

unlawfully removed from the custody of the Department of State (“State Department”) and stored on a personal computer server in the exclusive control and custody of former Secretary of State Hillary Rodham Clinton (“Clinton”).

2. At all times relevant, the Federal Records Act prohibited the unlawful removal or destruction of government records.

3. At all times relevant, the Federal Records Act required the head of each Federal agency to establish safeguards against the removal or loss of government records.

4. At all times relevant, the Federal Records Act provided that “[s]afeguards shall include making it known to officials and employees of the agency” that records were not to be removed or destroyed except in accordance with law and the penalties for the unlawful removal or destruction of records. 44 U.S.C. § 3105.

5. At all times relevant, the penalties for the unlawful or accidental removal, defacing, alteration, or destruction of Federal records or the attempt to do so, included a fine, imprisonment, or both, pursuant to 18 §§ U.S.C. 641 and 2071. 36 CFR § 1230.12.

6. On March 10, 2015, Clinton admitted to using a private email account for government business, housed on a computer server located within her home and over which she maintained exclusive control, throughout her tenure as Secretary of State. *Statement from the Office of Former Secretary Clinton* (Mar. 10, 2015), available at <http://goo.gl/wtSQ9e>.

7. Clinton said she turned over approximately 55,000 pages of printed copies of her work-related emails to the State Department on December 5, 2014 (22 months after she resigned from office).

8. In a letter dated March 27, 2015 to the Chairman of the House Select Committee on Benghazi, Clinton’s lawyer, David Kendall, stated that Clinton deleted all of her emails,

personal and work-related, from her tenure as Secretary of State. *See* Letter from David E. Kendall, Lawyer for Hillary Clinton, to Trey Gowdy, Chairman of the H. Select Comm. on Benghazi, at 6 (Mar. 27, 2015), *available at* <http://goo.gl/jXpS5x>.

9. Concerned that Clinton had violated the Federal Records Act by using a private email account on a private server to conduct government business and circumvent public oversight, Plaintiff Cause of Action Institute (“Cause of Action”), together with several other government oversight groups, wrote to Defendant Kerry and Defendant Ferriero on March 17, 2015. *See* Ex. 1. They explained the private server made it impossible for the State Department to search Secretary Clinton’s email correspondence for valid Freedom of Information Act requests and that it was “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.” *Id.* at 3.

10. By letter dated March 23, 2015, defendant Ferriero said the National Archives and Records Administration (“NARA”) had written to the State Department for a report on the matter and that it was “awaiting a response.” Ex. 2.

11. By letter dated April 24, 2015, Under Secretary of State for Management Patrick F. Kennedy said the State Department “is working closely with [NARA] regarding former Secretary Clinton’s records, as well as to pursue long term solutions to manage electronic records[.]” Ex. 3. Included was the State Department’s April 2, 2015 report to NARA. *See* Ex. 4.

12. As to Clinton’s emails, the report stated that in response to an October 28, 2014 request from the State Department for copies of federal records in her possession, Clinton’s

representatives “provided approximately 55,000 pages of emails that they determined to be potentially responsive to the Department’s request[.]” Ex. 4 at 2.

13. However, these were not all of the federal records unlawfully removed and in Clinton’s possession.

14. For example, the State Department admitted that it could not locate “all or part” of at least 15 Clinton e-mails that had been provided to the House Select Committee on Benghazi by Sidney Blumenthal.

15. Upon information and belief, Clinton also removed specific portions of certain emails she provided to the State Department. *See* Sarah Westwood, *Records show Clinton withheld emails about oil, terrorism*, Wash. Exam. (June 27, 2015), <http://goo.gl/sX3b3E> (stating that “in July 2012, Clinton removed paragraphs from a Blumenthal memo that warned ‘simply completing the election ... and fulfilling a list of proper democratic milestones may not create a true democracy.’ Blumenthal also wrote—in sections that Clinton deleted before providing the document to State—that the government would likely be ‘founded on Sharia,’ or Islamic laws.”).

16. Therefore, Defendants should have carried out their non-discretionary statutory duty to initiate legal action to recover all federal records in Clinton possession and unlawfully removed from the State Department, and to notify Congress that such action is being taken.

17. However, in violation of the Federal Records Act, defendants apparently have not done so.

JURISDICTION AND VENUE

18. Jurisdiction is proper under 28 U.S.C. § 1331 (action arising under the laws of the United States), 5 U.S.C. §§ 701, 702, and 706 (APA), 28 U.S.C. § 1361 (mandamus) and 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act).

19. Injunctive relief is proper when, as here, private parties are adversely affected or aggrieved by agency action or inaction and the court is authorized to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. §§ 702, 706.

20. Venue is proper under 28 U.S.C. § 1391(e).

PARTIES

21. Cause of Action is a non-profit strategic oversight group committed to ensuring that the regulatory process is transparent, fair, and accountable. In furtherance of its mission, Cause of Action regularly requests access to the public records of federal agencies, entities, and offices, and disseminates its findings, analysis, and commentary to the general public. Although not a subject of the current complaint, Cause of Action has a pending Freedom of Information Act request before the State Department for records that likely include emails to and from former Secretary Clinton. *See* Ex. 5.

22. Defendant John F. Kerry is U.S. Secretary of State and has his principal place of business at the U.S. Department of State, 2201 C Street N.W., Washington, DC 20520. Defendant Kerry is being sued in his official capacity only. He is the “agency head” and subject to the Federal Records Act.

23. Defendant David S. Ferriero is the U.S. Archivist and has his principal place of business at the National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. Defendant Ferriero is being sued in his official capacity only. He is the “Archivist” and subject to the Federal Records Act.

FACTS

A. The Federal Records Act.

24. At all times relevant, the Federal Records Act defined a “record” as any material, “regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.” 44 U.S.C. § 3301; 36 C.F.R. § 1220.18.

25. At all times relevant, the Federal Records Act required all agency heads, including the Secretary of State, to “establish and maintain an active, continuing program for the economical and efficient management of the records of the agency.” 44 U.S.C. § 3102.

26. At all times relevant, the Federal Records Act prohibited unauthorized alienation or destruction of records. 44 U.S.C. § 3314.

27. At all times relevant, the Federal Records Act prohibited the removal of records from the legal custody of an agency. 36 C.F.R. §§ 1222.24(a)(6), 1230.10(a); *see also* 36 C.F.R. § 1230.3(b).

28. At all times relevant, the Federal Records Act directed agency heads, including the Secretary of State, to establish “safeguards” against the removal or loss of records, including notifications to agency officials and employees that records are not to be alienated or destroyed unless authorized and of “the penalties provided by law for the unlawful removal or destruction of records.” 44 U.S.C. § 3105; 36 CFR § 1230.10 (requiring agency heads to “[p]revent the unlawful or accidental removal, defacing, alteration, or destruction of records”); 36 CFR § 1230.12; 5 FAH-4 H-217.1(c) (explaining to State Department personnel that “[f]ines,

imprisonment, or both may be imposed for the willful and unlawful removal or destruction of records as stated in the U.S. Criminal Code (e.g., 18 U.S.C., section 2071”).

29. At all times relevant, the Federal Records Act tasked NARA as the primary agency for records management oversight.

30. At all times relevant, the Federal Records Act made the Archivist of the United States responsible for assisting federal agencies in maintaining satisfactory documentation of agency policies and transactions, including by promulgating standards, procedures, and guidelines with respect to records management.

31. At all times relevant, the Federal Records Act mandated that an agency promptly notify NARA and produce a comprehensive report when records were unlawfully or accidentally removed, defaced, altered, or destroyed. 44 U.S.C. § 3106(a); 36 C.F.R. §§ 1230.10(d), 1230.14.

32. At all times relevant, the Federal Records Act required agency heads to collaborate with the Archivist to “initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency.” 44 U.S.C. § 3106(a); *see also* 36 C.F.R. § 1230.18

33. At all times relevant, the Federal Records Act provided that, if the agency head did not initiate an action for such recovery or other redress within a reasonable period of time, the Archivist “shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.” 44 U.S.C. § 3106(b).

34. At all times relevant, the Federal Records Act required the Archivist to “assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law” and provided that the Archivist “shall request the Attorney General to initiate such an action, and shall notify the Congress when

such a request has been made” if the agency head has failed to do so within a reasonable time.

44 U.S.C. § 2905(a).

B. The State Department’s Admissions Prove Clinton Violated The Federal Records Act.

35. As Secretary of State, Clinton was the “agency head” responsible for implementing and enforcing the Federal Records Act.

36. At all times relevant, her correspondence, briefing books, notes, agendas, memos, drafts, minutes, reports, talking points, and other such documentation relating to her diplomatic activities, appearances, briefings, speeches, travel, telephone calls, scheduling, staff meetings, and other matters relating to the responsibilities of the Secretary of State were subject to the Federal Records Act and designated for permanent preservation. *See* U.S. Dep’t of State Records Schedule, Chapter 01: Secretary of State, *available at* <http://goo.gl/1Nto0L>.

37. At all times relevant, emails made or received in her capacity as Secretary of State or in connection with the transaction of public business, were subject to the Federal Records Act.

38. As Clinton knew or should have known, the Federal Records Act did not authorize her to set up her own recordkeeping system or to maintain emails on a personal server or use a private email account without ensuring that the emails were concurrently archived in the State Department’s official recordkeeping system.

39. However, her emails were not concurrently archived in the State Department’s official recordkeeping system.

40. At all times relevant, the State Department did not archive the in-boxes of senior officials other than the Secretary. Therefore, Clinton’s emails to senior State Department officials using her private email and server were not properly and concurrently archived.

41. Also, at least ten percent of Clinton's emails were sent to or received from email addresses outside of the State Department. *See Statement from the Office of Former Secretary Clinton*, at 2 (Mar. 10, 2015), *available at* <http://goo.gl/wtSQ9e>. These emails also were not properly and concurrently archived.

42. On March 3, 2015, Paul M. Wester, Jr., the Chief Records Officer at NARA, advised the State Department that "Federal records may have been alienated from the Department of State's official recordkeeping system" and asked for a report within 30 days detailing how Clinton's emails "were managed and the current status of these records." Letter from Paul M. Wester, Jr., Chief Records Officer, NARA, to Margaret P. Grafeld, Deputy Assistant Sec'y for Global Info. Servs., Bureau of Admin., U.S. Dep't of State (Mar. 3, 2015), *available at* <http://goo.gl/8Bys0x>.

43. In response, the State Department admitted "the degree to which [Clinton's email] records were captured in the Department's systems was unknown." Ex. 4.

44. Later, the State Department admitted that it could not properly respond to certain FOIA requests because it did not have access to Clinton's records within its own system until after she had delivered paper copies on December 5, 2014.

45. Under 36 C.F.R. § 1230.3, the removal of federal records is defined as "selling, donating, loaning, transferring, stealing, or otherwise allowing a record to leave the custody of a Federal agency without the permission of the Archivist of the United States." 36 C.F.R. §§ 1230.3(b); 1228.100(a)

46. Notwithstanding her statutory obligation as agency head to ensure enforcement of the Federal Records Act by all State Department personnel, Clinton did not seek or obtain permission from the Archivist to remove federal records to her private email and server.

47. Also, contrary to her statutory duties, Clinton did not ensure that copies of her emails were contemporaneously preserved in the State Department record-keeping system, whether in hard copy or electronic form.

48. Therefore, Clinton violated the Federal Records Act.

C. Defendants Must Initiate Legal Action Against Clinton.

49. The Federal Records Act requires defendants to initiate legal action against Clinton for her violations.

50. Upon information and belief, defendant Kerry has known of Clinton's unlawful removal and/or destruction of records since on or before October 28, 2014.

51. Upon information and belief, defendant Ferriero has known of Clinton's unlawful removal and/or destruction of records since on or before March 2, 2015.

52. Upon information and belief, despite their knowledge of the unlawful removal and/or destruction of federal records, defendants have not carried out their non-discretionary duty to initiate legal action against Clinton through the Attorney General under 44 U.S.C. § 2905(a) and/or 44 U.S.C. § 3106, nor have they notified Congress in respect of the same.

D. Defendants Failure To Act Has Harmed Cause Of Action.

53. Cause of Action notified both defendants of the unlawful removal of records and asked that they fulfill their statutory duty to initiate legal action to recover the unlawfully removed records, including those which may have been deleted from Clinton's server. Ex. 1.

54. Cause of Action has a pending Freedom of Information Act request for records that may have been unlawfully removed or destroyed by Clinton.

55. The defendants' failure to discharge their statutory duties has delayed or frustrated Cause of Action's legal right to obtain such records.

56. Therefore, defendants' failure to carry out their non-discretionary duties under the Federal Records Act has directly harmed Cause of Action.

FIRST CLAIM FOR RELIEF

For Injunctive And Declaratory Relief

57. Cause of Action repeats paragraphs 1-56.

58. The Federal Records Act requires defendant Kerry to notify the Archivist of Clinton's unlawful removal and/or destruction of records and, with the assistance of the Archivist, to initiate legal action through the Attorney General. 44 U.S.C. § 3106(a).

59. If defendant Kerry does not initiate such action, then defendant Ferriero must request the Attorney General initiate such action, and notify the Congress when he makes such a request. 44 U.S.C. §§ 2905(a), 3106(b).

60. Defendants have actual and constructive knowledge of the unlawful removal and/or destruction of records subject to the Federal Records Act.

61. Defendant Kerry has violated his obligation under 44 U.S.C. § 3106(a) by failing to initiate legal action through the Attorney General to recover the unlawfully removed records.

62. Defendant Ferriero has violated his obligation under 44 U.S.C. § 2905(a) and 44 U.S.C. § 3106 by failing to initiate legal action through the Attorney General to recover the unlawfully removed records and to notify Congress of such action.

63. Cause of Action is therefore entitled to a declaratory judgment that defendants are in violation of their non-discretionary statutory duties under the Federal Records Act and to preliminary and permanent injunctive relief requiring defendants to recover unlawfully removed and destroyed records, and to seek other redress, all as required by law, and to prevent further removal or destruction of federal records.

SECOND CLAIM FOR RELIEF

For Mandamus

64. Cause of Action repeats paragraphs 1-63.

65. Cause of Action, a non-profit organization that makes information in State Department and other government records available to the public, has a direct interest in ensuring such records are maintained, preserved, and made accessible to the public in accordance with the Federal Records Act and other laws.

66. Defendants have wrongfully failed to carry out their non-discretionary, mandatory duties under the Federal Records Act to initiate legal action for recovery of unlawfully removed or destroyed records and/or for other redress, among other things. This failure has harmed Cause of Action.

67. Defendants can adequately fulfill their statutory obligations only by initiating legal action through the Attorney General to take custody of Clinton's server and attempting to recover the allegedly deleted emails from that server, among other things.

68. Cause of Action is therefore entitled to relief in the form of a writ of mandamus, ordering defendants Kerry and Ferrero to comply with 44 U.S.C. §§ 2905, 3106 by initiating legal action against Clinton through the Attorney General.

RELIEF REQUESTED

WHEREFORE, Cause of Action respectfully requests this Court:

- A. Declare Clinton's emails, as specified above, are subject to the Federal Records Act;
- B. Declare that Clinton, by, among other things, failing to seek or obtain permission from the Archivist to remove federal records to her private email and server, ensure

that copies of her emails were contemporaneously preserved in the State Department record-keeping system, whether in hard copy or electronic form, and altering emails, violated the Federal Records Act;

- C. Declare that defendants, by their failure to initiate legal action in this case, violated the Federal Records Act;
- D. Order defendants, in the form of injunctive and mandamus relief, to comply with 44 U.S.C. §§ 2905, 3106 by initiating legal action against Clinton through the Attorney General to take Clinton's computer server and recover the unlawfully removed and/or destroyed email records;
- E. Award Cause of Action its costs and reasonable attorney fees incurred in this action; and
- F. Grant such other relief as the Court may deem just and proper.

Dated: July 8, 2015

Respectfully submitted,

CAUSE OF ACTION INSTITUTE

/s/ Daniel Z. Epstein

Daniel Z. Epstein

D.C. Bar No. 1009132

daniel.epstein@causeofaction.org

CAUSE OF ACTION

1919 Pennsylvania Ave., NW, Suite 650

Washington, DC 20006

Telephone: (202) 499-4232

Facsimile: (202) 330-5842

Counsel for Cause of Action

Exhibit 1

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.*

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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

Exhibit 2



ARCHIVIST *of the*
UNITED STATES

DAVID S. FERRIERO

T 202.357.5900

F 202.357.5901

david.ferriero@nara.gov

VIA EMAIL TRANSMISSION

23 March 2015

Daniel Epstein, Executive Director
Cause of Action
Patrice McDermott, Executive Director
OpenTheGovernment.org
By Email

Dear Mr. Epstein and Ms. McDermott:

Thank you for the letter of March 17, 2015, from you and your fellow organizations. I welcome your perspective. NARA is committed to ensuring that all agencies properly manage federal records. As you are likely aware, the National Archives and Records Administration wrote a letter earlier this month requesting that the Department of State provide us with a report on this matter in accordance with our statutory and regulatory authority. (A copy of the letter is attached.) We are awaiting a response from the State Department and will work with them to address these records management issues.

Sincerely,

DAVID S. FERRIERO
Archivist of the United States



MAR 03 2015

Margaret P. Grafeld
Deputy Assistant Secretary for Global Information Services
Bureau of Administration
U.S. Department of State
SA-2, Suite 8000
515 22nd Street, NW
Washington, DC 20522-0208

Dear Ms. Grafeld:

The National Archives and Records Administration (NARA) is concerned with the events outlined in the March 2, 2015, New York Times article by Michael S. Schmidt regarding the potential alienation of Federal email records created or received by former Secretary of State Hillary Rodham Clinton. The article also suggests potential issues with the Federal email records created or received by former Secretaries of State dating back to Secretary Madeleine K. Albright.

Based on this article and other news reports, NARA is concerned that Federal records may have been alienated from the Department of State's official recordkeeping systems.

Pursuant to your Department's responsibilities under 44 U.S.C. Chapter 31 and NARA's authorities in 44 U.S.C. Chapter 29, we request that the Department of State explore this matter and provide NARA a report of how these records were managed and the current status of these records.

We request that you provide us with a report as required and described in 36 CFR 1230.14 within 30 days of the date of this letter.

If Federal records have been alienated, please describe all measures the Department has taken, or expects to take, to retrieve the alienated records. Please also include a description of all safeguards established to prevent records alienation incidents from happening in the future. Please also provide NARA all guidance and directives disseminated within the Department that address the management of email records, including those records created using personal email accounts.

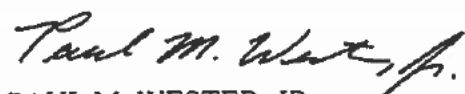
NATIONAL ARCHIVES and
RECORDS ADMINISTRATION

8601 ADELPHI ROAD
COLLEGE PARK, MD 20740-6001
www.archives.gov

If you are unable to provide a report within 30 days, please provide us with an interim report indicating what actions you have taken and when you expect to submit a final report.

Thank you for your cooperation.

Sincerely,

A handwritten signature in cursive script, reading "Paul M. Wester, Jr.".

PAUL M. WESTER, JR.
Chief Records Officer
for the U.S. Government

cc: Ambassador Patrick F. Kennedy
Under Secretary for Management
Senior Agency Official for Records Management
U.S. Department of State
Washington, DC 20520

Exhibit 3

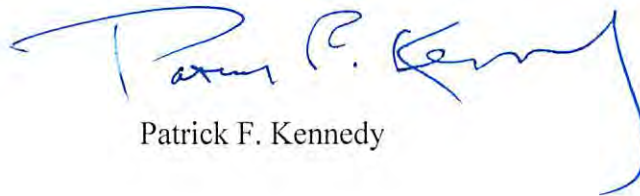
**UNDER SECRETARY OF STATE
FOR MANAGEMENT
WASHINGTON**

Dear Mr. Epstein and Ms. McDermott:

The Secretary has asked me to respond to your March 17 letter raising the concerns of your colleague organizations and Open the Government. I assure you that the Department's leadership is committed to preserving the documentation of US foreign policy and Department operations through meeting the statutory requirements and presidential initiatives regarding records, as well as ensuring that the Department maximizes transparency as embodied in the Freedom of Information Act. In furtherance of this commitment, the Department is working closely with the National Archives and Records Administration (NARA) regarding former Secretary Clinton's records, as well as to pursue long term solutions to manage electronic records as covered by our response to NARA's March 3 correspondence, a copy of which is provided as an attachment for your information.

In closing, we appreciate your identifying the issues of concern to yourselves and the organizations you represented in your March 17 letter and assure you that we are continually working to improve our recordkeeping practices.

Sincerely,

A handwritten signature in blue ink, appearing to read "Patrick F. Kennedy". The signature is fluid and cursive, with a large, sweeping "K" at the end.

Patrick F. Kennedy

Attachment: As stated

Mr. Daniel Epstein, Executive Director,
Cause of Action,
Patrice McDermott, Executive Director,
OpenTheGovernment.org,
By Email.

Exhibit 4



United States Department of State

Washington, D.C. 20520

Paul M. Wester, Jr.
Chief Records Officer for the U.S. Government
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

APR 2 2015

Dear Mr. Wester,

Paul

This letter constitutes our response regarding your March 3 letter in which you note a recent NY Times article regarding the Federal email records of former Secretary of State Hillary Rodham Clinton, as well as of former Secretaries Rice, Powell, and Albright. As you and I have discussed, we look forward to continuing the Department's longstanding demonstrated commitment to managing our records and to leveraging our ongoing partnership with the National Archives and Records Administration (NARA) to address the evolving complexities of email vis-a-vis government records life cycle management.

As you are aware through our reporting over the years, the Department and its leadership have in the past and continue to take very seriously our records management responsibilities particularly as embodied in the President's Managing Government Records Directive and recent amendments to the Federal Records Act. We understand the relationship between a sound records management program, the preservation and life cycle management of the full documentation of the essential evidence of our mission and operations, transparency, and Open Government. Consistent with this commitment, in 2013, the Under Secretary for Management and our Senior Agency Official for Records, Patrick F. Kennedy, asked senior officials ("Senior Sponsors") to review the Department's record email system. Subsequently, an Electronic Records Working Group with Senior Sponsors was formed to examine and make recommendations to address electronic records life cycle management, including Department-wide compliance with the aforementioned new mandates. One of the first actions was the promulgation by the Senior Agency Official for Records of an updated policy message in an August 28, 2014, memorandum to the Department's leadership, which stressed proper records management and advised senior officials that they should not use their private email accounts for official business (see attachment 1). In October 2014, the Department issued a Department Notice and cable to the field for all employees reminding them of their responsibilities vis-à-vis records, emails, and personal accounts (see attachments 2-3). This is an ongoing effort designed to address complex issues surrounding electronic records management issues with which you are deeply familiar as the Chief Records Officer for the Federal Government.

As you know, NARA has been updating its guidance on the management of emails. In furtherance of that guidance and to ensure that our records are as complete as possible, on October 28, 2014, Under Secretary Kennedy sent a letter to the representatives of former Secretaries Clinton, Powell, Rice, and Albright to request that copies of federal records be made available to the Department (see attachments 4-7).¹ Specifically, the Department requested the secretaries provide any federal records in

¹ Due to an error, the letters to the representatives for Secretaries Clinton, Powell and Albright had to be re-sent in November since the original letters to those representatives referenced Secretary Rice instead of their corresponding former Secretary (see attachments 4-7).

their possession, such as emails sent or received on a personal email account, if there was reason to believe the records may not otherwise be captured in the Department's recordkeeping system. (The Department fully recognizes the uniqueness and value of the Secretary of State's records collection, as well as the importance of maintaining it as block files "all together in one group" as provided in our authorized disposition schedules.) At the time the Department sent the letters, it was aware that Secretaries Clinton and Powell had used non-government accounts during their tenures, but the degree to which records were captured in the Department's systems was unknown.

In December 2014, former Secretary Clinton's representatives provided approximately 55,000 pages of emails that they determined to be potentially responsive to the Department's request (see attachment 8). These emails are being reviewed under the Freedom of Information Act and the releasable documents will be made publicly available online by the Department.

Also, last December, former Secretary Rice's representative advised that Secretary Rice did not use a personal email account for official business. In March 2015, former Secretary Powell's representative advised that while former Secretary Powell used a personal email account during his tenure as Secretary of State, he did not retain those emails or make printed copies. In March 2015, former Secretary Albright advised the Department of State that she never used a U.S. Government email or personal email account during her tenure as Secretary of State, and did not have a personal email account until after she left government service.

Finally, recognizing the importance of, as well as the resource challenges involved in, putting the principles of records' preservation, management, and transparency into practice, Secretary Kerry has asked the Department's Inspector General to review and make recommendations for improving the Department's recordkeeping and FOIA practices (see attachment 9). Informed by this review and in consultation and coordination with your leadership, we will continue to work through the complicated electronic records issues consistent with the President's initiative and statutory mandates. These efforts will be addressed in future reporting consistent with our mutual cooperation and resolution.

With continued best regards,



Margaret P. Grafeld
Deputy Assistant Secretary for Global Information Services
Bureau of Administration
U.S. Department of State

201412443 Rev. 1

ORIG TO IPS
ELECTRONIC DIST:
CODE I
CODE III
IPS/MMM



United States Department of State

*Under Secretary of State
for Management*

Washington, D.C. 20520

09/05/2014
2:29 PM

AUG 28 2014

UNCLASSIFIED

MEMORANDUM TO: The Office of the Secretary
The Office of Deputy Secretary Burns
The Office of Deputy Secretary for Management and
Resources Higginbottom
The Director of Foreign Assistance
All Under Secretaries
C- The Office of the Counselor
All Assistant Secretaries
L – The Office of the Legal Advisor
S/CPR – Peter Selfridge
S/P – David McKean
All Special Representatives and Special Envoys
cc: Executive Directors

From:

M – Patrick F. Kennedy

A handwritten signature in black ink, appearing to read 'PK' or 'Patrick F. Kennedy'.

SUBJECT: Senior Officials' Records Management Responsibilities

Senior officials are responsible for creating records necessary to document their activities and for the proper management and preservation of their records (see Tab 1 for the list of Senior Officials to which this memorandum is directed). These responsibilities are applicable to all records made or received in the conduct of agency business regardless of physical format or media. While all Department employees are to preserve records meeting the definition of a record under the Federal Records Act, see 3 FAM 414.8, senior officials' records are generally the most important documents created within the Department and are some of the most valued documents archived at the National Archives and Records Administration (NARA). Proper records management ensures statutory and regulatory compliance, preserves the rights of the government and citizens, supports better decision making, safeguards vital records, preserves organizational memory, minimizes litigation risk (ensuring systematic, documented, and routine disposal of records), and reduces operating costs through control over the lifecycle of the records.

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Specifically, senior officials must create records necessary to document their activities and actions taken on behalf of the Department. A records custodian must be identified who can manage a particular senior official's records in support of proper records lifecycle management, including appropriate access. Departing or transferring Senior Officials must identify their records prior to departure or transfer. Departing Senior Officials are reminded they may take with them only personal papers and non-record materials, subject to review by records officers to ensure compliance with federal records laws and regulations. All records generated by Senior Officials belong to the Department of State.

Defining and Managing Records

Records may exist in many formats, including Instant Messages (IM) and records on mobile devices like BlackBerries, mobile phones, and iPads. Typical records created by Senior Officials include not only e-mails, memos, and similar documents, but also calendars, schedules, and logs of daily activities.

Additionally, Senior Official records should include the following:

- Records pertaining to various committees, including Federal Advisory Boards, councils, and inter-agency and external committees in which the Senior Official participated.
- Materials relating to internal and external meetings, including briefing documents, minutes, and meeting notes.
- Records documenting the development of Department policies and programs, including correspondence, briefing and issue papers, and reports about policy, strategy, research and legislative priorities, program evaluation and planning, and similar topics.
- Reports to Congress and/or the President.

To establish a sound records management program, Senior Officials should, at minimum, take the following steps:

- Designate a records manager responsible for their records.
- Follow established records disposition schedules, which set out the applicable records retention and disposition requirements.
- Establish a plan for maintaining and managing their records.
- Collect, organize, and categorize their records in order to facilitate their preservation, retrieval, use, and disposition.

Specific Email Requirements and Procedures

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E-mail is the most widely-used tool within the Department for the conduct of official business. The Department generates millions of e-mail communications each year, many of which document significant foreign policy and Department business decisions. The standard for determining whether an e-mail message meets the definition of a "record" under the Federal Records Act is the same standard that applies to all other types of Department records (5 FAM 443.2 – see Tab 2).

As a supplement to existing policy, and consistent with the policy in place since 2009, it is important to capture electronically the e-mail accounts of the senior officials listed in Tab 1 as they depart their positions. Instructions for senior officials are provided (see Tab 3).

- At no time during designated senior officials' tenure will their e-mail accounts be cleared, deleted, or wiped for any reason.
- While senior officials may delete personal e-mails, they should be aware that the definition of a personal e-mail is very narrow. The only e-mails that are personal are those that do not relate to or affect the transaction of Government business.
- As a general matter, to ensure a complete record of their activities, senior officials should not use their private e-mail accounts (e.g., Gmail) for official business. If a senior official uses his or her private e-mail account for the conduct of official business, she or he must ensure that records pertaining to official business that are sent from or received on such e-mail account are captured and maintained. The best way to ensure this is to forward incoming e-mails received on a private account to the senior official's State account and copy outgoing messages to their State account.

Visit the Department's Records Management website for more information.

Attachments:

Tab 1 – List of Designated Senior Official Positions

Tab 2 – 5 FAM 443.2 (Which E-mail Messages Are Records)

Tab 3 – Instructions for Preserving E-mail of Departing Senior Officials

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DRAFT: Designated Senior Official Positions – March 5, 2014

***The positions identified below reflect NARA guidance to satisfy the Presidential Directive on retaining Email for Senior Officials. The Electronic Records Management Working Group will subsequently address the companion NARA guidance for retaining all other Email.**

- Secretary of State
- Deputy Secretary
- Under Secretary
- Assistant Secretary (AS)
- Regional Deputy Assistant Secretary
- Principal Deputy Assistant Secretary (PDAS)
- Chief of Staff
- Deputy Chief of Staff
- Executive Secretary
- Deputy Executive Secretary
- Executive Assistant to the Principal Officers
- Policy Advisor
- Strategic Advisor
- Chief Speechwriter
- Director of Communications
- Director of Foreign Assistance
- Director of M/PRI
- White House Liaison
- Chief Financial Officer
- Chief Economist
- Chief Information Officer
- Chief of Protocol
- Assistant Chief of Protocol
- Deputy Chief of Protocol
- Counselor
- Comptroller
- Legal Adviser
- Deputy Legal Adviser
- Assistant Legal Adviser
- Counselor on International Law
- Special Assistant to the Legal Adviser
- Principal Deputy Legal Adviser
- Inspector General
- Deputy Inspector General
- Counsel to the Inspector General
- Geographer
- Accountability Review Board Members
- Senior Advisers to the Principals
- Ambassador
- Ambassador-At-Large
- Chief of Mission
- Charges d' Affaires
- Charges d' Affaires ad interim
- Consuls General
- Consuls
- Principal Officer of U.S. Interest Sections
- Deputy Chief of Mission
- Deputy to the Ambassador-At-Large
- Deputy Principal Officers
- Assistant Chiefs of Mission
- Special Envoy
- Deputy Special Envoy
- Special Representative
- United States Permanent Representative
- United States Representative
- United States Deputy Representative
- Alternate Representative
- All individuals formally designated (i.e. by memorandum) as "Acting" in the above listed positions
- Applicable Special Assistants and Staff Assistants to the above listed positions, when they receive and respond to emails on the Senior Official's behalf

****Beyond this list, Bureaus may determine at an office level which individual positions would be considered "Designated Senior Official Positions" for the purposes of email preservation.**

5 FAM 440 ELECTRONIC RECORDS, FACSIMILE RECORDS, AND ELECTRONIC MAIL RECORDS

*(CT:IM-126; 02-28-2012)
(Office of Origin: A/GIS/IPS)*

5 FAM 441 ELECTRONIC RECORDS MANAGEMENT

(TL:IM-19; 10-30-1995)

These requirements apply to all electronic records systems: microcomputers; minicomputers; and mainframe computers in networks or stand-alone configurations, regardless of storage media.

a. Electronic Data files.

- (1) Those employees who are responsible for designing electronic records systems that produce, use, or store data files, shall incorporate disposition instructions for the data into the design plan.
- (2) System Administrators must maintain adequate and current technical documentation for electronic records systems that produce, use, or store data files. At a minimum, include:
 - (a) a narrative description of the system (overview);
 - (b) a records layout that describes each field, its name, size, starting or relative position;
 - (c) a description of the form of the data (e.g., alphabetic, zoned decimal, packed decimal or numeric) or a data dictionary. Include the equivalent information and a description of the relationship between data elements in the data bases when associated with a data base management system; and
 - (d) any other technical information needed to read or process the records.
- (3) Electronic data bases that support administrative or housekeeping functions and contain information derived from hard copy records authorized for disposal may be deleted if the hard copy records are maintained in official files.
- (4) Data in electronic form that is not preserved in official hard copy files or supports the primary program or mission of an office, even if preserved in official hard copy files, may not be deleted or destroyed except through authorities granted as prescribed in sections h. and i. below.

b. Documents.

- (1) Electronic records systems that maintain the official file copies of documents shall provide a capability for the disposition of the documents. This includes the requirements for transferring permanent records to the National Archives, when necessary.**
- (2) Electronic records systems that maintain the official file copy of documents shall identify each document sufficiently to enable authorized personnel to retrieve, protect, and carry out the disposition of documents in the system. Appropriate identifying information may include: office of origin, TAGS/Terms, subject line, addressee (if any), signatory, author, date, security classification, and authorized disposition.**
- (3) Electronic records systems that maintain the official file copy of documents shall provide sufficient security to ensure document integrity.**
- (4) Documents such as letters, messages, memorandums, reports, handbooks, directives, and manuals recorded on electronic media may be deleted if the hard copy record is maintained in official files.**
- (5) Documents such as letters, messages, memorandums, reports, handbooks, directives, and manuals recorded and preserved on electronic media as the official file copy shall be deleted in accordance with authorized disposition authorities for the equivalent hard copy. If the authority does not exist, the documents in electronic form may not be deleted or destroyed except through authorities granted as prescribed in sections h. and j. below.**

c. Spreadsheets.

- (1) Spreadsheets recorded on electronic media may be deleted when no longer needed to update or produce hard copy if the hard copy record is maintained in official files.**
- (2) Spreadsheets recorded and preserved on electronic media shall be deleted in accordance with authorized disposition authorities for the equivalent hard copy.**

d. Electronic records are acceptable as evidence in federal courts. Rule 803 (6), Federal Rules of Evidence, has been interpreted to include computer records. Further under Rule 1006, summary electronic records may be provided to limit the quantity of information considered during judicial proceedings. The courts must believe that records admitted before it are "trustworthy" that is, they must clearly and accurately relate the facts as originally presented or in summary form.

e. Administrators of electronic records systems shall ensure that only authorized personnel have access to electronic records.

f. Administrators of electronic records systems shall provide for the backup and recovery of records.

- g. Administrators of electronic records systems shall make certain that storage media meet applicable requirements prescribed in 36 CFR 1234.28. These requirements are also contained in FIRMR Bulletin B-1 and are discussed in the RMH, 5 FAH-4 H-219.
- h. Retention of electronic records.
- (1) The information in electronic records systems and related documentation and indexes must be scheduled for disposition no later than one year after the implementation of the system.
 - (2) Procedures must be established for systematically backing up, copying, reformatting, and providing other necessary maintenance for the retention and usability of electronic records throughout their prescribed life cycles.
- i. Destruction of electronic records.
- (1) Electronic records may be destroyed only in accordance with a records disposition authority approved by the Archivist of the United States. This authority is obtained through the Records Management Branch (OIS/RA/RD).
 - (2) This process is exclusive, and records of the United States Government, including electronic records, may not be alienated or destroyed except through this process.
 - (3) Electronic records scheduled for destruction must be disposed of in a manner that ensures protection of any sensitive, proprietary or national security information. Magnetic recording media are not to be reused if the previously recorded information can be compromised in any way. Refer to 12 FAM for requirements regarding the security of magnetic media.
- j. All automated information systems (AIS) or facsimile machines used to process or store electronic records must comply with the security regulations contained in 12 FAM.

5 FAM 442 FACSIMILE RECORDS

(TL:IM-19; 10-30-1995)

The use of facsimile (FAX) equipment in appropriate and cost-effective circumstances is encouraged in the Department. Facsimile transmissions have the same potential to be Federal records as any other documentary materials received in Federal offices. The method of transmitting a document does not relieve sending or receiving offices of the responsibility for adequately and properly documenting official actions and activities and for ensuring the integrity of records. See the RMH, 5 FAH-4, for more guidance on facsimile records. See 5 FAM 561 for policies on FAX transmissions, including use of secure FAX equipment and using FAX equipment to send correspondence to members of Congress.

5 FAM 442.1 Facsimile Label

(TL:IM-19; 10-30-1995)

The Records Management Branch (OIS/RA/RD) has designed a facsimile transmission label (Form DS-1905), to be affixed to facsimile equipment. The label serves as a reminder to users of the responsibility to file record copies of facsimiles and to photocopy record copies of thermal paper facsimiles onto plain paper for filing. The labels are available from OIS/RA/RD.

5 FAM 442.2 FAX Transmittal Forms

(TL:IM-19; 10-30-1995)

- a. Form DS-1890, Unclassified Facsimile Transmittal Cover Sheet, and Form DS-1890-A, Classified Facsimile Transmittal Cover Sheet, are Department forms that are available for use in transmitting documents. Their use is not mandatory. These forms are available on the INFOFORMS disk, which is part of the Department's INFOEXPRESS application. At a minimum, the transmittal form which is used by an office, should contain the following information:

- date of transmittal
- sending and receiving office information (symbol, name, voice & fax telephone numbers)
- subject information, including TAGS/Terms to help properly file the documents
- any comments regarding the transmission
- appropriate security classification, when using a secure fax machine.

- b. Transmittal cover sheets containing substantive comments are to be filed with related record material. Those containing informal messages can be destroyed upon receipt or when no longer needed.

5 FAM 443 ELECTRONIC MAIL (E-MAIL) RECORDS

5 FAM 443.1 Principles Governing E-Mail Communications

(TL:IM-19; 10-30-1995)

- a. All Government employees and contractors are required by law to make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency (Federal Records Act, or "FRA," 44 U.S.C. 3101 et

seq). In addition, Federal regulations govern the life cycle of these records: they must be properly stored and preserved, available for retrieval, and subject to appropriate approved disposition schedules.

- b. As the Department's information modernization program goes forward, new forms of electronic communications have become increasingly available within the Department and between the Department and overseas posts. One example of the improvements that modernization has brought is the automatic electronic preservation of departmental telegrams. Employees are reminded that under current policy departmental telegrams should be used to convey policy decisions or instructions to or from posts, to commit or request the commitment of resources to or from posts, or for official reporting by posts.
- c. Another important modern improvement is the ease of communication now afforded to the Department world-wide through the use of E-mail. Employees are encouraged to use E-mail because it is a cost-efficient communications tool. All employees must be aware that some of the variety of the messages being exchanged on E-mail are important to the Department and must be preserved; such messages are considered Federal records under the law. The following guidance is designed to help employees determine which of their E-mail messages must be preserved as Federal records and which may be deleted without further authorization because they are not Federal record materials.

5 FAM 443.2 Which E-Mail Messages are Records

(TL:IM-19; 10-30-1995)

- a. E-mail messages are records when they meet the definition of records in the Federal Records Act. The definition states that documentary materials are Federal records when they:
 - are made or received by an agency under Federal law or in connection with public business; and
 - are preserved or are appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government, or because of the informational value of the data in them.
- b. The intention of this guidance is not to require the preservation of every E-mail message. Its purpose is to direct the preservation of those messages that contain information that is necessary to ensure that departmental policies, programs, and activities are adequately documented. E-mail message creators and recipients must decide whether a particular message is appropriate for preservation. In making these decisions, all personnel should exercise the same judgment they use when determining whether to retain and file paper records.
- c. Under FRA regulations (36 CFR 1222.38), principal categories of materials, including E-mail, that are to be preserved are:

- records that document the formulation and execution of basic policies and decisions and the taking of necessary actions;
- records that document important meetings;
- records that facilitate action by agency officials and their successors in office;
- records that make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government; and
- records that protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.

d. For example, just like paper records, E-mail messages that may constitute Federal records include:

- (1) E-mail providing key substantive comments on a draft action memorandum, if the E-mail message adds to a proper understanding of the formulation or execution of Department action;
- (2) E-mail providing documentation of significant Department decisions and commitments reached orally (person to person, by telecommunications, or in conference) and not otherwise documented in Department files;
- (3) E-mail conveying information of value on important Department activities, e.g. data on significant programs specially compiled by posts in response to a Department solicitation, if the E-mail message adds to a proper understanding of Department operations and responsibilities.

5 FAM 443.3 How to Preserve E-Mail Records

(TL:IM-19; 10-30-1995)

For those E-mail messages and attachments that meet the statutory definition of records, it is essential to ensure that the record documentation include the E-mail message, any attachments, and essential transmission data (i.e. who sent the message, the addressees and any other recipients, and when it was sent). In addition, information about the receipt of messages should be retained if users consider it necessary for adequately documenting Department activities. If transmission and necessary receipt data is not printed by the particular E-mail system, the paper copies must be annotated as necessary to include such data. Until technology allowing archival capabilities for long-term electronic storage and retrieval of E-mail messages is available and installed, those messages warranting preservation as records (for periods longer than current E-mail systems routinely maintain them) must be printed out and filed with related records. Instructions for printing and handling of Federal records for most of the Department's existing E-mail systems have been prepared and will be available through bureau Executive Offices

5 FAM 443.4 Records Management Reviews

(TL:IM-19; 10-30-1995)

The Department's Records Management Office (OIS/RA/RD) conducts periodic reviews of the records management practices both at headquarters and at overseas posts. These reviews ensure proper records creation, maintenance, and disposition by the Department. These periodic reviews now will include monitoring of the implementation of the Department's E-mail policy.

5 FAM 443.5 Points to Remember About E-Mail

(TL:IM-19; 10-30-1995)

- Department E-mail systems are for official use only by authorized personnel.
- The information in the systems is Departmental, not personal. No expectation of privacy or confidentiality applies.
- Before deleting any E-mail message, apply these guidelines to determine whether it meets the legal definition of a records and if so, print it.
- Be certain the printed message kept as a record contains the essential transmission and receipt data; if not, print the data or annotate the printed copy.
- File the printed messages and essential transmission and receipt data with related files of the office.
- Messages that are not records may be deleted when no longer needed.
- Certain E-mail messages that are not Federal records may still be subject to pending requests and demands under the Freedom of Information Act, the Privacy Act, and litigation and court orders, and should be preserved until no longer needed for such purposes.
- Classified information must be sent via classified E-mail channels only, with the proper classification identified on each document.
- When E-mail is retained as a record, the periods of its retention is governed by records retention schedules. Under those schedules, records are kept for defined periods of time pending destruction or transfer to the National Archives.

5 FAM 443.6 Future Technology

(TL:IM-19; 10-30-1995)

- a. The Department is actively working to develop systems that will enable those E-mail messages that are official records to be preserved electronically.
- b. These regulations are in compliance with those set forth by the National Archives and Records Administration.

- c. The Department and all posts are requested to bring these regulations to the attention of all Department employees and contractors and to begin its implementation immediately.

5 FAM 444 THROUGH 449 UNASSIGNED

**Instructions for Preserving Email of
Departing Senior Officials
August 2014**

- 1) As part of the employee check-out process, Executive Directors and Post Management Officers must notify their system administrators of the departure of designated Senior Officials and direct the system administrators to replicate the Official's remaining email onto CDs according to the following directions. If possible ask departing Officials to delete truly personal emails (to/from family, friends, and other non-work related emails) from their inbox, sent mail and PST. folders.
- 2) Note, preceding the Senior Officials' departure, at no time during their tenure in a position will their email account be deleted, cleared, or wiped for any reason. If, for instance, they reach their maximum allotted space in their mailbox, the Executive Director, Post Management Officer, and the system administrator will work constructively with the Senior Official to move older emails into stable and secure storage until the check-out process delineated in Instruction 1 is initiated.
- 3) System administrators must disable (but NOT delete) the OpenNet, ClassNet, POEMS and PACE Active Directory (AD) accounts of departing Officials.
- 4) System administrators do NOT delete the OpenNet, ClassNet, POEMS and PACE email accounts of departing Officials.
- 5) System administrators DO hide (but not remove) names of departing Officials from GALs.
- 6) System administrators DO delete the names of departing Officials from DLs.
- 7) Executive Directors, Office Directors or equivalent (Domestic Offices) or Management Counselors/Officers (Posts) must provide A/GIS/IPS/RA (by OpenNet mail to Records-DL@state.gov) with (a) the name of departed officials, (b) the designated Bureau/Post Records Management Coordinator, and (c) the Bureau/Post System Administrator. After the information is copied to the CDs, the bureau/post must verify that the CDs are readable before sending.
- 8) System administrators should create CDs for each OpenNet, ClassNet, POEMS and PACE email account of departed Officials. One set must be created for retirement, using the form DS-693, to A/GIS/IPS/RA for records preservation; the other is for Bureau/Post use, if required. See the *How to Retire Records* page of the DOS Records Management intranet site for further guidance on retiring records using the DS-693:
<http://a.m.state.sbu/sites/gis/ips/RA/Pages/RetiredRecords.aspx>.
- 9) System administrators must use the following .PST naming conventions:

- a. For "Mailbox" content, use the user name followed by "_MB".
- b. i.e., Smith_John H_MB. If the mailbox exceeds the capacity of one CD, use: Smith_John H_MB1 for the first .PST created by the system administrator and Smith_John H_MB2 for the second .PST created by the system administrator, etc. (System administrators can decide where/how to split the content among multiple CDs.)
- c. For existing (user created) .PSTs, aka "personal folders", (this is a misnomer used by Microsoft since the content is "official", not "personal"), use the user name followed by "_PF" i.e: Smith, John H_PF . If the existing PSTs exceed the capacity of one CD, or there are multiple .PSTs, use Smith, John H_PF1 for the first .PST, Smith, John H_PF2 for the second .PST, etc. (System administrators can decide where/how to split the content among multiple CDs.)

10) CD markings:

- a. CDs from OpenNet, POEMS and PACE should be marked "SBU" (i.e., content not intended for public disclosure in accordance with 12 FAM 5400). CDs from ClassNet must be marked "Secret" (12 FAM 632.1-6).
- b. CDs must be marked with the user's name and office symbol or Post (example: John H. Doe, IRM/OPS/MSO).
- c. CDs must be marked with the users SMTP address (example jdoe@state.gov or jdoe@state.sgov.gov).
- d. In the event .PST exceeds one CD, the CDs must include X of Y (example, 1 of 3.)

11) Distributed System Administrator roles:

- a. IRM will handle CD production for email accounts of users under IT Desktop Consolidation.
- b. Bureau/Office system administrators will handle CD production for email accounts that are NOT managed under IT Desktop Consolidation.
- c. Post system administrators should handle CD production for their email accounts.
- d. IRM's IT Service Center (IT Service Center@State.gov or (202) 647-2000) will be available to assist Post and Bureau system administrators with technical support for the .PST and CD creation process.

12) System administrators must NOT delete the source mailbox or .PST files until after receipt of an email confirmation from A/GIS/IPS/RA and authorization to delete.

13) Technical questions relating to the CD creation can be sent to the IT Service Center on OpenNet at ITServiceCenter@state.gov or on ClassNet to ITServiceCenter@state.sgov.gov or by calling 202-647-2000. Other questions can be sent to A/GIS/IPS/RA on OpenNet at records-dl@state.gov or on ClassNet at records-dl@state.sgov.gov .

NOTE: Transferring records through Direct Network Transfer is *also an available option for the emails of Senior Officials*. For assistance, please contact records@state.gov.

UNITED STATES DEPARTMENT OF STATE

Department Notice



Office of Origin: M
Announcement Number: 2014_10_115
Date of Announcement: October 17, 2014

A Message from Under Secretary for Management Patrick F. Kennedy regarding State Department Records Responsibilities and Policy

As the Senior Agency Official (SAO) for records, it is my responsibility to ensure that we maintain the documentation of all that we do in the performance of our official duties, not only because it is required by law and is a good business practice, but because it is the right thing to do.

The Office of Management and Budget (OMB) and the National Archives and Records Administration (NARA) have recently issued joint guidance on managing email that is consistent with Department policy. This guidance serves as a reminder to ALL employees regardless of rank or position -- including Foreign Service and Civil Service employees, contractors, When Actually Employed (WAEs) employees, and Locally Employed Staff (LES) of the Department -- that we are responsible for creating records necessary to document our activities, in addition to the proper management and preservation of records. These responsibilities are applicable to all records made or received in the conduct of agency business, regardless of physical format or media, including e-mail.

In short, as a condition of our employment with the USG, employees at every level have both a legal responsibility and a business obligation to ensure that the documentation of their official duties is captured, preserved, managed, protected and accessible in official government systems. This includes email.

Through Presidential initiatives and under the leadership of OMB and NARA, this Administration is moving aggressively to ensure we capture the essential documentation of what we do for ourselves and for posterity. It's important for you to know that the public appetite for our contemporary records is huge. The historical records of the State Department are the most accessed of all the agency records archived at the National Archives. So, in continuing our long standing tradition of record keeping - of preserving our history - it is imperative we leverage new technologies to ensure officials and the public today, as well as future generations, will know what we have done to promote our foreign policy mission with its related programs, operations and activities.

With that in mind, we recently reminded senior officials and other selected employees of their

records responsibilities, and provided instructions for preserving the e-mail of senior officials. See 14 STATE 111506 and my August 28, 2014 memorandum, "Senior Officials' Records Management Responsibilities." Both are available on the [Department's Records Management website](#).

While employees, including senior officials, may delete personal e-mails, they should be aware that the definition of a personal e-mail is very narrow. The only e-mails that are personal or non-record are those that do not relate to or affect the transaction of Government business. Departing employees are also reminded they may take with them only personal papers and non-record materials, subject to review by records officers to ensure compliance with federal records laws and regulations. All federal records generated by employees, including senior officials, belong to the Department of State.

In addition to the responsibility for preserving the documentation of official activities insofar as it is captured in email, employees generally should not use private e-mail accounts (e.g., Gmail, AOL, Yahoo, etc.) for official business. However, in those very limited circumstances when it becomes necessary to do so, the email messages covering official business sent from or received in a personal account must be captured and preserved in one of the Department's official electronic records systems (i.e., SMART or POEMS). The best way for employees to ensure this is to forward e-mail messages from a private account to their respective State account. Private email accounts should not be used for classified information.

I appreciate your cooperation in adhering to this policy guidance. This is an essential part of your official responsibilities. Further instructions will be forthcoming, as well as codification of this policy in the FAM. Should you have any questions, please address them to Records-DL@state.gov or visit the [Department's Records Management website](#) for more information. As part of the Department's records management responsibility there is an on-going effort to promulgate guidance that covers such technologies as email, instant messaging, social media and other online tools that are becoming more widely used.

Patrick F. Kennedy

Under Secretary for Management

[◀ Return to Department Notices index](#)

CLASSIFICATION: UNCLASSIFIED
Page 1 of 3

From: SMART Archive
Sent: 10/30/2014 6:57:49 PM
To: ALL DIPLOMATIC AND CONSULAR POSTS COLLECTIVE; svcSMARTBTSP08
Subject: State Department Records Responsibilities and Policy.

UNCLASSIFIED



MRN: 14 STATE 128030
Date/DTG: Oct 30, 2014 / 302301Z OCT 14
From: SECSTATE WASHDC
Action: ALL DIPLOMATIC AND CONSULAR POSTS COLLECTIVE ROUTINE
E.O.: 13526
TAGS: AINF, AMGT, ASEC
Pass Line: INFORM CONSULS
FROM THE UNDER SECRETARY FOR MANAGEMENT PATRICK F. KENNEDY
Subject: State Department Records Responsibilities and Policy.

1. As the Senior Agency Official (SAO) for records, it is my responsibility to ensure that we maintain the documentation of all that we do in the performance of our official duties, not only because it is required by law and is a good business practice, but because it is the right thing to do.

2. The Office of Management and Budget (OMB) and the National Archives and Records Administration (NARA) have recently issued joint guidance on managing email that is consistent with Department policy. This guidance serves as a reminder to ALL employees regardless of rank or position -- including Foreign Service and Civil Service employees, contractors, When Actually Employed (WAEs) employees, and Locally Employed Staff (LES) of the Department -- that we are responsible for creating records necessary to document our activities, in addition to the proper management and preservation of records. These responsibilities are applicable to all records made or received in the conduct of agency business, regardless of physical format or media, including e-mail.

3. In short, as a condition of our employment with the USG, employees at every level have both a legal responsibility and a business obligation to ensure that the documentation of their official duties is captured, preserved, managed, protected and accessible in official government systems. This includes email.

4. Through Presidential initiatives and under the leadership of OMB and NARA, this Administration is moving aggressively to ensure we capture the essential documentation of what we do for ourselves and for posterity. It's important for you to know that the public appetite for our contemporary records is huge. The historical records of the State Department are the most accessed of all the agency records archived at the National Archives. So, in continuing our long standing tradition of record keeping - of preserving our history - it is imperative we

CLASSIFICATION: UNCLASSIFIED
Page 1 of 3

CLASSIFICATION: UNCLASSIFIED
Page 2 of 3

leverage new technologies to ensure officials and the public today, as well as future generations, will know what we have done to promote our foreign policy mission with its related programs, operations and activities.

5. With that in mind, we recently reminded senior officials and other selected employees of their records responsibilities, and provided instructions for preserving the e-mail of senior officials. See 14 STATE 111506 and my August 28, 2014 memorandum, "Senior Officials' Records Management Responsibilities." Both are available on the [Department's Records Management website](#).

6. While employees, including senior officials, may delete personal e-mails, they should be aware that the definition of a personal e-mail is very narrow. The only e-mails that are personal or non-record are those that do not relate to or affect the transaction of Government business. Departing employees are also reminded they may take with them only personal papers and non-record materials, subject to review by records officers to ensure compliance with federal records laws and regulations. All federal records generated by employees, including senior officials, belong to the Department of State.

7. In addition to the responsibility for preserving the documentation of official activities insofar as it is captured in email, employees generally should not use private e-mail accounts (e.g., Gmail, AOL, Yahoo, etc.) for official business. However, in those very limited circumstances when it becomes necessary to do so, the email messages covering official business sent from or received in a personal account must be captured and preserved in one of the Department's official electronic records systems (i.e., SMART or POEMS). The best way for employees to ensure this is to forward e-mail messages from a private account to their respective State account. Private email accounts should not be used for classified information.

8. I appreciate your cooperation in adhering to this policy guidance. This is an essential part of your official responsibilities. Further instructions will be forthcoming, as well as codification of this policy in the FAM. Should you have any questions, please address them to Records-DL@state.gov or visit the [Department's Records Management website](#) for more information. As part of the Department's records management responsibility there is an on-going effort to promulgate guidance that covers such technologies as email, instant messaging, social media and other online tools that are becoming more widely used.

Signature: Kerry

Drafted By: A/GIS: MPGRAFELD
Cleared By: A:JBARR A/GIS:MPGRAFELD A/GIS/IPS ACTING:JHACKETT
A/GIS/IPS/RA:WFISCHER M/PRI:ATEPLITZ H:CDUVAL AF/EX:MTABLER-STONE
DS/SI:DREID EAP/EX:KSTANTON
EUR-IO/EX:JARBIN L:RUISEK NEA-SCA/EX:PHOFFMAN+
WHA/EX:APAN A/EX:JDEGARMO A/FO:DWHITTEN S/ES-O: MTOUSSAINT
WASHDCUJareroE
Approved By: M:KAUSTIN-FERGUSON
Released By: IRM_OPS_MSO:Jarero, Eduardo

Dissemination Rule: Archive Copy


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CLASSIFICATION: UNCLASSIFIED
Page 3 of 3

**UNDER SECRETARY OF STATE
FOR MANAGEMENT
WASHINGTON**


Dear Ms. Mills:

NOV 12 2014

The Department of State has a longstanding and continuing commitment to preserving the history of U.S. diplomacy, established in authorities under the Federal Records Act of 1950. I am writing to you, the representative of Secretary of State Hillary Clinton, as well as to representatives of other former Secretaries (principals), to request your assistance in further meeting this requirement.

The Federal Records Act of 1950, as amended, 44 U.S.C. chapters 29, 31 and 33, seeks to ensure the preservation of an authoritative record of official correspondence, communications, and documentation. Last year, in *Bulletin 2013-03*, the National Archives and Records Administration (NARA) clarified records management responsibilities regarding the use of personal email accounts for official government business. NARA recommended that agencies refer to its guidance when advising incoming and departing agency employees about their records management responsibilities. This bulletin was followed by additional NARA guidance on managing email issued on September 15, 2014. See enclosed.

We recognize that some period of time has passed since your principal served as Secretary of State and that the NARA guidance post-dates that service. Nevertheless, we bring the NARA guidance to your attention in order to ensure that the Department's records are as complete as possible. Accordingly, we ask that should your principal or his or her authorized representative be aware or become aware in the future of a federal record, such as an email sent or received on a personal email account while serving as Secretary of State, that a copy of this record be made available to the Department. In this regard, please note that diverse Department records are subject to various disposition schedules, with most

Enclosures - 3

Ms. Cheryl Mills,
1361 Locus Road NW,
Washington, DC 20012.

-2-

Secretary of State records retained permanently. We ask that a record be provided to the Department if there is reason to believe that it may not otherwise be preserved in the Department's recordkeeping system.

The Department is willing to provide assistance to you in this effort. In the meantime, should you have any questions regarding this request, please do not hesitate to contact William Fischer, A/GIS/IPS/RA, Agency Records Officer, at (202) 261-8369.

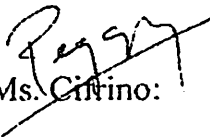
We greatly appreciate your consideration of and assistance with this matter.

Sincerely,

A handwritten signature in black ink, appearing to be 'P. Kennedy', written over the printed name.

Patrick F. Kennedy

UNDER SECRETARY OF STATE
FOR MANAGEMENT
WASHINGTON


Dear Ms. Ciffrino:

12 2014

The Department of State has a longstanding and continuing commitment to preserving the history of U.S. diplomacy, established in authorities under the Federal Records Act of 1950. I am writing to you, the representative of Secretary of State Colin Powell, as well as to representatives of other former Secretaries (principals), to request your assistance in further meeting this requirement.

The Federal Records Act of 1950, as amended, 44 U.S.C. chapters 29, 31 and 33, seeks to ensure the preservation of an authoritative record of official correspondence, communications, and documentation. Last year, in *Bulletin 2013-03*, the National Archives and Records Administration (NARA) clarified records management responsibilities regarding the use of personal email accounts for official government business. NARA recommended that agencies refer to its guidance when advising incoming and departing agency employees about their records management responsibilities. This bulletin was followed by additional NARA guidance on managing email issued on September 15, 2014. See enclosed.

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Enclosures - 3

Ms. Peggy Ciffrino,
Principal Assistant to General Colin Powell,
909 North Washington Street, Suite 700,
Alexandria, Virginia 22314.

-2-

Secretary of State records retained permanently. We ask that a record be provided to the Department if there is reason to believe that it may not otherwise be preserved in the Department's recordkeeping system.

The Department is willing to provide assistance to you in this effort. In the meantime, should you have any questions regarding this request, please do not hesitate to contact William Fischer, A/GIS/IPS/RA, Agency Records Officer, at (202) 261-8369.

We greatly appreciate your consideration of and assistance with this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Patrick F. Kennedy', with a stylized flourish at the end.

Patrick F. Kennedy

UNDER SECRETARY OF STATE
FOR MANAGEMENT
WASHINGTON

OCT 28 2014

Dear Mr. Bellinger:

The Department of State has a longstanding and continuing commitment to preserving the history of U.S. diplomacy, established in authorities under the Federal Records Act of 1950. I am writing to you, the representative of Secretary of State Condoleezza Rice, as well as to representatives of other former Secretaries (principals), to request your assistance in further meeting this requirement.

The Federal Records Act of 1950, as amended, 44 U.S.C. chapters 29, 31 and 33, seeks to ensure the preservation of an authoritative record of official correspondence, communications, and documentation. Last year, in *Bulletin 2013-03*, the National Archives and Records Administration (NARA) clarified records management responsibilities regarding the use of personal email accounts for official government business. NARA recommended that agencies refer to its guidance when advising incoming and departing agency employees about their records management responsibilities. This bulletin was followed by additional NARA guidance on managing email issued on September 15, 2014. See enclosed.

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Enclosures - 3

Mr. John B. Bellinger III,
Arnold & Porter LLP,
555 Twelfth Street, NW,
Washington, DC 20004-1206.

-2-

Secretary of State records retained permanently. We ask that a record be provided to the Department if there is reason to believe that it may not otherwise be preserved in the Department's recordkeeping system.

The Department is willing to provide assistance to you in this effort. In the meantime, should you have any questions regarding this request, please do not hesitate to contact William Fischer, A/GIS/IPS/RA, Agency Records Officer, at (202) 261-8369.

We greatly appreciate your consideration of and assistance with this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'P. Kennedy', with a stylized flourish at the end.

Patrick F. Kennedy

UNDER SECRETARY OF STATE
FOR MANAGEMENT
WASHINGTON

NOV 12 2014

Dear Ms. Stewart:

The Department of State has a longstanding and continuing commitment to preserving the history of U.S. diplomacy, established in authorities under the Federal Records Act of 1950. I am writing to you, the representative of Secretary of State Madeleine K. Albright, as well as to representatives of other former Secretaries (principals), to request your assistance in further meeting this requirement.

The Federal Records Act of 1950, as amended, 44 U.S.C. chapters 29, 31 and 33, seeks to ensure the preservation of an authoritative record of official correspondence, communications, and documentation. Last year, in *Bulletin 2013-03*, the National Archives and Records Administration (NARA) clarified records management responsibilities regarding the use of personal email accounts for official government business. NARA recommended that agencies refer to its guidance when advising incoming and departing agency employees about their records management responsibilities. This bulletin was followed by additional NARA guidance on managing email issued on September 15, 2014. See enclosed.

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Enclosures - 3

Ms. Jan Stewart,
Albright Stonebridge Group,
1101 New York Avenue NW, Suite 900,
Washington, DC 20005.

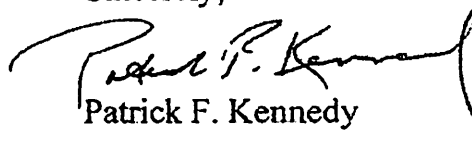
-2-

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We greatly appreciate your consideration of and assistance with this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick F. Kennedy". The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

Patrick F. Kennedy

THE SECRETARY OF STATE
WASHINGTON

The Honorable
Steve A. Linick
Inspector General
Department of State
Washington, DC 20520

MAR 25 2015

Dear Inspector General Linick:

It is critical for the State Department to preserve a full and complete record of American foreign policy, consistent with federal laws and regulations. It is also important for the American public to have access to that record. The Department of State is committed to these interrelated principles of preservation and transparency.

For several years, the Department has been engaged in an effort to update its approach to records management in line with guidance from the National Archives and Records Administration (NARA). These are important initiatives: We must adapt our systems and policies to keep pace with changes in technology and the way our personnel work. At the same time, the Department is focused on improving the way we search for and produce documents in response to requests, whether through the Freedom of Information Act, inquiries from Congress, or access granted to historians and researchers.

I am pleased the Department has made strides to promote both preservation and transparency. We are working to improve and upgrade our capabilities. We are updating our technologies, improving and clarifying our training, and hiring additional people to work on these issues. And we are doing so with an eye towards meeting present obligations and anticipating the demands of the future.

Of course, there is still work to do. For example, the Department currently faces a sizable Freedom of Information Act burden—over 18,000 requests per year—that places a significant strain on existing resources and requires personnel to take time away from their work to further U.S. foreign policy. Although we are working to address the challenge, I am aware of recent reports that we are not there yet with respect to the FOIA. We are also facing challenges regarding our integration of recordkeeping technologies and the use of non-government systems by some Department personnel to conduct official business.

It is clear that putting the principles of preservation and transparency into practice is an evolving challenge, often hampered by resource constraints. The Department is working to improve, but I also know we can and must increase our efforts. To that end, I am requesting that your office undertake a review of our efforts to date, and to recommend concrete ways we can improve. The Department will benefit from your review, which will reinforce and augment the efforts already underway.

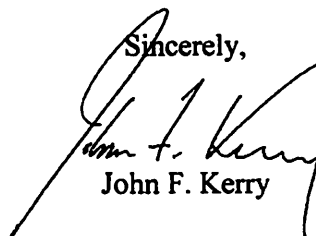
Several of the questions that have been brought to our attention are set forth below for your consideration. I welcome your insights on these and related matters:

- How are changes in technology and the way Department personnel work challenging existing preservation and transparency technologies and policies, especially with respect to email? Does the Department have the resources and tools it needs to meet NARA guidance on preservation and the concomitant resources to meet its obligations to disclose information pursuant to FOIA and other requests?
- What unique challenges are posed by the Department's global presence, spanning more than 280 overseas posts, with respect to meeting its preservation and transparency goals?
- How can the Department improve and streamline individual employees' efforts to preserve appropriate documents, both during their tenure and upon their departure? Are current training and instructions on preservation and responding to requests adequate and easy to follow?
- How can the Department improve its tools and methods for complying with the FOIA and other requests to search for and produce documents from both current and former employees?
- Congressional investigations and requests from multiple Committees have greatly increased, and the Department has had difficulty responding in a timely way. While new technology is being tested, what further steps can be taken to respond more effectively to Congressional inquiries, and what funding is necessary to accomplish this goal?
- Are bureaus within the Department currently engaged in an integrated approach to these challenges? Are there ways to improve the synergy between, for example, IRM, A Bureau, the Executive Secretariat, and regional and functional bureaus?
- Would the Department benefit from outside expertise on an integrated approach to document management, preservation, and transparency? If so, what expertise is required? Are there specific models or technologies the Department should consider?
- What resource constraints are inhibiting the Department's goals with respect to document management, preservation, and transparency?

The Department is already engaged on these and other challenges associated with meeting its preservation and transparency obligations. Again, I recognize the work that has already been done. But I also request your help in ensuring that the Department is doing everything it can to improve. I welcome your findings and commit the Department to cooperating fully with your review. Because of the importance of these issues, I ask you to consider an expedited review of these issues.

Thank you for your consideration of my request, and for your shared commitment to furthering the public interest.

Sincerely,



John F. Kerry



VIA HAND DELIVERY

The Honorable Patrick F. Kennedy
Under Secretary of State for Management
U.S. Department of State
2201 C Street, N.W.
Washington, DC 20520

December 5, 2014

Dear Under Secretary Kennedy:

I am writing in response to your request for assistance in helping the Department meet its requirements under the Federal Records Act.

Like Secretaries of State before her, Secretary Clinton at times used her own electronic mail account when engaging with other officials. On matters pertaining to the conduct of government business, it was her practice to use the officials' government electronic mail accounts. Accordingly, to the extent the Department retains records of government electronic mail accounts, it already has records of her electronic mail during her tenure preserved within the Department's recordkeeping systems.

Out of an abundance of caution though and to assist the Department, the Secretary's electronic mail has been reviewed. Please find enclosed those electronic mails we believe respond to your request. Given the volume of electronic mails being provided, please note these materials inevitably include electronic mail that are not federal, and in some cases are personal, records which we request be handled accordingly.

Sincerely,

A handwritten signature in dark ink, appearing to read "Cheryl Mills", is written over a horizontal line.

Cheryl Mills

Exhibit 5



March 9, 2015

VIA CERTIFIED MAIL & ONLINE PORTAL

John F. Hackett
Acting Director, Office of Information Programs and Services
A/GIS/IPS/RL, SA-2, Room 5021
U. S. Department of State
Washington, D.C. 20522-8100
Email: hackettjf@state.gov

Re: Freedom of Information Act Request

Dear Acting Director John F. Hackett:

I write on behalf of Cause of Action, a 501(c)(3) nonpartisan strategic oversight group committed to ensuring that the regulatory process is transparent, fair, and accountable.¹ In carrying out its mission, Cause of Action uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. In this regard, Cause of Action is concerned that there are potential violations of the law in connection with the lack of maintenance of former Secretary of State Hillary Clinton's emails while conducting business on behalf of the Government. Accordingly, Cause of Action requests certain documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

Former Secretary Clinton Conducted Government Business on Private Email.

On March 2, 2015, the *New York Times* reported that Mrs. Clinton

[E]xclusively used a personal email account to conduct government business as secretary of state. . . . Mrs. Clinton did not have a government email address during her four-year tenure at the State Department. Her aides took no actions to have her personal emails preserved on department servers at the time, as required by the Federal Records Act.²

¹ CAUSE OF ACTION, *available at* www.causeofaction.org.

² Michael S. Schmidt, *Hillary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules*, N.Y. TIMES (Mar. 2, 2015), <http://goo.gl/wdQatR>.

Acting Director John F. Hackett

March 9, 2015

Page 2

The *Associated Press* added that Mrs. Clinton's emails were stored on "a personal email server traced back to the Chappaqua, New York," where she keeps her home.³ Although press reports indicate that the White House was aware of Mrs. Clinton's potential breach of protocol at least by August 2014 (but "defer[red] to Clinton's aides"), Mrs. Clinton did not reveal the existence of the account until the *New York Times* article, in March 2015.⁴

Agencies (and Agency Heads) are Obligated to Preserve Records.

The Federal Records Act ("FRA") requires every federal agency, including the State Department, to preserve its electronic records in accordance with applicable statutes, regulations, and agency policies. In turn, National Archives and Records Administration ("NARA") interpretive regulations define "record" as all papers or "documentary materials, regardless of physical form or characteristics, made or received by an agency . . . in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government."⁵

When agency records are unlawfully or accidentally removed, defaced, altered, or destroyed, the agency must "promptly" notify NARA and produce a comprehensive report.⁶ The agency head also must collaborate with the Archivist of the United States to "initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed."⁷ If an agency does not contact the Attorney General within a reasonable period of time, the Archivist is required to do so on his own, while simultaneously notifying Congress that such a request has been made.

The FRA further establishes the framework for records management throughout the federal government and requires the head of every agency, such as then-Secretary Clinton, to "establish safeguards against the removal or loss of records."⁸ Agency heads also must "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency."⁹ Moreover, the State Department's Foreign Affairs Manual ("FAM") provides direction "with respect to the creation, maintenance, use, and disposition of records, including electronic . . . and Internet" records.¹⁰ FAM tasks the Secretary with the primary responsibility to ensure the agency is

³ Jack Gillum and Ted Bridis, *House committee subpoenas Clinton emails in Benghazi probe*, ASSOCIATED PRESS (Mar. 5, 2015), <http://goo.gl/25yWBb>; see also J.K. Trotter, *Source: Top Clinton Aides Used Secret Email Accounts at State Dept.*, GAWKER.COM (Mar. 3, 2015), <http://goo.gl/ctOQfh> (noting that other State Department employees also used private email accounts to conduct government business).

⁴ Edward-Isaac Dove, *White House alerted to potential Clinton email problem in August*, POLITICO.COM (Mar. 6, 2015), <http://goo.gl/Dx50B8>.

⁵ 36 C.F.R. § 1220.18.

⁶ *Id.* § 1230.14.

⁷ 44 U.S.C. § 3106.

⁸ *Id.* § 3105.

⁹ *Id.* § 3101.

¹⁰ Dep't of State, 5 Foreign Affairs Manual, at § 411(2), available at <http://goo.gl/CISv1R>.

Acting Director John F. Hackett

March 9, 2015

Page 3

preserving its records “in accordance with the Federal Records Act.”¹¹ FAM adopts NARA’s broad definition of “record” as all papers or “documentary materials, regardless of physical form or characteristics, made or received by an agency . . . in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government.”¹² FAM directs that emails in particular “must be preserved [because] such messages are considered Federal records under the law.”¹³

With regard to classified material, the current FAM provides that employees “must never remove classified materials from government custody.”¹⁴ The previous version of the FAM section on transfers, which was in place during much of Mrs. Clinton’s tenure at the State Department, provides that “when seeking to transfer records to state or private organizations . . . employees must obtain [Record Management Branch] and NARA approval.”¹⁵

The Evidence Indicates Non-Compliance with the Law.

As set forth above, news reports reflect that Mrs. Clinton had control over her own server hosting official agency emails, including relevant documents responsive to congressional investigations into the terror attacks in Benghazi, Libya. The FRA, in addition to binding regulations issued by NARA and the State Department (through its FAM) required then-Secretary Clinton to preserve her official communications on federal government servers or electronic records systems approved by NARA.

Moreover, former-Secretary Clinton took no action during her tenure as Secretary of State to preserve her personal emails on department servers, as required by the FRA. Based upon her position as a federal agency head, in addition to numerous inspector general reports finding inappropriate use of personal emails (as discussed below) Mrs. Clinton knew or should have known that the failure to preserve her personal emails and the storage of those emails on a personal server, without specific authorization from the Archivist, constituted a removal of documents or materials without authority and with the intent to retain such documents or materials at an unauthorized location. Finally, even if Mrs. Clinton’s use of a personal email and server during her tenure as Secretary of State does not constitute removal, the possession of the only copies of official agency records as a departing employee on February 1, 2013 would constitute unlawful removal under the FRA and its interpreting regulations.

¹¹ *Id.* § 414.1.

¹² *Id.* § 415.1.

¹³ *Id.* § 443.1(c).

¹⁴ *Id.* § 432.1(c).

¹⁵ *Id.* § 430. The State Department has been unable to confirm whether Mrs. Clinton transferred classified materials to her personal email system, calling such inquiries not “a pertinent question.” Statement of Marie Harf, Deputy Spokesperson, Dep’t of State (Mar. 4, 2015), *available at* <http://goo.gl/qcsXnA>. However, if Mrs. Clinton had emails regarding, for example, the attacks in Benghazi, Libya, then either the Record Management Branch or NARA likely needed to be consulted.

Acting Director John F. Hackett

March 9, 2015

Page 4

With respect to Mrs. Clinton, there is no doubt that she had actual knowledge of the illegality of removing official records from the federal government. First, NARA has clearly stated that “agency officials may create Federal records if they conduct agency business on their personal email accounts.”¹⁶ And the Archivist’s own comments suggest that Mrs. Clinton did not abide by the regulations in place during her tenure.¹⁷ Second, during 1995 hearings (regarding Whitewater), a Secret Service agent testified that then-First Lady Clinton directed the unlawful removal of records from the office of Deputy White House Counsel Vincent Foster, who had committed suicide.¹⁸

Moreover, on March 27, 2012, the State Department, under Mrs. Clinton’s stewardship, reported that it “is considered a leading agency in the Executive Branch in records management and received a score of 92 in the most recent records management program evaluation conducted by” NARA.¹⁹ The report detailed that the State Department had replaced its outdated cable communication system with the State Messaging and Archive Retrieval Toolset (“SMART”), which “contains an email management component for capturing record email.”²⁰

The evidence shows that Mrs. Clinton had access to and did use the official State Department SMART system, which logged her communications.²¹ However, because Mrs. Clinton could access official emails via her personal system, we know that she had access to classified material on her personal computer, such as an agency communication discussing WikiLeaks (which contains portions that are classified).²² And an email from Paul Elliott, a government relations employee at TransCanada, to Nora Toiv in the Secretary’s Office, shows that the office was able to circumvent the SMART system when needed.²³

¹⁶ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT & ARCHIVIST OF THE U.S., NAT’L ARCHIVES & RECORDS ADMIN., M-14-16, GUIDANCE ON MANAGING EMAIL (2014), available at <http://goo.gl/oDOIBS>.

¹⁷ David Corn, *How Hillary May Have Violated Government Rules on Emails*, MOTHER JONES (Mar. 3, 2015), available at <http://goo.gl/0LakhW>.

¹⁸ Angie Cannon, *Probe Turning More to Hillary Clinton D’amato Refused To Call Her to Testify. The Whitewater Committee Has Questions For Her Top Aides*, PHILLY.COM (June 26, 1995), <http://goo.gl/pWKJd>.

¹⁹ DEP’T OF STATE, SUMMARY CURRENT STATE OF RECORDS MANAGEMENT AT THE STATE DEPARTMENT at 1 (Mar. 27, 2012), available at <http://goo.gl/jXCv1u>.

²⁰ *Id.* at 2. SMART operates such that when “Department personnel send cables and record emails, a copy of the message is automatically sent to the Department’s official archive, which is an enterprise-wide electronic repository.” *Id.* at 5.

²¹ Memorandum from USDEL SECRETARY on Secretary Clinton’s September 26, 2009, Meeting with Mexican Foreign Secretary Espinosa (Oct. 20, 2009), available at <http://goo.gl/pEy3Jm>; Memorandum from SECSTATE WASH DC to AMEMBASSY CAIRO on Secretary Clinton’s May 28, 2009 Meeting with Egyptian Democracy Activists (June 2009), available at <http://goo.gl/kgcu7m>; Memorandum from SECSTATE WASH DC to AMEMBASSY BAGHDAD on Secretary Clinton’s December 12, 2011 Meeting with Iraqi Foreign Minister Zebari (Dec. 2011), available at <http://goo.gl/15NTGy>.

²² See Memorandum from SECSTATE WASH DC to ALL DIPLOMATIC AND CONSULAR POSTS on WikiLeaks Working Group Situation Report No. 14 (Dec. 2010), available at <http://goo.gl/ZeJIN2>.

²³ Email from Nora Toiv, Office of the Secretary, Dep’t of State to Paul Elliott, TransCanada, Corp. (Nov. 22, 2010), available at <http://goo.gl/6MGAZI>.

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Indeed, despite the agency's claims and its use of the SMART system, the Department of State Office of Inspector General ("DOS-OIG") has issued myriad reports exposing the agency's deficiencies in record keeping:

- In 2014, DOS-OIG concluded that the Bureau of Conflict and Stabilization Operations "does not have a uniform process for the storage and organization of files. Files and records are stored in several locations, including the bureau's network shared drive, SharePoint document libraries, *personal emails*, and hard drives."²⁴ The Bureau also permitted "[c]ontracting officer's representatives [to] keep emails and other materials on their *personal computers* instead of using shared drives or paper files."²⁵
- In 2013, DOS-OIG concluded that in the Bureau of East Asian and Pacific Affairs, the "staff members store official records variously on *personal drives*, *email folders*, shared drives, and SharePoint. Bureau shared drive folders are not organized in accordance with Department guidance."²⁶
- In 2012, DOS-OIG concluded that in the Bureau of Administration, Global Information Services, Office of Information Programs and Services, "SMART captured 61,156 of an estimated 15 million record emails in the system that should [have been] captured. The OIG team noted that confusion among Department employees and, in some cases, inadequate performance have resulted in an underuse of SMART's record email function."²⁷

These illustrative examples show that far from being an exemplar of proper records management in the Executive Branch, the State Department has a persistent and dangerous pattern of failing to comply with federal records laws.

Pursuant to FOIA, Cause of Action hereby requests access to the following records, from the time period of January 21, 2009 to the present:

1. All records referring or relating to training regarding the Federal Records Act, Records Management Handbook, and/or the Foreign Affairs Manual, which Secretary Clinton attended or completed, or for which her attendance or completion was required.
2. All records referring or relating to all electronic devices (including but not limited to a computer, mobile communications device, or email server) used by Secretary Clinton, but in the control and possession of the U.S. Department of State.

²⁴ DEP'T OF STATE, OFFICE INSPECTOR GEN., INSPECTION OF THE BUREAU OF CONFLICT AND STABILIZATION OPERATIONS at 20 (Mar. 2014), *available at* <http://goo.gl/pgWsYi> (emphasis added).

²⁵ *Id.* at 25 (emphasis added).

²⁶ DEP'T OF STATE, OFFICE INSPECTOR GEN., INSPECTION OF THE BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS at 26 (Sept. 2013), *available at* <http://goo.gl/JWrMNP> (emphasis added).

²⁷ DEP'T OF STATE, OFFICE INSPECTOR GEN., INSPECTION OF THE BUREAU OF ADMINISTRATION, GLOBAL INFORMATION SERVICES, OFFICE OF INFORMATION PROGRAMS AND SERVICES at 13 (Sept. 2012), *available at* <http://goo.gl/5BGRyT>

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3. All records referring or relating to the existence, installation, or removal of the SMART system on an electronic device (including but not limited to a computer, mobile communications device, or email server) used by, controlled by or in the exclusive possession of Secretary Clinton.
4. All documents relating to any waiver granted to Secretary Clinton regarding compliance with the SMART system.
5. All documents relating to any waiver granted to Secretary Clinton regarding compliance with the Federal Records Act.
6. All communications between Secretary Clinton (including her personal or professional delegates), or anyone in the Office of the Secretary and/or NARA concerning the use, transfer, disposition or preservation of Mrs. Clinton's electronic records on a server controlled or held by Secretary Clinton.
7. All communications between Secretary Clinton (including her personal or professional delegates), or anyone in the Office of the Secretary and/or NARA concerning the use, transfer, disposition or preservation of Mrs. Clinton's electronic records on a server controlled or held by the agency.

Request for Expedited Processing

Pursuant to FOIA and State Department regulations, Cause of Action hereby requests expedited processing of this request.²⁸ One of the bases that qualifies a request for expedited processing is when the "information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity."²⁹ A requester urgently needs information when the information relates to "a breaking news story of general public interest."³⁰

Former-Secretary Hillary Clinton exclusively using a private email account to conduct her official State Department activities is "a breaking news story of general public interest."³¹ This issue also relates to federal government activity, *i.e.*, the State Department's and/or Mrs. Clinton's potential failures to comply with the records management laws. Further, there are concerns that Mrs. Clinton may have failed to appropriately segregate classified national security information in her personal control from other information. Therefore, this request meets the test for expedited processing.

Request for Public Interest Fee Waiver

Cause of Action requests a public interest waiver of all applicable fees.³² This provision provides that agencies shall furnish requested records without or at reduced charge if "disclosure of the information is in the public interest because it is likely to contribute significantly to public

²⁸ See 5 U.S.C. § 552(a)(6)(E); 22 C.F.R. § 171.12(b).

²⁹ 22 C.F.R. § 171.12(b)(2).

³⁰ *Id.*, § 171.12(b)(2)(i).

³¹ See generally articles cited herein.

³² 5 U.S.C. § 552(a)(4)(A)(iii).

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understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”³³

The requested records would unquestionably shed light on the “operations or activities of the government,” namely the steps the State Department did or did not take that resulted in Mrs. Clinton using her private email account for official government business in potential contravention of federal statutory law and agency manuals. This information is likely to contribute significantly to public understanding because, to date, the State Department’s role in allowing Mrs. Clinton’s behavior to go unchecked is not fully known.

Cause of Action has both the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Cause of Action’s staff has a wealth of experience and expertise in government oversight, investigative reporting, and federal public interest litigation.³⁴ These professionals will analyze the information responsive to this request, use their editorial skills to turn raw materials into a distinct work, and share the resulting analysis with the public, whether through Cause of Action’s regularly published online newsletter, memoranda, reports, or press releases. Further, Cause of Action, a nonprofit organization under section 501(c)(3) of the Internal Revenue Code, does not have a commercial interest in making this request. The requested information will be used to educate the general public about the State Department’s treatment of private email accounts.

Request to be Classified as a Representative of the News Media

For fee status purposes, Cause of Action qualifies as a “representative of the news media” under FOIA.³⁵ Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.³⁶ Cause of Action gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters.³⁷ These distinct works are distributed to the public through various media, including

³³ *Id.*; see also 22 C.F.R. § 171.17(a).

³⁴ See 22 C.F.R. § 171.17(a)(1)(iii) (providing that one factor is “whether the requester has expertise in the subject area as well as the intention and ability to disseminate the information to the public”).

³⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II); 22 C.F.R. § 171.15(c).

³⁶ Cause of Action notes that the agency’s definition of “representative of the news media” at 22 C.F.R. § 171.11(o) is out of date and in conflict with the current statutory definition.

³⁷ See, e.g., *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com*, CAUSE OF ACTION (Sept. 8, 2014), available at <http://goo.gl/935qAi>; *Legal and Political Issues Raised by the Loss of Emails at the IRS*, CAUSE OF ACTION (July 8, 2014), available at <http://goo.gl/PaoEyi>; CAUSE OF ACTION, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://goo.gl/BiaEaH>; see also CAUSE OF ACTION, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://goo.gl/N0xSvs>; CAUSE OF ACTION, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://goo.gl/GpPlwR>.

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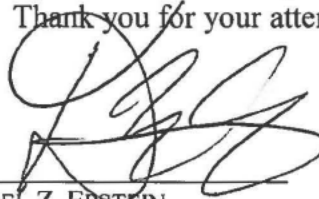
Cause of Action's website, which has been viewed just under 100,000 times in the past year alone.³⁸ Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via email.

The statutory definition of a "representative of the news media" unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."³⁹ In light of the foregoing, numerous federal agencies – including the State Department as recently as December 2014 – have appropriately recognized Cause of Action's news media status in connection with its FOIA requests.⁴⁰

Record Production and Contact Information

In an effort to facilitate document review, please provide the responsive documents in electronic form in lieu of a paper production. If readily reproducible, the production should consist of load files that are compatible with Concordance® Evolution. If a certain portion of responsive records can be produced more readily, Cause of Action requests that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by telephone at (202) 499-4232 or at daniel.epstein@causeofaction.org. Thank you for your attention to this matter.



DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

³⁸ *Google Analytics* for <http://www.causeofaction.org> (on file with Cause of Action).

³⁹ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

⁴⁰ *See, e.g.*, FOIA Request F-2015-106, Fed. Comm'n Comm'n (Dec. 12, 2014); Dep't of State, F-2014-21360 (Dec. 3, 2014); Nat'l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request 2015-OSEC-00771-F, U.S. Dep't of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, U.S. Dep't of Interior (Office of Sec'y) (Nov. 20, 2014); FOIA Request CFPB-2015-049-F, Consumer Fin. Prot. Bureau (Nov. 19, 2014); FOIA Request GO-14-307, Dep't of Energy (Nat'l Renewable Energy Lab.) (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep't of Energy (Nat'l Headquarters) (Aug. 14, 2014); FOIA Request LR-20140441, Nat'l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm'n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep't of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep't of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep't of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep't of Educ. (Jan. 20, 2012).