict, and misunderstandings.

There should be no instances where case related activity discussions leave this field office without seeking approval from your direct report (i.e. SA to SSA to ASAC to SAC). By following the chain of command, we can all work together to ensure that our team is successful.

Kind Regards ,

Kareem Carter
(Acting) Special Agent in Charge, Washington DC Field Office
Internal Revenue Service – Criminal Investigation
Cell: [REDACTED]
[REDACTED]