



KOHN, KOHN & COLAPINTO, LLP

URGENT MATTER – DATED MATERIAL

January 5, 2010

Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Office of Professional Responsibility
U.S. Department of Justice
Mary Patrice Brown - Acting Counsel
950 Pennsylvania Avenue, N.W. - Suite 3266
Washington, D.C. 20530

Dear Attorney General and Acting Counsel for the Office of Professional Responsibility:

Attached please find a letter to the Attorney General of the United States dated December 7, 2009. This letter raised serious concerns regarding the actions taken by attorneys for the United States Department of Justice concerning a whistleblower, Mr. Bradley Birkenfeld. It provides detailed factual evidence that the main allegation raised against Mr. Birkenfeld, and used to secure his indictment and imprisonment, was not based on accurate or truthful information. In the December 7th letter we requested that the Attorney General review this very serious matter. To date we are aware of no such review. To the contrary, in a nationally broadcast on-the-record interview, a high level Department of Justice official repeated the same inaccurate, misleading and incomplete allegations against Mr. Birkenfeld that were debunked in the December 7th letter. *See CBS News 60 Minutes* (January 3, 2010).

Under the terms of the Privacy Act, 5 U.S.C. 552a, we hereby file a formal complaint and request for correction of record based on the information provided in the December 7th letter.

Under the controlling Department of Justice regulations, we hereby request a formal investigation by the Department of Justice Office of Professional Responsibility into the statements made by the Department of Justice at the sentencing hearing of Mr. Birkenfeld, and thereafter. It is absolutely incumbent that the information provided by attorneys for the Department of Justice to the American people (especially statements made to a national audience in highly respected news programs like *60 Minutes*) be accurate, complete and not

misleading. Likewise, given the critical role the Department plays in the administration of justice, it is also absolutely critical that information provided to the Courts of the United States, be completely truthful, complete, accurate and not misleading.

As you know, Mr. Birkenfeld exposed a multi-billion dollar offshore tax fraud scheme organized by the Swiss bank UBS. His important contributions were recognized in letters submitted to the Justice Department by representatives from the IRS, the Securities and Exchange Commission, the Chairman of the Senate Permanent Subcommittee on Investigations, and leading public interest organizations.

The attached December 7 letter to Attorney General Holder specifically documents inaccurate statements made by a Department of Justice attorney before a Court of the United States. These statements had a material impact on Mr. Birkenfeld, and caused the Department of Justice to improperly seek jail time for one of the most important tax whistleblowers in American history. Moreover, these statements, although not true, have been repeated in the news media and have improperly demeaned Mr. Birkenfeld. The facts contained in the letter to the Attorney General are fully supported by the exhibits attached thereto, and speak for themselves.

We are greatly troubled by the actions of the Department of Justice. At his sentencing hearing, Justice Department attorneys accused Mr. Birkenfeld of withholding information from the United States concerning a former client, Igor Olenicoff, which justified their recommendation that Mr. Birkenfeld serve a long prison term. However, this allegation is *not true*. While Mr. Birkenfeld did not disclose Mr. Olenicoff's identity at his initial meeting with the Justice Department in June 2007, he refused only because he was still a resident of Switzerland, and could not disclose Mr. Olenicoff without violating Swiss law.

In order to avoid criminal prosecution in Switzerland, Mr. Birkenfeld informed the Justice Department that he needed them to subpoena his testimony. The Department of Justice refused. However, at Mr. Birkenfeld's request, the Senate Permanent Subcommittee on Investigations served the required subpoena on October 9, 2007. Two days later, on October 11, 2007, he gave extensive testimony on Mr. Olenicoff and several other clients. He subsequently made similar disclosures to other agencies. Contrary to the Justice Department's allegation, Mr. Birkenfeld *fully disclosed* the details of his activities regarding Mr. Olenicoff *before* Mr. Olenicoff was indicted, *before* Mr. Olenicoff plead guilty to tax evasion, and *long before* the Department of Justice decided to prosecute Mr. Birkenfeld himself.

Unfortunately, the United States failed to investigate (or even interview) Mr. Birkenfeld in a coordinated manner. In order to insure that his information reached all interested parties, Mr. Birkenfeld sought out various government agencies that he believed would have an interest in the UBS tax frauds, and voluntarily came forward to these agencies. At his own initiative, Mr. Birkenfeld contacted and met with the Department of Justice, the Internal Revenue Service, the Securities and Exchange Commission, and the United States Senate. Although he disclosed detailed information on Mr. Olenicoff to several government agencies in 2007, only the Senate investigators created a transcript of the testimony provided during one of the two days he met with Senate Staff.

The transcript from that day, October 11, 2007, objectively and irrefutably confirms that Mr. Birkenfeld disclosed detailed information on Mr. Olenicoff prior to the Olenicoff indictment and/or plea, and long *before* the Justice Department began its prosecution of Mr. Birkenfeld himself.

That government investigators may have failed to share all of Mr. Birkenfeld's disclosures among themselves should not prejudice Mr. Birkenfeld. Mr. Birkenfeld approached the United States Government in good faith and made full and complete voluntary disclosures about UBS and specific clients (including Mr. Olenicoff). Instead of recognizing this contribution and truthfully informing the court (and the public) about the nature of his disclosures, officials from the Department of Justice (who are themselves attorneys) have repeatedly made statements that are inaccurate, misleading and incomplete.

We are also deeply troubled by an apparent double standard applied to UBS, UBS clients, and Mr. Birkenfeld. The top officials from UBS, who are responsible for planning and initiating the scheme Mr. Birkenfeld revealed, have escaped all criminal liability. In fact, one of the top managers of UBS who supervised the entire illegal offshore scheme was arrested by the Justice Department, but was then *released* and permitted to return to Switzerland. Moreover, the thousands of individuals who for years willfully profited from the UBS scheme were not prosecuted, and in most cases were offered full immunity from prosecution in exchange for their cooperation. These individuals were not whistleblowers. They admitted guilt only when confronted with their crimes, yet escaped all criminal sanction. Bizarrely, the Department of Justice reserved the harshest treatment for the whistleblower – and justified a long prison sentence on unfounded speculation. It is one thing to hold Mr. Birkenfeld accountable for wrongdoing. It is another thing altogether to imprison Mr. Birkenfeld on false information, especially when he is treated far more harshly than the wrongdoers who actually profited from the illegal tax schemes *that Mr. Birkenfeld disclosed*.


In the interests of justice, this matter must be fully and independently investigated. It would also serve the interests of justice if all of the attorneys

responsible for the inaccurate representations made to the Court during Mr. Birkenfeld's sentencing were completely recused from participation in matters related to Mr. Birkenfeld. Finally, we request, and the interests of justice demand, that the Department of Justice correct the public record and acknowledge, both before the Court and in an official press statement, that Mr. Birkenfeld in fact disclosed information about Mr. Olenicoff's tax evasion to representatives of the United States government *before* Mr. Olenicoff was indicted, *before* Mr. Olenicoff signed a plea agreement, *before* that plea agreement was presented to the Court and *before* Mr. Olenicoff was sentenced.

The request for correction of the record concerning statements issued to the public related to the Olenicoff disclosures is also submitted to the Office of Professional Responsibility as a formal request under the Privacy Act. If the Office of Professional Responsibility does not have jurisdiction to investigate and seek corrective action under the Privacy Act, please forward this letter and the attached information to the proper agency. However, it is our understanding that all issues concerning the conduct of attorneys for the Justice Department is within the investigatory authority of the Office of Professional Responsibility.

Thank you in advance for your prompt attention to this matter. Please keep our offices fully informed as to the progress of your reviews. In regard to the Privacy Act request, please let me know within five working days the corrections made to the public record.

Respectfully submitted,



Stephen M. Kohn
Dean Zerbe

Attorneys for Mr. Birkenfeld

Enclosure: December 7, 2009 Letter to Attorney General Holder
(with attachments)

CC: Chairman, Senate Judiciary Committee