

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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February 1, 2018

The Honorable Kirstjen M. Nielsen
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Nielsen,

As part of an ongoing review of the federal government's cybersecurity posture, the Committee on Science, Space, and Technology is continuing our investigation into Kaspersky Lab. The purpose of this letter is to reiterate the production requests contained in my previous letter, dated December 5, 2017.¹ In that letter, I asked the Department of Homeland Security (DHS or "the Department") to provide documents and information, no later than December 19, 2017, related to the government-wide implementation of DHS Binding Operational Directive (BOD) 17-01.² Despite almost an additional three weeks past the Committee's requested production deadline, the Department has failed to fully respond to the Committee's request.

On January 8, 2018, the Department provided a partial production, however, the response provided by DHS largely contained publicly available information outside the scope of the Committee's request. Subsequent to the Department's production on January 8, 2018, Committee staff contacted staff at the Department to determine the universe of outstanding materials and the timing of additional productions by the Department.³ In response to the Committee staff inquiries, the Department indicated that no further production would be forthcoming due to the pending litigation.⁴ Pending litigation is not a basis for declining to fully comply with the December 5, 2017, request for documents and information. Courts have repeatedly affirmed congressional prerogatives to gain access to various types of documents—litigation sensitive and trade secrets—among others. In *Ashland Oil v. Federal Trade Commission*, the district court determined that disclosing materials to Congress "did not

¹ Letter from Hon. Lamar Smith, Chairman, H. Science, Space, & Tech. Comm. to Hon. Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Security (Dec. 5, 2017).

² 82 Fed. Reg. 43782 (Sept. 19, 2017) [hereinafter BOD 17-01].

³ Emails from H. Science, Space, & Tech. Comm. Staff, to U.S. Dep't of Homeland Security Staff (Jan. 17, 2018, 1:25 p.m. & Jan. 19, 2018, 2:44 p.m.)

⁴ Telephone Call from U.S. Dep't of Homeland Security Staff, to H. Science, Space, & Tech. Comm. Staff (Jan. 23, 2018).

constitute ‘public disclosure.’”⁵ Moreover, in matters related to oversight, courts repeatedly adhere to the belief that “the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties.”⁶ Finally, in *National Abortion Federation v. Center for Medical Progress*,⁷ the court held that the defendant’s production of materials in response to a congressional subpoena would not violate the court’s temporary restraining order (TRO) that prohibited dissemination of those materials.⁸ If parties can produce materials to Congress that are at issue in a case and subject to a TRO, it should go without staying that that they can produce materials to Congress that might be at issue in a case and are not subject to a TRO.

Over several months, the Committee has been tracking the Administration’s use of Kaspersky and the implementation of BOD 17-01. BOD 17-01 requires federal departments and agencies to identify the use or presence of Kaspersky software on their information systems, develop a plan of action to remove and discontinue use of Kaspersky products, and report to the Department other details on the implementation of the complete removal of Kaspersky products.⁹ These required plans of action contain a number of elements critical to ensuring the elimination of the risk posed by Kaspersky products and were directly requested in my letter.

The Committee believes it is necessary to ensure that departments and agencies are taking appropriate steps to remove this risk. The federal government must leverage all available resources to ensure that Kaspersky products have been completely removed from federal systems. This includes identifying all actions needed to eliminate or mitigate the risk, even beyond the risk to federal systems. As you know, Congress requires full and uninhibited access to information to ensure that it can effectively carry out its duty to identify shortcomings and areas for improvement within the federal government.

Given the serious nature of these concerns related to the Committee’s broader goal of uncovering all risks associated with Kaspersky, the Committee expects a full and complete response from the Department, including the requested briefing and production of the requested documents and communications, so that the Committee can fulfill its oversight responsibilities. I reiterate all of the requests contained in my December 5, 2017, letter. Please provide all of the requested materials to the Committee as soon as possible, but no later than February 8, 2018, at 12:00 p.m. If the Department does not provide all of the requested materials, the Committee will consider use of the compulsory process to obtain the information.

Pursuant to House Rule X, the Committee on Science, Space, and Technology has jurisdiction over the National Institute of Standards and Technology which develops cybersecurity standards and guidelines for the federal government and recommendations for the private sector. Additionally, under the Federal Information Security Modernization Act of 2014,

⁵ *Exxon Corp. v. Fed. Trade Comm’n*, 589 F.2d 582, 586 (1978) (citing *Ashland Oil, Inc. v. Fed. Trade Comm’n*, 548 F.2d 977 (1976)).

⁶ *Id.* at 589.

⁷ 2015 WL 5818863 (N.D. Cal. Oct. 6, 2015).

⁸ *Id.* at *1.

⁹ BOD 17-01 at Sections 1 and 2.

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or FISMA, federal departments and agencies are required to report to the Science Committee annually and circumstantially, in cases of a major cybersecurity breach. This request and any documents created as a result of this request will be deemed congressional documents and property of the House Science Committee.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

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

Sincerely,


Lamar Smith
Chairman

Encl.

cc: The Honorable Eddie Bernice Johnson, Ranking Member, House Committee on Science, Space, and Technology