

March 17, 2015

VIA CERTIFIED MAIL

The Honorable John Kerry
Secretary of State
U.S. Department of State
2201 C Street NW
Washington, DC 20520

The Honorable David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, N.W.
Washington, D.C. 20408

Dear Secretary Kerry and Mr. Ferriero:

The undersigned represent nonprofit organizations concerned with government transparency and accountability. Recently, the *New York Times* reported that former Secretary of State Hillary Clinton exclusively used a private email address – the server for which was located at her residence in Chappaqua, New York – to conduct official government business.

A number of media and transparency organizations have submitted Freedom of Information Act (FOIA) requests pertaining to Secretary of State Clinton's email correspondence while serving at the Department of State. These organizations include *The Associated Press*, *Gawker Media*, Judicial Watch, and Citizens for Responsibility and Ethics in Washington (CREW). Congressional committees also have requested access to these emails. Unfortunately, the *New York Times* report suggests that Secretary Clinton's use of only a private email account for State Department business without a contemporaneous government record – a potential violation of the Federal Records Act – may have been an intentional attempt to circumvent public oversight. Regardless of intent, the exclusive use of a private server made it impossible for the State Department to search Secretary Clinton's email correspondence in response to Freedom of Information Act requests. To illustrate this possibility, a 2012 FOIA request from CREW sought "records sufficient to show the number of email accounts of or associated with Secretary Hilary Rodham Clinton[.]"¹ No documents were ever produced to CREW, and State Department FOIA logs released in 2013 show that the request was closed.²

¹ *E.g.*, <http://www.scribd.com/doc/116569351/CREW-Department-of-State-Regarding-Alias-Email-Accounts-12-12-2012-State-Response>; http://foia.state.gov/searchapp/DOCUMENTS/5-FY2014/F-2013-04561/DOC_0C05449403/C05449403.pdf, page 372 of 392.

² *Id.*

The notion that Mrs. Clinton – or any federal employee – was under no duty to preserve her official emails on a federally-managed electronic records system from the time period of January 21, 2009 to February 1, 2013³ is false. Although all agencies are bound by the National Archives and Records Administration’s (NARA) regulations interpreting the Federal Records Act, the U.S. Department of State follows an additional set of records preservation laws: the Foreign Affairs Manual (FAM) regulations. Pursuant to FAM, the State Department created the State Messaging and Archive Retrieval Toolset (SMART), which is “a custom-developed Microsoft Outlook add-in component that enables users to draft and release archive messages.”⁴ SMART applies to all State Department archive messages (“record emails and cables”) and is a State Department-run archival system.⁵ In fact, the FAM sets forth over 70 pages of regulations regarding electronic State Department communications alone.⁶ A March 27, 2012 letter from Tasha Thian, Agency Records Officer at the Department of State, in response to the November 28, 2011 Presidential Memorandum on Managing Government Records,⁷ explains that “[t]he SMART system replaces an outdated cable communication system and contains an email management component for capturing record email.”⁸

Public records reflect that former Secretary Clinton was an active user of the SMART system for cable communications.⁹ As the State Department’s SMART system does not distinguish between record emails and cable records, however, it would appear that the only way in which Mrs. Clinton could avoid having her official emails captured on the SMART system was to use email in a manner inconsistent with the Foreign Affairs Manual regulations. Her control of official records through the use and maintenance of a private server and email account that was not linked to the SMART system therefore raises serious concerns.¹⁰

As advocates of transparency and good government, we are extremely troubled that Mrs. Clinton not only failed to retain her email records as the FAM instructs, but may

³ See, e.g., *Hillary Clinton asks State to release emails: What you need to know* <http://www.cnn.com/2015/03/04/politics/hillary-clinton-emails/>.

⁴ 5 FAH-1 H-231, *available at* <http://www.state.gov/documents/organization/89317.pdf> (last visited Mar. 6, 2015).

⁵ 5 FAH-1 H-231 (*id.*); 1 FAM 273, *available at* <http://www.state.gov/documents/organization/84183.pdf> (last visited Mar. 6, 2015).

⁶ *Id.*

⁷ E.g., <http://www.whitehouse.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>.

⁸ DEP’T OF STATE, SUMMARY CURRENT STATE OF RECORDS MANAGEMENT AT THE STATE DEPARTMENT at 2 (Mar. 27, 2012), *available at* <http://goo.gl/jXCv1u>.

⁹ See, e.g., Cable re: Secretary Clinton’s Sep. 26, 2009 meeting with Mexican Foreign Secretary Espinosa, available at foia.state.gov (last visited Mar. 6, 2015); Cable re: Secretary Clinton’s May 28, 2009 meeting with Egyptian democracy activists, available at foia.state.gov (last visited Mar. 6, 2015); Cable re: Secretary Clinton’s Dec 12, 2011 meeting with Iraqi Foreign Minister Zebari, available at foia.state.gov (last visited Mar. 6, 2015).

¹⁰ The State Department’s Inspector General has publicly reprimanded at least one former Ambassador for “disregard[ing] Department regulations on the use of commercial email for official government business.” See U.S. Department of State Office of Inspector General, Office of Inspections, *Inspection of Embassy Nairobi, Kenya* (Aug. 2012), *available at* <http://oig.state.gov/system/files/196460.pdf>.

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have ignored protocol by setting up a private server and email address to handle official documents while serving as Secretary of State – a fact that was not revealed to the public until recently, more than two years after Mrs. Clinton left office. The manner in which the former Secretary's emails were segregated from and only later returned to the State Department can set a dangerous precedent for future agency appointees.

Because it is of the utmost importance that all of former Secretary Clinton's emails are properly preserved and transferred back to the State Department for accountability and historical record purposes, we are asking that you verify that Secretary Clinton's emails containing federal records are transferred to the Department of State in their original electronic form, so that all such emails may be accessible pursuant to the Freedom of Information Act. The Archivist and State Department are authorized by the Federal Records Act to seek the recovery of records that may have been improperly removed, and the task of determining which emails constitute federal records should not be left solely to Mrs. Clinton's personal aides. Rather, the Archivist and State Department should oversee the process to ensure its independence and objectivity. To the extent that it is ascertained that any record emails were deleted, they should be retrieved if technically possible.

Thank you in advance for your attention to this important matter. To discuss these issues in greater detail, please contact Daniel Epstein, the executive director for Cause of Action, at 202-499-4232 or Daniel.Epstein@CauseOfAction.org; or Patrice McDermott, the executive director of OpenTheGovernment.org, at 202-332-6736 or pmcdermott@openthegovernment.org.

Sincerely,

Cause of Action
Defending Dissent Foundation
Electronic Frontier Foundation
MuckRock
National Coalition for History
National Security Archive
National Security Counselors
OpenTheGovernment.org
Pirate Times
Project on Government Oversight (POGO)
Society of Professional Journalists
The Sunlight Foundation