



COMMISSIONER

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

February 3, 2016

The Honorable Orrin G. Hatch
Chairman, Committee on Finance
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am writing in response to your letter dated January 20, 2016, regarding the hard drive of former IRS employee, Samuel Maruca. This hard drive appears to have been erased following Mr. Maruca's departure from the IRS so that it could be securely reused or scrapped, pursuant to standard IRS procedures. However, the IRS has determined that shortly before Mr. Maruca's departure from the Service on August 1, 2014, Mr. Maruca's hard drive was copied. Accordingly, as detailed below, the data stored on Mr. Maruca's hard drive as of the copy date (July 16, 2014) has been preserved.

As noted in your letter, in a court pleading filed by the Service last month in the case of *Microsoft v. IRS*, we identified a potential issue for the Court. In particular, we advised the Court that in the time period between Mr. Maruca's departure from the IRS in August 2014 and the erasure of his hard drive in early 2015, the IRS received a Freedom of Information Act (FOIA) request from Microsoft and implemented a litigation hold. Due to the timing of Mr. Maruca's departure - specifically, because Mr. Maruca's hard drive was designated for erasure before the litigation hold was issued - the litigation hold did not prevent the erasure of this hard drive.¹

Having studied this issue further, we recently determined that Mr. Maruca's hard drive was copied on July 16, 2014 in connection with a document collection in separate litigation. This data set remains preserved. We have loaded it onto a Clearwell database, which also contains emails copied from Mr. Maruca's network account in July 2014. We will search this database to respond to the Microsoft FOIA requests and to fulfill any related obligations. We are in the process of confirming the parameters of the copied data set, and we will update the Court as appropriate.²

We note, contrary to certain media reports, that this was an internal IRS litigation hold - a proactive measure to preserve information that may, or may not, become relevant in future litigation - as opposed to a court-issued document preservation order or congressional investigative request.

² We do not know, at this point, if it will be necessary in the future to access pertinent back-up or disaster recovery tapes in light of the aforementioned copy sets.

Although we were fortunate in this case to have had overlapping litigation holds and to have taken redundant document collection measures, we recognize of course that this event reflected a shortcoming in our document controls. As you know, we have been working to strengthen these controls since mid-2015, when a Treasury Inspector General for Tax Administration (TIGTA) report identified a number of document retention failures in connection with the IRS's Exempt Organizations function.

We want to emphasize that we are taking several additional measures in light of the events surrounding Mr. Maruca's hard drive. In the short term, pending further review of our litigation hold procedures, I have ordered a halt to the erasure and recycling of all employee devices, including hard drives and mobile devices, for all current and departing employees. This is in addition to the halt on erasure and reuse of the disaster recovery tapes backing up our network server, which was instituted in 2013 and remains in effect.

In the longer term, we will be addressing several issues. First, we are exploring whether we can add additional layers of controls into our hard drive inventory management. We are also broadening our litigation hold procedures, to ensure that hold instructions are provided not only to the pertinent custodians, but also to the custodians' supervisors. We will update our procedures for processing employees who leave the Service, to ensure that employees advise their supervisors and administrative personnel as to pending litigation holds and document collections.

In addition, as we have described in prior correspondence concerning the Exempt Organizations function, we are working to move away from reliance on hard drives for storing electronic communication. It has long been our view – validated, unfortunately, by the events of recent years – that the Service's reliance on employee hard drives as an archival records store is suboptimal, not least because they are vulnerable to equipment failure resulting in data loss. Apart from the risks of data loss, the IRS's reliance on hard drives and other devices for records storage slows down our responses to FOIA requests, litigation discovery, Congressional inquiries, and other information requests.

We have begun the transition to more efficient electronic information stores, for instance working with the National Archives and Records Administration (NARA) to ensure the preservation of electronic records of senior executives on the IRS network based upon the Capstone approach. This preservation process was initiated in late 2014 and completed for existing executives in April 2015. As additional executives are hired, promoted, or appointed, their electronic records are preserved on the network based on the Capstone approach. Indeed, were Mr. Maruca still employed as an IRS executive at this time, his emails would have been copied to the network and preserved pursuant to this approach. Beyond Capstone, we are studying the feasibility – both from a technical perspective and a resource perspective – of establishing dedicated storage from which we could more easily access copies of the records of all departing employees. We will keep you posted as to these efforts.

Your letter requests a series of documents, which we are producing under separate cover. Among these documents are inventory records reflecting the processing and disposition of the Maruca hard drive. Our staff will be in touch with yours to field any questions or follow-up requests, and to identify IRS employees who can be made available if the Committee decides to proceed with staff interviews. Finally, as noted above, we will keep the Court in the *Microsoft* case, as well as Microsoft's counsel, promptly apprised of any document-related or other issues that arise.

Please do not hesitate to contact me if I can be of any further assistance. I also sent a letter to Ranking Member Wyden. You may contact me directly, or your staff may contact Leonard Oursler, Director of Legislative Affairs, at (202) 317-6985.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Koskinen", written in a cursive style.

John Koskinen