

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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CAUSE OF ACTION INSTITUTE	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 16-2145
	)	
JOHN F. KERRY,	)	
	)	
and	)	
	)	
DAVID S. FERRIERO,	)	
	)	
Defendants.	)	

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**EXHIBIT 1 TO COMPLAINT**

**United States House of Representatives Committee on Oversight and Government Reform**  
Hearing: *“Examining FOIA Compliance at the Department of State”*

Partial Transcript Prepared by Cause of Action Institute

LINK TO HEARING VIDEO: <https://www.youtube.com/watch?v=Hn7lZtX7a8>

@43:18

**Rep. Stephen Lynch (D-MA):**

I have a letter that you sent on November 12, 2014. I ask unanimous consent to submit it in the record. In your letter you ask Secretary Powell’s representative to provide all of Secretary Powell’s records that were not in the State Department’s record keeping system. Is that correct?

**Under Secretary Patrick Kennedy:**

Yes, sir.

**Rep. Lynch:**

OK. That would have included emails from his AOL account that were work-related, right?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

Ok. Did Secretary Powell . . . let me ask you, how many emails did he produce pursuant to your request?

**Under Sec’y Kennedy:**

Secretary Powell responded that he did not have access anymore to any of those records, sir.

**Rep. Lynch:**

He didn’t have access to them?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

So that number would be zero?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

I have another letter from you dated October 21, 2015. In this letter you ask Secretary Powell’s representative to contact AOL to determine whether any of his emails were still on their system. Is that correct?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

OK. To the best of your knowledge, did Secretary Powell follow-up and do this?

**Under Sec’y Kennedy:**

We never received a response to that request, sir.

**Rep. Lynch:**

Ok. I’ve got another letter from you, Ambassador Kennedy, dated November 6, 2015. In this letter, you inform the National Archives that Secretary Powell never contacted AOL. Isn’t that right?

**Under Sec’y Kennedy:**

That is correct, sir.

**Rep. Lynch:**

Ok. Again, Ambassador Kennedy, in July 2015, the Chief Records Officer for the National Archives asked the State Department to contact AOL directly to determine, and I quote, “whether it is still possible to retrieve the email records that may still be present.” Close quote. Mr. Kennedy, did you ever contact AOL?

**Under Sec’y Kennedy:**

Our lawyers advised, sir, that we are not a party to . . .

**Rep. Lynch:**

Would that answer be a “no”? Did you contact AOL?

**Under Sec’y Kennedy:**

No, sir, we did not contact AOL.

**Rep. Lynch:**

OK. So you got the Chief Records Officer asking you to contact AOL. And you’re saying “no” and your attorneys are telling you “no.”

**Under Sec’y Kennedy:**

They’re telling that we cannot make a request for someone else’s records from their provider. That request has to be made by them, sir.

**Rep. Lynch:**

Now, at some point the Inspector General informed you that Secretary Powell sent classified information from his AOL account. Did you contact AOL then?

**Under Sec’y Kennedy:**

Again, it’s the same answer, sir. We asked that Secretary Powell contact AOL.

**Rep. Lynch:**

So that answer would be “no.” I mean . . . but you have a responsibility here though. You admit that, by virtue of your position?

**Under Sec’y Kennedy:**

Yes, we contacted Secretary Powell.

[. . .]

@46:53

**Rep. Lynch:**

To your knowledge, has anybody at the State Department ever picked up the phone and called AOL about these questions?

**Under Sec’y Kennedy:**

As I said in response to your earlier questions, sir, it is . . . we cannot get records of another individual from their provider. They have to do it.

**Rep. Lynch:**

I don’t get this. This is ridiculous. This is the National Archives asking you to contact AOL. But you didn’t do that. You asked Secretary Powell to contact AOL. He didn’t do that. [. . .]

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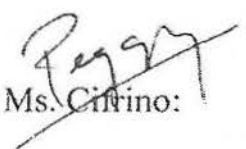
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**EXHIBIT 2 TO COMPLAINT**

UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON

NOV 12 2014

  
Dear Ms. Cifrino:

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.

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

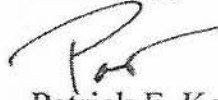
-2-

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 extending from the end.

Patrick F. Kennedy

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**EXHIBIT 3 TO COMPLAINT**



**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

OCT 21 2015

Peggy Cifrino  
Principal Assistant to General Colin Powell  
Office of General Colin L. Powell, USA (Ret)  
909 North Washington Street, Suite 700  
Alexandria, Virginia 22314

Dear Ms. Cifrino:

I am writing regarding the Department's November 12, 2014 request that former Secretary of State Colin Powell provide it with any federal records in his possession, such as an email sent or received on a personal email account while serving as Secretary of State, if there is reason to believe that it may not otherwise be preserved in the Department's recordkeeping system.

You previously advised, with respect to official emails sent on Secretary Powell's private account during his time in office, that the account he used has been closed for a number of years. Based on advice we have received from the National Archives and Records Administration, the Department would nevertheless encourage you – if you have not already done so – to check with the internet service or email provider for the former account to see if it is still possible to retrieve any official emails from Secretary Powell's tenure at the Department. If you do recover any such emails, we would appreciate your forwarding them to the Department.

Thank you for considering this request.

Sincerely,

  
Patrick F. Kennedy

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**EXHIBIT 4 TO COMPLAINT**

**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

November 6, 2015

Laurence Brewer  
Acting Chief Records Officer  
National Archives and Records Administration  
700 Pennsylvania Avenue, NW  
Washington, DC 20408

Dear Mr. Brewer,

The Department of State has been working these past months with the National Archives and Records Administration (NARA) regarding the emails of former Secretary of State Hillary Clinton. I am writing to provide NARA additional information regarding the Department's efforts, including information relevant to Paul M. Wester, Jr.'s July 2 letter to Margaret P. Grafeld, Deputy Assistant Secretary for Global Information Services.

Mr. Wester inquired as to steps the Department is taking to implement records management directives it issued in 2014 with respect to senior Department officials. As you know, in March of this year, Secretary Kerry asked the Department's Office of Inspector General ("OIG") to review and make recommendations for improving the Department's recordkeeping practices. Although OIG has not yet issued recommendations, Secretary Kerry appointed a Transparency Coordinator in September to work with Department bureaus and offices on improving Department records systems. It is expected that the Transparency Coordinator will be able to build on the work of the OIG as well as on the ongoing efforts of the Department's records management program, which has been instrumental in reminding all Department employees, including senior officials, of their records management responsibilities, including those regarding email.

The Department is reviewing email management options for the Department through an Electronic Records Management Working Group (ERMWG) that was established in order to meet the requirements for email management by December 31, 2016, as mandated by the President's Managing Government Records Directive. Although a long-term solution will be in place by the end of 2016, the

Department is working on several short-term steps to preserve senior officials' email. In February 2015, the Department's Executive Secretariat began journaling the email of 85 senior officials; as of October, the Executive Secretariat was journaling 112 senior officials. This includes the Deputy Secretaries, Under Secretaries, several senior advisers, as well as the Secretary's staff ranging from his chief of staff to staff assistants. The Department is also automatically journaling Secretary Kerry's email. Any email sent or received on Secretary Kerry's state.gov account is automatically copied and remotely saved electronically. In addition to the above listed officials, the Department began journaling the email accounts of Assistant Secretaries, Principal Deputy Assistant Secretaries, and a limited number of other senior officials in October 2015.

The Department updated its email policy in the Foreign Affairs Manual in October reminding employees that personal email accounts should only be used for official work in very limited circumstances and that under the Presidential and Federal Records Act Amendments of 2014, employees are prohibited from creating or sending a record using a non-official email account unless the employee (1) copies the employee's official email account in the original creation or transmission, or (2) forwards a complete copy of the record (including any attachments) to the employee's official email account not later than 20 days after the original creation or transmission. In addition, the Department's Foreign Service Institute (FSI) provides a variety of training courses, both classroom and online, that include records management. These courses include records management training for Office Management Specialists, Information Management Officers, and orientation courses for new employees. FSI also offers a specialized records management course for all levels of employees and training for State Messaging and Archive Retrieval Toolset (SMART) users.

The Secretary's Executive Secretariat regularly hosts record-keeping workshops for all Seventh Floor Department Principals' offices and employees, including five sessions in 2015. Representatives from the Office of Information Programs and Services (A/GIS/IPS) and the Correspondence, Records and Staffing Division of the Executive Secretariat Staff review senior officials' responsibilities for creating records necessary to document their activities and for the proper management and preservation of their records regardless of physical format or media. They also discuss departing senior officials' responsibility to identify their records prior to departure and to 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. Adherence to Department email

requirements in accordance with the Presidential and Federal Records Act Amendments of 2014 is also emphasized at these workshops.

The Executive Secretariat also requires a briefing for all incoming and departing employees assigned to Seventh Floor Department Principals' offices on their record keeping requirements and responsibilities. Upon notification of a senior official's departure, the Executive Secretariat Staff briefs and assists each departing Principal's office with the proper preservation of official records.

In his letter, Mr. Wester also requested that the Department contact former Secretary Clinton's representatives to request the native electronic version with the associated metadata of the approximately 55,000 pages of emails provided to the Department. As set forth in the Department's and NARA's September 17 motion to dismiss in the consolidated cases of *Judicial Watch v. Kerry*, No. 1:15-cv-00785-JEB and *Cause of Action Institute v. Kerry*, No. 1:15-cv-01068-JEB, the Department requested on May 22 that former Secretary Clinton provide an electronic copy of the approximately 55,000 pages of emails, and Secretary Clinton's attorney responded that they would do so. The electronic copy was not, however, provided; Secretary Clinton's counsel advised on August 12 that the email server that was used to store Secretary Clinton's emails while she was Secretary of State and the thumb drives that included electronic copies of the documents she had provided to the Department had been turned over to the Federal Bureau of Investigation (FBI). On September 14, 2015, the Department sent a letter to the FBI requesting an electronic copy of the approximately 55,000 pages. We have not yet received such a copy.

Mr. Wester also advised that the Department may want to reach out to both former Secretary Clinton and former Secretary Colin Powell to see if Department emails could be recovered from any internet service and email providers that they used. On October 2, 2015, the Department requested Secretary Clinton's counsel to confirm that "with regard to her tenure as Secretary of State, former Secretary Clinton has provided the Department with all federal records in her possession, regardless of their format or the domain on which they were stored or created, that may not otherwise be preserved in the Department's recordkeeping system. To the extent her emails might be found on any internet service and email providers, we encourage you to contact them." (Attachment A). On October 8, former Secretary Clinton's counsel wrote to:

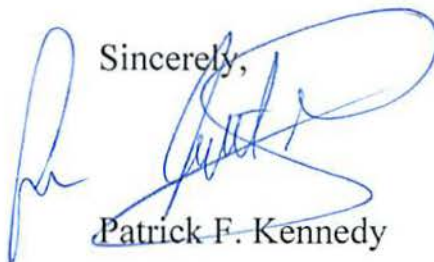
confirm that, with regard to her tenure as Secretary of State, former Secretary Clinton has provided the Department on December 5, 2014, with

all federal e-mail records in her custody, regardless of their format or the domain on which they were stored or created, that may not otherwise be preserved, to our knowledge, in the Department's recordkeeping system. She does not have custody of e-mails sent or received in the first few weeks of her tenure, as she was transitioning to a new address, and we have been unable to obtain these. In the event we do, we will immediately provide the Department with federal record e-mails in this collection. (Attachment B).

On October 21, the Department sent a letter to Secretary Powell's principal assistant similarly encouraging them to check with the internet service or email provider for Secretary Powell's former account to see if it is still possible to retrieve any official emails from his tenure at the Department. (Attachment C). The Department has not as yet received a response.

Finally, please be advised that in letters of March 11, 2015, the Department also requested of former aides to former Secretary Clinton -- Cheryl Mills, Huma Abedin, Jacob Sullivan, and Philippe Reines -- that should any of them be aware or become aware of a federal record in his or her possession, such as an email sent or received on a personal email account while serving in an official capacity at the Department, that such record be made available to the Department. We also advised them of NARA's records management guidance *Bulletin 2013-03* and the additional NARA guidance on managing email issued on September 15, 2014, some or all of which post-dated their service to the Department. The Department has received over one hundred thousand pages of documents from Ms. Mills, Ms. Abedin, Mr. Sullivan, and Mr. Reines collectively, through their representatives in response to the Department's request.

We hope that this information assists in NARA's understanding of this matter. As always, thank you for our continued close collaboration.

Sincerely,  
  
Patrick F. Kennedy

Enclosures

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**EXHIBIT 5 TO COMPLAINT**



NATIONAL  
ARCHIVES

JUL 02 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:

I am in receipt of your letter of April 2, 2015, responding to the National Archives and Records Administration's (NARA) formal request of March 3, 2015, that you provide us with the report required in 36 CFR 1230.14 concerning the potential alienation of Federal email records created and received by former Secretary of State Hillary R. Clinton.

I appreciate the details you have provided to date; however, recognizing that the situation continues to be fluid, there are currently two major questions or concerns that the Department needs to address.

First, in your response you described and forwarded key policy directives issued by the Department in 2014, on records management in general, including specific guidance related to the management of email and other electronic records of senior agency officials. Related to these policies, I am requesting additional information on how the Department implemented these directives with senior officials. More specifically, we would like to understand the specific training, procedures, and other controls the Department employed to ensure the key directives were implemented. This will allow NARA to evaluate whether there are appropriate safeguards in place to prevent the alienation of records from occurring in the future.

Second, as we have discussed, I would like to reiterate our request that the Department contact the representatives of former Secretary Clinton to secure the native electronic versions with associated metadata of the approximately 55,000 hard copy pages of emails provided to the

NATIONAL ARCHIVES *and*  
RECORDS ADMINISTRATION

8601 ADELPHI ROAD  
COLLEGE PARK, MD 20740-6001

[www.archives.gov](http://www.archives.gov)



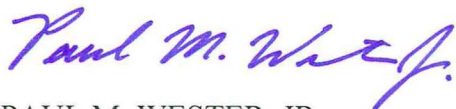
Department. If the Department is unable to obtain the electronic versions of these messages from Secretary Clinton, I am requesting that the Department inquire with the internet service or email provider of former Secretary Clinton, and also of former Secretary Powell, with regard to whether it is still possible to retrieve the email records that may still be present on their servers. As stated in the OMB/NARA M-12-18 *Managing Government Records Directive*, Federal agencies are required by the end of 2016 to maintain all electronic records, including email, in their native electronic format to facilitate active use and future access.

I am aware that there are multiple ongoing inquiries into the details of this case, including by Congressional oversight committees and the Department's Inspector General, which may already be addressing the requests that I have made. I would therefore appreciate continuing updates on the current status of these activities to the extent possible, particularly where the investigations may reveal that the collection Secretary Clinton provided to the Department is incomplete. I also look forward to receiving copies of the final reports of all such investigations, as well as the Department's plans for corrective action. This documentation will assist us in understanding this situation and the Department plans to ensure a comparable situation will not happen in the future.

In closing, I would like to convey my appreciation for the Department's efforts in following up with the representatives of the former Secretary on the many concerns that have surfaced in the past several months. We share many of the Department's concerns and stand ready to provide advice when needed on the records management issues that arise.

I look forward to receiving your response and appreciate your continued attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Paul M. Wester, Jr." in a cursive script.

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

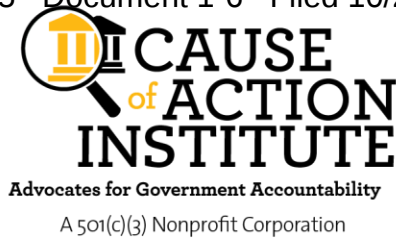
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**EXHIBIT 6 TO COMPLAINT**



October 12, 2016

**VIA CERTIFIED MAIL**

The Honorable John F. Kerry  
Secretary of State  
U.S. Department of State  
2201 C Street, N.W.  
Washington, D.C. 20520

Mr. John F. Hackett  
Director, Office of Information Programs and Services  
A/GIS/IPS/RL, SA-2, Rm. 5021  
U.S. Department of State  
Washington, D.C. 20522-8100

**Re: Federal Records Act Notification and Freedom of Information Act Request**

Dear Secretary Kerry and Mr. Hackett:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.<sup>1</sup> In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. To that end, we are investigating instances where high-ranking government officials have used personal devices and email accounts to conduct official agency business.

On September 8, 2016, at a hearing held by the House of Representatives Committee on Oversight and Government Reform, Under Secretary for Management Patrick F. Kennedy was questioned (among other matters) about Department of State (“State Department”) efforts to recover work-related email created or received by former Secretary Colin Powell on a personal AOL email account.<sup>2</sup> Consistent with the findings of the State Department Office of Inspector General,<sup>3</sup> Under Secretary Kennedy testified that, notwithstanding applicable Federal Records Act requirements, regulations promulgated by the National Archives and Records Administration (“NARA”), and long-standing State Department policies, the email records in question were not archived in State Department recordkeeping systems during Secretary Powell’s tenure and have

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<sup>1</sup> See CAUSE OF ACTION, *About*, [www.causeofaction.org/about/](http://www.causeofaction.org/about/) (last accessed Oct. 12, 2016).

<sup>2</sup> See U.S. H.R. Comm. on Oversight & Gov’t Reform, Hearing Notice and Summary, “Examining FOIA Compliance at the Department of State” (Sept. 8, 2016), <http://coainst.org/2bYqj9J>.

<sup>3</sup> See U.S. DEP’T OF STATE OFFICE OF INSPECTOR GEN., OFFICE OF THE SECRETARY: EVALUATION OF EMAIL RECORDS MANAGEMENT AND CYBERSECURITY REQUIREMENTS 21–22 (May 2016) [hereinafter STATE OIG REPORT], available at <http://bit.ly/2dfG36F>.

not since been recovered or returned to the State Department.<sup>4</sup> Although the State Department acknowledged sending two letters to Secretary Powell and his representative requesting their cooperation in retrieving the relevant email records,<sup>5</sup> Secretary Powell failed to produce anything to the State Department and has not indicated a willingness to contact his former internet service or email provider.<sup>6</sup> Under Secretary Kennedy testified that the State Department has not taken any additional efforts to retrieve or recover the email records created and received on Secretary Powell's personal email account, nor has it directly contacted Secretary Powell's internet service or email provider, despite a request from NARA to do so.<sup>7</sup> Under Secretary Kennedy even suggested that the State Department does not have the legal authority to secure such records from a third-party email provider because "we cannot make a request for someone else's records from their provider. That request has to be made by them[.]"<sup>8</sup>

Based on the foregoing, CoA Institute is submitting this Freedom of Information Act request and notifying Secretary Kerry of his obligation under the Federal Records Act to initiate action through the Attorney General to recover Secretary Powell's email records.

## **I. NOTIFICATION OF SECRETARY KERRY'S OBLIGATION UNDER THE FEDERAL RECORDS ACT TO RECOVER SECRETARY POWELL'S EMAIL RECORDS**

The Federal Records Act ("FRA") refers to the collection of statutes and regulations that govern the creation, management, and disposal of the records of federal agencies.<sup>9</sup> The FRA was enacted to ensure the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government" and the "[j]udicious preservation and disposal of records."<sup>10</sup> Among other matters, the FRA requires agency heads to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency,"<sup>11</sup> and to

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<sup>4</sup> See CoA Inst., Transcript of Sept. 8, 2016 OGR Hearing (attached as Exhibit 1) (recording of hearing available at <http://bit.ly/2dOOAzH>); STATE OIG REPORT, *supra* note 3, at 22.

<sup>5</sup> See Ex. 1; see also Letter from Patrick F. Kennedy, Under Sec'y for Mgmt., Dep't of State, to Peggy Cifrino, Principal Assistant to Gen. Colin Powell (Nov. 12, 2014) (attached as Exhibit 2) ("[W]e 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."); Letter from Patrick F. Kennedy, Under Sec'y for Mgmt., Dep't of State, to Peggy Cifrino, Principal Assistant to Gen. Colin Powell (Oct. 21, 2015) (attached as Exhibit 3) ("Based on advice we have received from the National Archives and Records Administration, the Department would nevertheless encourage you – if you have not already done so – to check with the internet service or email provider for [Secretary Powell's] former account to see if it is still possible to retrieve any official emails[.]").

<sup>6</sup> See Ex. 1; Letter from Patrick F. Kennedy, Under Sec'y for Mgmt., Dep't of State, to Laurence Brewer, Acting Chief Records Officer, Nat'l Archives & Records Admin., at 4 (Nov. 6, 2015) (attached as Exhibit 4) ("The Department has not as yet received a response [from Secretary Powell].").

<sup>7</sup> See Ex. 1; see also Letter from Paul M. Webster, Chief Records Officer, Nat'l Archives & Records Admin., to Margaret P. Grafeld, Dep. Asst. Sec'y for Global Info. Servs., Dep't of State, at 2 (July 2, 2015) (attached as Exhibit 5) ("I am requesting that the Department inquire with the internet service or email provider of former Secretary Clinton, and also of former Secretary Powell, with regard to whether it is still possible to retrieve the email records that may still be present on their servers."); Jonathan Allen, *Lawmakers will contact AOL to recover Colin Powell's missing State Department emails*, BUS. INSIDER (Sept. 8, 2016), <http://read.bi/2dx2xh2>.

<sup>8</sup> Ex. 1 at 2.

<sup>9</sup> See 44 U.S.C. chs. 21, 29, 31, 33; 36 C.F.R. pts. 1220–39.

<sup>10</sup> 44 U.S.C. §§ 2902(1), (5).

<sup>11</sup> *Id.* § 3102; see also *id.* § 3301 (defining federal records); 36 C.F.R. § 1220.18 (The definition of record includes any material, "regardless of physical form or characteristics, made or received by an agency of the United States

establish “safeguards” against the removal or loss of records, including notifications to agency officials and employees that records may not be alienated or destroyed unless authorized and of “the penalties provided by law for the unlawful removal or destruction of records.”<sup>12</sup>

Under 44 U.S.C. § 3106, the FRA requires the “head of each Federal agency”—in this case, Secretary Kerry—to notify the Archivist of the United States “of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency[.]”<sup>13</sup> In addition to notification, the FRA requires that an agency head, with the assistance of the Archivist, “*shall* 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.”<sup>14</sup> Unlawful removal of 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.”<sup>15</sup>

In any situation where the head of the agency does not initiate action through the Attorney General for the recovery of unlawfully removed records, the Archivist is required to request the Attorney General to initiate such action and to notify Congress of that request.<sup>16</sup>

In 1995—*i.e.*, before Secretary Powell’s tenure—NARA clarified that “messages created or received on electronic mail systems may meet the definition of a record.”<sup>17</sup> The State Department adopted a similar approach the same year in the Foreign Affairs Manual, which provided, in relevant part, that “all employees must be aware that some variety of the messages being exchanged on email are important to the Department and must be preserved; such messages are considered Federal records under the law.”<sup>18</sup> With respect to the preservation of email records, the State Department instructed its employees that “until technology allowing archival capabilities for long-term electronic storage and retrieval of E-mail messages is available and installed”—a development apparently completed in February 2015<sup>19</sup>—employees were to print out and file hard copies of their electronic correspondence.<sup>20</sup> Established State Department policy also required that every departing employee sign a separation statement, or

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Government under Federal law or 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 or because of the informational value of data in them.”)

<sup>12</sup> 44 U.S.C. § 3105; *see also* 36 C.F.R. § 1230.10 (requiring agency heads to “[p]revent the unlawful or accidental removal, defacing, alteration, or destruction of records”); *id.* § 1230.12 (“The penalties for the unlawful or accidental removal, defacing, alteration, or destruction of Federal records or the attempt to do so, include a fine, imprisonment, or both (18 U.S.C. 641 and 2071).”).

<sup>13</sup> 44 U.S.C. § 3106(a) *see also* 36 CFR 1230.14 (providing that “[t]he agency must report promptly any unlawful or accidental removal, defacing, alteration, or destruction of records in the custody of that agency to the National Archives and Records Administration” and outlining the content of such a report).

<sup>14</sup> 44 U.S.C. § 3106(a) (emphasis added).

<sup>15</sup> 36 C.F.R. § 1230.3(b) (emphasis added).

<sup>16</sup> 44 U.S.C. §§ 2905(a), 3106(b).

<sup>17</sup> 36 C.F.R. § 1222.34(e) (1995).

<sup>18</sup> 5 FAM 443.2(d) (Oct. 30, 1995).

<sup>19</sup> *See* STATE OIG REPORT, *supra* note 3, at 8.

<sup>20</sup> 5 FAM 443.3 (Oct. 30, 1995).

Form DS-109, indicating the surrender of “all unclassified documents and papers relating to the official business of the Government acquired by me while in the employ of the Department.”<sup>21</sup>

In this case, there can be—and is—no dispute that the work-related emails created and received by Secretary Powell on his personal email account(s) were and are federal records as defined by the FRA.<sup>22</sup> As such, those email records belong to the State Department, not Secretary Powell.<sup>23</sup> Despite the applicable requirements relating to the preservation of State Department email records, Secretary Powell never printed out or provided copies of email containing official business from his personal email account(s), and the State Department has not otherwise secured copies, whether in electronic or hard-copy format, of those records.<sup>24</sup>

The use of a personal email account by Secretary Powell to conduct official government business without archiving or saving the email messages to an official State Department recordkeeping system and without turning those email records over to the agency upon his departure constitutes unlawful removal of the records under the FRA.<sup>25</sup> As the State Department Inspector General concluded:

Secretary Powell should have surrendered all emails sent from or received in his personal account that related to Department business. Because he did not do so at the time that he departed government service or at any time thereafter, Secretary Powell did not comply with Department policies that were implemented in accordance with the Federal Records Act.<sup>26</sup>

Under 44 U.S.C. § 3106, Secretary Kerry has an obligation to recover all email records created or received by Secretary Powell on his personal email account(s) that remain outside State Department custody. Although the State Department has written to ask Secretary Powell’s

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<sup>21</sup> 5 FAM 413.9 (Oct. 30, 1995); *see also* STATE OIG REPORT, *supra* note 3, at 11. It appears, however, that this policy may have included an unofficial exception for the agency head. STATE OIG REPORT, *supra* note 3, at 17.

<sup>22</sup> *See, e.g.*, U.S. Dep’t of State Records Schedule, Chapter 01: Secretary of State, *available at* <http://coainst.org/2dXYH47> (under the approved records disposition schedule for Secretary of State records, all correspondence, briefing books, notes, agendas, memos, drafts, minutes, reports, talking points, and other such documentation relating to diplomatic activities, appearances, briefings, speeches, travel, telephone calls, scheduling, staff meetings, and other such matters relating to the responsibilities of the Secretary of State must be preserved permanently).

<sup>23</sup> *See* Memorandum from Patrick F. Kennedy, Under Sec’y of State for Mgmt., re: Senior Officials’ Records Management Responsibilities, at 1 (Aug. 28, 2014), *available at* <http://coainst.org/2dGKWtB> (“All records generated by Senior Officials belong to the Department of State.”); U.S. Dep’t of State, *Department Notice, A Message from Under Secretary for Management Patrick F. Kennedy regarding State Department Records Responsibilities and Policy*, at 2 (Oct. 17, 2014), *available at* <http://coainst.org/2dGJISE> (“All records generated by Senior Officials belong to the Department of State.”).

<sup>24</sup> *See* Ex. 1; STATE OIG REPORT, *supra* note 3, at 3, 21–22.

<sup>25</sup> *See* 44 U.S.C. § 3105 (“The head of each Federal agency shall establish safeguards against the removal or loss of records . . . . Safeguards shall include making it known to officials and employees of the agency . . . the penalties provided by law for the unlawful removal or destruction of records.”); 36 C.F.R. § 1230.3 (defining unlawful removal of federal records); *id.* § 1228.100(a) (“The Archivist of the United States and heads of Federal agencies are responsible for preventing the alienation or unauthorized destruction of records, including all forms of mutilation. Records may not be removed from the legal custody of Federal agencies or destroyed without regard to the provisions of agency records schedules (SF 115 approved by NARA or the General Records issued by NARA).”).

<sup>26</sup> STATE OIG REPORT, *supra* note 3, at 22.

representative to retrieve email records that might remain on the servers of Secretary Powell's internet service or email provider,<sup>27</sup> that effort is insufficient as a matter of law. Not only has Secretary Powell refused to answer the State Department's inquiry,<sup>28</sup> the FRA mandates that Secretary Kerry (1) notify the Archivist of the United States that federal records belonging to the State Department have been unlawfully removed from the agency; and (2) initiate action through the Attorney General for the recovery of those federal records.<sup>29</sup> As the D.C. Circuit Court of Appeals has held, the obligation to initiate action through the Attorney General to recover unlawfully removed records is a mandatory obligation, not subject to agency discretion.<sup>30</sup> Any attempt to evade that obligation by claiming that Secretary Kerry or the State Department lack the legal authority to recover the email records at issue directly from Secretary Powell's internet service or email provider cannot be countenanced. Even if that claim were true in the abstract (which it cannot be since the records belong to the State Department, not Secretary Powell<sup>31</sup>), the FRA grants Secretary Kerry the necessary authorization in this case to recover the records through action directed by the Attorney General.

It is incumbent upon Secretary Kerry, acting through the Attorney General, to contact Secretary Powell's internet service or email provider(s) directly and to take all other action necessary to secure and recover the email records at issue that remain outside of State Department custody. We look forward to Secretary Kerry complying with his statutory obligations in this matter and to providing public notice that he has done so.

## II. FREEDOM OF INFORMATION ACT REQUEST

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), CoA Institute hereby requests access to the following records. Unless otherwise noted, the time period for all items of this request is January 20, 2001 to the present.<sup>32</sup>

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<sup>27</sup> *Id.*; see also Exs. 2–3.

<sup>28</sup> STATE OIG REPORT, *supra* note 3, at 22; see also Exs. 1, 4.

<sup>29</sup> 44 U.S.C. § 3106(a); *Armstrong v. Bush*, 924 F.2d 282, 294 (D.C. Cir. 1991) (“[T]he Federal Records Act establishes only one remedy for the improper removal of a “record” from the agency”: the agency head, in conjunction with the Archivist, is required to request the Attorney General to initiate an action to recover records unlawfully removed from the agency.”) (quoting *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980)).

<sup>30</sup> *Armstrong*, 924 F.2d at 295 (“Because the FRA enforcement provisions leave *no* discretion to determine which cases to pursue, the agency head's and Archivist's enforcement decisions are not committed to agency discretion by law. In contrast to a statute that merely *authorizes* an agency to take enforcement action as it deems necessary, the FRA *requires* the agency head and Archivist to take enforcement action.”).

<sup>31</sup> See *supra* note 23; *Competitive Enter. Inst. v. Office of Sci. & Tech. Pol'y*, 827 F.3d 145, 149 (D.C. Cir. 2016) (“If the agency head controls what would otherwise be an agency record, then it is still an agency record[.]”).

<sup>32</sup> For purposes of this request, the term “present” should be construed as the date on which the agency begins its search for responsive records. See *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002). The term “record” means the entirety of the record any portion of which contains responsive information. See *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, No. 15-5201, 2016 WL 4056405, at \*7–9 (D.C. Cir. July 29, 2016) (admonishing agency for withholding information as “non-responsive” because “nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure”).

1. All State Department records created or received by Secretary Powell on any personal email account.<sup>33</sup> The time period for this item of the request is January 20, 2001 to January 26, 2005.
2. All records reflecting any permission, clearance, or approval granted to Secretary Powell by the Archivist and/or NARA for the use of any personal email account for the conduct of official State Department business. The time period for this item of the request is January 20, 2001 to January 26, 2005.
3. All communications between any official from the State Department and the Executive Office of the President (including, but not limited to, the Office of the White House Counsel or the Office of the President) concerning Secretary Powell's use of any personal email account for official agency business.
4. All communications between any official from the State Department and the Attorney General of the United States concerning efforts to retrieve, recover, or retain agency records created or received by Secretary Powell on any personal email account.
5. All records reflecting notification by the State Department to the Archivist of the United States or NARA pursuant to 44 U.S.C. § 3106 and/or 36 CFR 1230.14 concerning State Department records created or received by Secretary Powell on any personal email account, as well as all communications between the State Department and the Archivist or NARA concerning efforts to retrieve, recover, or retain those records.
6. To the extent not already covered by the above items of this request, all other records concerning State Department efforts to retrieve, recover, or retain State Department records created or received by Secretary Powell on any personal email account, including all correspondence on this topic with Secretary Powell or his representatives after his departure from the State Department.
7. A copy of the signed and executed Form DS-109 and/or Form DS-1904 completed by Secretary Powell upon his departure from the State Department.

### **Request for Expedited Processing**

CoA Institute requests expedited processing of its request because (1) it is “primarily engaged in disseminating information” and (2) the requested records concern “actual or alleged Federal government activity,” about which there is an “urgency to inform the public.”<sup>34</sup>

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<sup>33</sup> Records of official State Department business that are saved on private employee email accounts still qualify as “agency records” under the FOIA, even if they are not in the immediate possession of the State Department. *See Competitive Enter. Inst. v. Office of Sci. & Tech. Pol’y*, 827 F.3d 145, 149 (D.C. Cir. 2016) (“If the agency head controls what would otherwise be an agency record, then it is still an agency record[.]”).

<sup>34</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II); 22 C.F.R. § 171.11(f)(2).



**1. CoA Institute is primarily engaged in disseminating information as a representative of the news media.**

As discussed below, CoA Institute is primarily engaged in disseminating information because it qualifies as a news media organization.<sup>35</sup> CoA Institute gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

**2. There is an urgency to inform the public about actual Federal government activity.**

In *Al-Fayed v. Central Intelligence Agency*, the U.S. Court of Appeals for the District of Columbia Circuit established a multi-factor test to determine whether a FOIA requester properly satisfies the “urgency to inform” standard.<sup>36</sup> Those factors include: (1) whether a request concerns a “matter of current exigency to the American public”; (2) whether the consequences of delaying a response would “compromise a significant recognized interest”; (3) whether the request concerns “federal government activity”; and, (4) whether the requester has proffered credible “allegations regarding governmental activity.”<sup>37</sup>

In this case, the requested records concern high-ranking agency officials possibly violating federal laws and agency rules and regulations. The issue has been widely covered by the news media and Congressional interest in the subject is naturally acute.<sup>38</sup> In short, CoA Institute does not seek records of merely “newsworthy” topics, but rather “subject[s] of a currently unfolding story.”<sup>39</sup> These records unquestionably concern the activity of the Federal government, insofar as they reflect communications between high-ranking State Department officials, NARA, and employees of the Office of the White House Counsel and the Executive Office of the President. The communications may reveal potential impropriety in the manner and content of the correspondence, as well as in agency efforts, or lack thereof, to recover the work-related email correspondence of Secretary Powell. Importantly, the State Department and other agencies have granted CoA Institute its prior requests for expedited processing of requests concerning the use of private email by agency heads and potential attendant FRA violations.<sup>40</sup>

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<sup>35</sup> *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (referencing *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).

<sup>36</sup> 254 F.3d 300, 310–11 (D.C. Cir. 2001).

<sup>37</sup> *Id.*; see also 22 C.F.R. § 171.11(b)(2) (“Urgently needed information” means that “information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest.”).

<sup>38</sup> See *supra* notes 2–7 and accompanying text.

<sup>39</sup> *Al-Fayed*, 254 F.3d at 311.

<sup>40</sup> See Email from FOIA@nara.gov, Nat’l Archives & Records Admin., to CoA Inst. (Jan. 28, 2015) (granting expedited processing of request NGC16-124) (on file with CoA Inst.); Email from Adrienne M. Santos, Gov’t Info. Specialist, OSD/JA FOIA Office, Dep’t of Def. (Dec. 24, 2015) (granting expedited processing of request 16-F-0338) (on file with CoA Inst.); Email from FOIA@nara.gov, Nat’l Archives & Records Admin., to CoA Inst. (Oct. 2, 2015) (granting expedited processing of request NGC15-648) (on file with CoA Inst.); Email from Joseph A. Scanlon, FOIA & Privacy Officer, Nat’l Archives & Records Admin., to CoA Inst. (Mar. 30, 2015) (granting expedited processing of request NGC15-159) (on file with CoA Inst.); Letter from Requester Commc’ns Branch, Office of Info. Programs & Servs., Dep’t of State, to CoA Inst. (Apr. 14, 2015) (granting expedited processing of request F-2015-4785) (on file with CoA Inst.).

Delay in the production of this FOIA request would compromise a significant and recognized public interest in government accountability. The Supreme Court has stated that the “core purpose of the FOIA” is to allow the American people access to information that might “contribute significantly to public understanding of the operations or activities of the government.”<sup>41</sup> The ability of a “watchdog” group like CoA Institute to secure records such as those sought in this request for the purposes of government accountability,<sup>42</sup> especially where a current exigency and unfolding story exists, weighs in favor of expedited processing.

### **Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of any and all applicable fees. The FOIA and applicable regulations provide that the State Department shall furnish the 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 understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>43</sup>

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, the extent to which Secretary Powell used a personal email account to conduct official business in contravention of agency policies, as well as efforts by the agency to retrieve those records for proper preservation. Disclosure will “contribute significantly” to public understanding of such matters because, to date, the public has not known the details of how the State Department attempted to retrieve records of email from Secretary Powell, and prior to September 8, 2016, it was unknown that the agency had refused to contact Secretary Powell’s email provider directly in the absence of a response from Secretary Powell or his representatives. Public interest in these matters is particularly acute in light of scandals surrounding the use of personal email by former Secretary Hillary Clinton and the heads of the Departments of Defense and Homeland Security, as well as broader congressional efforts to prevent the use of personal email for government business.<sup>44</sup>

CoA Institute has the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has significant experience and expertise in government oversight, investigative reporting, and federal public interest litigation. 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

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<sup>41</sup> *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989).

<sup>42</sup> See *Balt. Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001) (“[O]btaining information to act as a ‘watchdog’ of the government is a well-recognized public interest in the FOIA.”); see also *Ctr. to Prevent Handgun Violence v. Dep’t of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) (“This self-appointed watchdog role is recognized in our system.”).

<sup>43</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 22 C.F.R. § 171.16(a); see *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

<sup>44</sup> See, e.g., Colleen McCain Nelson, *In Wake of Clinton, Disclosures, Bill Bans Spending on Private Email*, WALL ST. J. (Dec. 16, 2015), <http://goo.gl/IGEY6l>; Michael S. Schmidt, *Defense Secretary Conducted Some Official Business on a Personal Email Account*, N.Y. TIMES (Dec. 16, 2015), <http://goo.gl/pnWJvM>; Byron Tau, *In Lawsuit, Journalist Seeks Hillary Clinton’s Deleted Emails*, WALL ST. J. (Dec. 8, 2015), <http://goo.gl/A6WoLB>; Mark Tapscott, *Judicial Watch Sues For Top Homeland Security Officials’ Private Email Docs*, DAILY CALLER (Nov. 18, 2015), <http://goo.gl/b3xlaZ>; Rachel Witkin, *Sec. Jeh Johnson: ‘Whoops’ on Using Personal Email at DHS*, NBC NEWS (July 21, 2015), <http://goo.gl/KH3SA7>.

through CoA Institute's regularly published online newsletter, memoranda, reports, or press releases.<sup>45</sup> In addition, as CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in making this request.

### **Request To Be Classified as a Representative of the News Media**

For fee status purposes, CoA Institute also qualifies as a "representative of the news media" under the FOIA.<sup>46</sup> As the D.C. Circuit recently held, the "representative of the news media" test is properly focused on the requestor, not the specific FOIA request at issue.<sup>47</sup> CoA Institute satisfies this test because it 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. Although it is not required by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>48</sup> These distinct works are distributed to the public through various media, including CoA Institute's website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via email.

The statutory definition of a "representative of the news media" contemplates that organizations such as CoA Institute, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."<sup>49</sup> In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute as a news media organization in connection with its FOIA requests.<sup>50</sup>

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<sup>45</sup> See also *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

<sup>46</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 22 C.F.R. § 171.14(b)(5)(ii)(C).

<sup>47</sup> See *Cause of Action*, 799 F.3d at 1121.

<sup>48</sup> See, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program* (May 19, 2015), available at <http://coainst.org/2aJ8UAA>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://coainst.org/2as088a>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), available at <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://coainst.org/2apTwqP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

<sup>49</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>50</sup> See, e.g., FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep't of Justice (Aug. 2, 2016); FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 2016); FOIA Request 796939, Dep't of Labor (Mar. 7, 2016); FOIA Request 2015-HQFO-00691, Dep't of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep't of Educ. (Aug. 13, 2015); FOIA Request HQ-2015-01689-F, Dep't of Energy (Aug. 7, 2015); FOIA Request 2015-OSEC-04996-F, Dep't of Agric. (Aug. 6, 2015); FOIA Request OS-2015-00419, Dep't of Interior (Aug. 3, 2015); FOIA Request 780831, Dep't of Labor (Jul 23, 2015); FOIA Request 15-05002, Sec. & Exch. Comm'n (July 23, 2015); FOIA Request 145-FOI-13785, Dep't of Justice (Jun. 16, 2015); FOIA Request 15-00326-F, Dep't of Educ. (Apr. 08, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm'n (Feb. 13, 2015); FOIA Request HQ-2015-00248, Dep't of Energy (Nat'l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Commc'n Comm'n (Dec. 12, 2014); FOIA Request HQ-2015-00245-F, Dep't of

**Record Preservation Requirement**

CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.<sup>51</sup>

**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 a certain portion of responsive records can be produced more readily, CoA Institute requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

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



RYAN P. MULVEY  
COUNSEL

cc: The Honorable Steve A. Linick  
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The Honorable David S. Ferriero  
Archivist of the United States  
National Archives & Records Administration  
700 Pennsylvania Avenue, N.W.  
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Energy (Dec. 4, 2014); FOIA Request F-2014-21360, Dep't of State, (Dec. 3, 2014); FOIA Request LR-2015-0115, Nat'l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request 2015-OSEC-00771-F, Dep't of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, 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).

<sup>51</sup> See 22 C.F.R. § 171.18; 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.”); *Chambers v. Dep't of the Interior*, 568 F.3d 998, 1004–05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep't of Commerce*, 34 F. Supp. 2d 28, 41–44 (D.D.C. 1998).

# EXHIBIT

1

**United States House of Representatives Committee on Oversight and Government Reform**  
Hearing: *“Examining FOIA Compliance at the Department of State”*

Partial Transcript Prepared by Cause of Action Institute

LINK TO HEARING VIDEO: <https://www.youtube.com/watch?v=Hn7lZtX7a8>

@43:18

**Rep. Stephen Lynch (D-MA):**

I have a letter that you sent on November 12, 2014. I ask unanimous consent to submit it in the record. In your letter you ask Secretary Powell’s representative to provide all of Secretary Powell’s records that were not in the State Department’s record keeping system. Is that correct?

**Under Secretary Patrick Kennedy:**

Yes, sir.

**Rep. Lynch:**

OK. That would have included emails from his AOL account that were work-related, right?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

Ok. Did Secretary Powell . . . let me ask you, how many emails did he produce pursuant to your request?

**Under Sec’y Kennedy:**

Secretary Powell responded that he did not have access anymore to any of those records, sir.

**Rep. Lynch:**

He didn’t have access to them?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

So that number would be zero?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

I have another letter from you dated October 21, 2015. In this letter you ask Secretary Powell’s representative to contact AOL to determine whether any of his emails were still on their system. Is that correct?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

OK. To the best of your knowledge, did Secretary Powell follow-up and do this?

**Under Sec’y Kennedy:**

We never received a response to that request, sir.

**Rep. Lynch:**

Ok. I’ve got another letter from you, Ambassador Kennedy, dated November 6, 2015. In this letter, you inform the National Archives that Secretary Powell never contacted AOL. Isn’t that right?

**Under Sec’y Kennedy:**

That is correct, sir.

**Rep. Lynch:**

Ok. Again, Ambassador Kennedy, in July 2015, the Chief Records Officer for the National Archives asked the State Department to contact AOL directly to determine, and I quote, “whether it is still possible to retrieve the email records that may still be present.” Close quote. Mr. Kennedy, did you ever contact AOL?

**Under Sec’y Kennedy:**

Our lawyers advised, sir, that we are not a party to . . .

**Rep. Lynch:**

Would that answer be a “no”? Did you contact AOL?

**Under Sec’y Kennedy:**

No, sir, we did not contact AOL.

**Rep. Lynch:**

OK. So you got the Chief Records Officer asking you to contact AOL. And you’re saying “no” and your attorneys are telling you “no.”

**Under Sec’y Kennedy:**

They’re telling that we cannot make a request for someone else’s records from their provider. That request has to be made by them, sir.

**Rep. Lynch:**

Now, at some point the Inspector General informed you that Secretary Powell sent classified information from his AOL account. Did you contact AOL then?

**Under Sec’y Kennedy:**

Again, it’s the same answer, sir. We asked that Secretary Powell contact AOL.

**Rep. Lynch:**

So that answer would be “no.” I mean . . . but you have a responsibility here though. You admit that, by virtue of your position?

**Under Sec’y Kennedy:**

Yes, we contacted Secretary Powell.

[. . .]

@46:53

**Rep. Lynch:**

To your knowledge, has anybody at the State Department ever picked up the phone and called AOL about these questions?

**Under Sec’y Kennedy:**

As I said in response to your earlier questions, sir, it is . . . we cannot get records of another individual from their provider. They have to do it.

**Rep. Lynch:**

I don’t get this. This is ridiculous. This is the National Archives asking you to contact AOL. But you didn’t do that. You asked Secretary Powell to contact AOL. He didn’t do that. [. . .]




# EXHIBIT

2

UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON

NOV 12 2014

  
Dear Ms. Cifrino:

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.

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

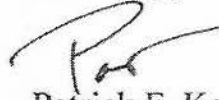
-2-

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 extending from the end.

Patrick F. Kennedy

# EXHIBIT

3

**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

OCT 21 2015

Peggy Cifrino  
Principal Assistant to General Colin Powell  
Office of General Colin L. Powell, USA (Ret)  
909 North Washington Street, Suite 700  
Alexandria, Virginia 22314

Dear Ms. Cifrino:

I am writing regarding the Department's November 12, 2014 request that former Secretary of State Colin Powell provide it with any federal records in his possession, such as an email sent or received on a personal email account while serving as Secretary of State, if there is reason to believe that it may not otherwise be preserved in the Department's recordkeeping system.

You previously advised, with respect to official emails sent on Secretary Powell's private account during his time in office, that the account he used has been closed for a number of years. Based on advice we have received from the National Archives and Records Administration, the Department would nevertheless encourage you – if you have not already done so – to check with the internet service or email provider for the former account to see if it is still possible to retrieve any official emails from Secretary Powell's tenure at the Department. If you do recover any such emails, we would appreciate your forwarding them to the Department.

Thank you for considering this request.

Sincerely,

  
Patrick F. Kennedy

# EXHIBIT

4

**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

November 6, 2015

Laurence Brewer  
Acting Chief Records Officer  
National Archives and Records Administration  
700 Pennsylvania Avenue, NW  
Washington, DC 20408

Dear Mr. Brewer,

The Department of State has been working these past months with the National Archives and Records Administration (NARA) regarding the emails of former Secretary of State Hillary Clinton. I am writing to provide NARA additional information regarding the Department's efforts, including information relevant to Paul M. Wester, Jr.'s July 2 letter to Margaret P. Grafeld, Deputy Assistant Secretary for Global Information Services.

Mr. Wester inquired as to steps the Department is taking to implement records management directives it issued in 2014 with respect to senior Department officials. As you know, in March of this year, Secretary Kerry asked the Department's Office of Inspector General ("OIG") to review and make recommendations for improving the Department's recordkeeping practices. Although OIG has not yet issued recommendations, Secretary Kerry appointed a Transparency Coordinator in September to work with Department bureaus and offices on improving Department records systems. It is expected that the Transparency Coordinator will be able to build on the work of the OIG as well as on the ongoing efforts of the Department's records management program, which has been instrumental in reminding all Department employees, including senior officials, of their records management responsibilities, including those regarding email.

The Department is reviewing email management options for the Department through an Electronic Records Management Working Group (ERMWG) that was established in order to meet the requirements for email management by December 31, 2016, as mandated by the President's Managing Government Records Directive. Although a long-term solution will be in place by the end of 2016, the

Department is working on several short-term steps to preserve senior officials' email. In February 2015, the Department's Executive Secretariat began journaling the email of 85 senior officials; as of October, the Executive Secretariat was journaling 112 senior officials. This includes the Deputy Secretaries, Under Secretaries, several senior advisers, as well as the Secretary's staff ranging from his chief of staff to staff assistants. The Department is also automatically journaling Secretary Kerry's email. Any email sent or received on Secretary Kerry's state.gov account is automatically copied and remotely saved electronically. In addition to the above listed officials, the Department began journaling the email accounts of Assistant Secretaries, Principal Deputy Assistant Secretaries, and a limited number of other senior officials in October 2015.

The Department updated its email policy in the Foreign Affairs Manual in October reminding employees that personal email accounts should only be used for official work in very limited circumstances and that under the Presidential and Federal Records Act Amendments of 2014, employees are prohibited from creating or sending a record using a non-official email account unless the employee (1) copies the employee's official email account in the original creation or transmission, or (2) forwards a complete copy of the record (including any attachments) to the employee's official email account not later than 20 days after the original creation or transmission. In addition, the Department's Foreign Service Institute (FSI) provides a variety of training courses, both classroom and online, that include records management. These courses include records management training for Office Management Specialists, Information Management Officers, and orientation courses for new employees. FSI also offers a specialized records management course for all levels of employees and training for State Messaging and Archive Retrieval Toolset (SMART) users.

The Secretary's Executive Secretariat regularly hosts record-keeping workshops for all Seventh Floor Department Principals' offices and employees, including five sessions in 2015. Representatives from the Office of Information Programs and Services (A/GIS/IPS) and the Correspondence, Records and Staffing Division of the Executive Secretariat Staff review senior officials' responsibilities for creating records necessary to document their activities and for the proper management and preservation of their records regardless of physical format or media. They also discuss departing senior officials' responsibility to identify their records prior to departure and to 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. Adherence to Department email



requirements in accordance with the Presidential and Federal Records Act Amendments of 2014 is also emphasized at these workshops.

The Executive Secretariat also requires a briefing for all incoming and departing employees assigned to Seventh Floor Department Principals' offices on their record keeping requirements and responsibilities. Upon notification of a senior official's departure, the Executive Secretariat Staff briefs and assists each departing Principal's office with the proper preservation of official records.

In his letter, Mr. Wester also requested that the Department contact former Secretary Clinton's representatives to request the native electronic version with the associated metadata of the approximately 55,000 pages of emails provided to the Department. As set forth in the Department's and NARA's September 17 motion to dismiss in the consolidated cases of *Judicial Watch v. Kerry*, No. 1:15-cv-00785-JEB and *Cause of Action Institute v. Kerry*, No. 1:15-cv-01068-JEB, the Department requested on May 22 that former Secretary Clinton provide an electronic copy of the approximately 55,000 pages of emails, and Secretary Clinton's attorney responded that they would do so. The electronic copy was not, however, provided; Secretary Clinton's counsel advised on August 12 that the email server that was used to store Secretary Clinton's emails while she was Secretary of State and the thumb drives that included electronic copies of the documents she had provided to the Department had been turned over to the Federal Bureau of Investigation (FBI). On September 14, 2015, the Department sent a letter to the FBI requesting an electronic copy of the approximately 55,000 pages. We have not yet received such a copy.

Mr. Wester also advised that the Department may want to reach out to both former Secretary Clinton and former Secretary Colin Powell to see if Department emails could be recovered from any internet service and email providers that they used. On October 2, 2015, the Department requested Secretary Clinton's counsel to confirm that "with regard to her tenure as Secretary of State, former Secretary Clinton has provided the Department with all federal records in her possession, regardless of their format or the domain on which they were stored or created, that may not otherwise be preserved in the Department's recordkeeping system. To the extent her emails might be found on any internet service and email providers, we encourage you to contact them." (Attachment A). On October 8, former Secretary Clinton's counsel wrote to:

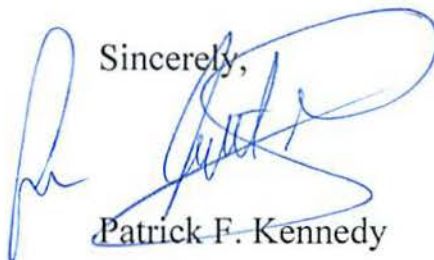
confirm that, with regard to her tenure as Secretary of State, former Secretary Clinton has provided the Department on December 5, 2014, with

all federal e-mail records in her custody, regardless of their format or the domain on which they were stored or created, that may not otherwise be preserved, to our knowledge, in the Department's recordkeeping system. She does not have custody of e-mails sent or received in the first few weeks of her tenure, as she was transitioning to a new address, and we have been unable to obtain these. In the event we do, we will immediately provide the Department with federal record e-mails in this collection. (Attachment B).

On October 21, the Department sent a letter to Secretary Powell's principal assistant similarly encouraging them to check with the internet service or email provider for Secretary Powell's former account to see if it is still possible to retrieve any official emails from his tenure at the Department. (Attachment C). The Department has not as yet received a response.

Finally, please be advised that in letters of March 11, 2015, the Department also requested of former aides to former Secretary Clinton -- Cheryl Mills, Huma Abedin, Jacob Sullivan, and Philippe Reines -- that should any of them be aware or become aware of a federal record in his or her possession, such as an email sent or received on a personal email account while serving in an official capacity at the Department, that such record be made available to the Department. We also advised them of NARA's records management guidance *Bulletin 2013-03* and the additional NARA guidance on managing email issued on September 15, 2014, some or all of which post-dated their service to the Department. The Department has received over one hundred thousand pages of documents from Ms. Mills, Ms. Abedin, Mr. Sullivan, and Mr. Reines collectively, through their representatives in response to the Department's request.

We hope that this information assists in NARA's understanding of this matter. As always, thank you for our continued close collaboration.

Sincerely,  
  
Patrick F. Kennedy

Enclosures

# EXHIBIT

5



NATIONAL  
ARCHIVES

JUL 02 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:

I am in receipt of your letter of April 2, 2015, responding to the National Archives and Records Administration's (NARA) formal request of March 3, 2015, that you provide us with the report required in 36 CFR 1230.14 concerning the potential alienation of Federal email records created and received by former Secretary of State Hillary R. Clinton.

I appreciate the details you have provided to date; however, recognizing that the situation continues to be fluid, there are currently two major questions or concerns that the Department needs to address.

First, in your response you described and forwarded key policy directives issued by the Department in 2014, on records management in general, including specific guidance related to the management of email and other electronic records of senior agency officials. Related to these policies, I am requesting additional information on how the Department implemented these directives with senior officials. More specifically, we would like to understand the specific training, procedures, and other controls the Department employed to ensure the key directives were implemented. This will allow NARA to evaluate whether there are appropriate safeguards in place to prevent the alienation of records from occurring in the future.

Second, as we have discussed, I would like to reiterate our request that the Department contact the representatives of former Secretary Clinton to secure the native electronic versions with associated metadata of the approximately 55,000 hard copy pages of emails provided to the

NATIONAL ARCHIVES *and*  
RECORDS ADMINISTRATION

8601 ADELPHI ROAD  
COLLEGE PARK, MD 20740-6001

[www.archives.gov](http://www.archives.gov)

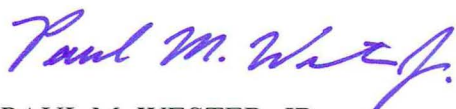
Department. If the Department is unable to obtain the electronic versions of these messages from Secretary Clinton, I am requesting that the Department inquire with the internet service or email provider of former Secretary Clinton, and also of former Secretary Powell, with regard to whether it is still possible to retrieve the email records that may still be present on their servers. As stated in the OMB/NARA M-12-18 *Managing Government Records Directive*, Federal agencies are required by the end of 2016 to maintain all electronic records, including email, in their native electronic format to facilitate active use and future access.

I am aware that there are multiple ongoing inquiries into the details of this case, including by Congressional oversight committees and the Department's Inspector General, which may already be addressing the requests that I have made. I would therefore appreciate continuing updates on the current status of these activities to the extent possible, particularly where the investigations may reveal that the collection Secretary Clinton provided to the Department is incomplete. I also look forward to receiving copies of the final reports of all such investigations, as well as the Department's plans for corrective action. This documentation will assist us in understanding this situation and the Department plans to ensure a comparable situation will not happen in the future.

In closing, I would like to convey my appreciation for the Department's efforts in following up with the representatives of the former Secretary on the many concerns that have surfaced in the past several months. We share many of the Department's concerns and stand ready to provide advice when needed on the records management issues that arise.

I look forward to receiving your response and appreciate your continued attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Paul M. Wester, Jr." in a cursive script.

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

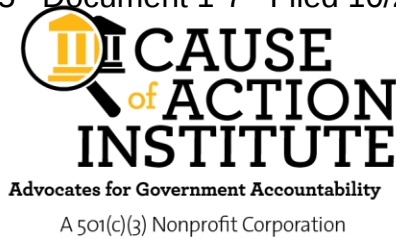
**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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CAUSE OF ACTION INSTITUTE	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 16-2145
	)	
JOHN F. KERRY,	)	
	)	
and	)	
	)	
DAVID S. FERRIERO,	)	
	)	
Defendants.	)	

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**EXHIBIT 7 TO COMPLAINT**



October 12, 2016

**VIA CERTIFIED MAIL**

The Honorable David S. Ferriero  
Archivist of the United States  
National Archives & Records Administration  
700 Pennsylvania Avenue, N.W.  
Washington, D.C. 20408-0001

Mr. Gary M. Stern  
General Counsel and Chief FOIA Officer  
National Archives and Records Administration  
8601 Adelphi Road, Rm. 3110  
College Park, MD 20740-6001

**Re: Federal Records Act Notification and Freedom of Information Act Request**

Dear Archivist Ferriero and Mr. Stern:

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.<sup>1</sup> In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. To that end, we are investigating instances where high-ranking government officials have used personal devices and email accounts to conduct official agency business.

On September 8, 2016, at a hearing held by the House of Representatives Committee on Oversight and Government Reform, Under Secretary for Management Patrick F. Kennedy was questioned (among other matters) about Department of State (“State Department”) efforts to recover work-related email created or received by former Secretary Colin Powell on a personal AOL email account.<sup>2</sup> Consistent with the findings of the State Department Office of Inspector General,<sup>3</sup> Under Secretary Kennedy testified that, notwithstanding applicable Federal Records Act requirements, regulations promulgated by the National Archives and Records Administration (“NARA”), and long-standing State Department policies, the email records in question were not archived in State Department recordkeeping systems during Secretary Powell’s tenure and have

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<sup>1</sup> See CAUSE OF ACTION, *About*, [www.causeofaction.org/about/](http://www.causeofaction.org/about/) (last accessed Oct. 12, 2016).

<sup>2</sup> See U.S. H.R. Comm. on Oversight & Gov’t Reform, Hearing Notice and Summary, “Examining FOIA Compliance at the Department of State” (Sept. 8, 2016), <http://coainst.org/2bYqj9J>.

<sup>3</sup> See U.S. DEP’T OF STATE OFFICE OF INSPECTOR GEN., OFFICE OF THE SECRETARY: EVALUATION OF EMAIL RECORDS MANAGEMENT AND CYBERSECURITY REQUIREMENTS 21–22 (May 2016) [hereinafter STATE OIG REPORT], available at <http://bit.ly/2dfG36F>.

October 12, 2016

Page 2

not since been recovered or returned to the State Department.<sup>4</sup> Although the State Department acknowledged sending two letters to Secretary Powell and his representative requesting their cooperation in retrieving the relevant email records,<sup>5</sup> Secretary Powell failed to produce anything to the State Department and has not indicated a willingness to contact his former internet service or email provider.<sup>6</sup> Under Secretary Kennedy testified that the State Department has not taken any additional efforts to retrieve or recover the email records created and received on Secretary Powell's personal email account, nor has it directly contacted Secretary Powell's internet service or email provider, despite a request from NARA to do so.<sup>7</sup> Under Secretary Kennedy even suggested that the State Department does not have the legal authority to secure such records from a third-party email provider because "we cannot make a request for someone else's records from their provider. That request has to be made by them[.]"<sup>8</sup>

Based on the foregoing, CoA Institute is submitting this Freedom of Information Act request and notifying Archivist Ferriero of his obligation under the Federal Records Act to initiate action through the Attorney General to recover Secretary Powell's email records.

## **I. NOTIFICATION OF THE ARCHIVIST'S OBLIGATION UNDER THE FEDERAL RECORDS ACT TO RECOVER SECRETARY POWELL'S EMAIL RECORDS**

As both of you are aware, the Federal Records Act ("FRA") refers to the collection of statutes and regulations that govern the creation, management, and disposal of the records of federal agencies.<sup>9</sup> The FRA was enacted to ensure the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government" and the "[j]udicious preservation and disposal of records."<sup>10</sup> Among other matters, the FRA requires agency heads to "establish and maintain an active, continuing program for the economical and efficient management of the

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<sup>4</sup> See CoA Inst., Transcript of Sept. 8, 2016 OGR Hearing (attached as Exhibit 1) (recording of hearing available at <http://bit.ly/2dOOAzH>); STATE OIG REPORT, *supra* note 3, at 22.

<sup>5</sup> See Ex. 1; see also Letter from Patrick F. Kennedy, Under Sec'y for Mgmt., Dep't of State, to Peggy Cifrino, Principal Assistant to Gen. Colin Powell (Nov. 12, 2014) (attached as Exhibit 2) ("[W]e 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."); Letter from Patrick F. Kennedy, Under Sec'y for Mgmt., Dep't of State, to Peggy Cifrino, Principal Assistant to Gen. Colin Powell (Oct. 21, 2015) (attached as Exhibit 3) ("Based on advice we have received from the National Archives and Records Administration, the Department would nevertheless encourage you – if you have not already done so – to check with the internet service or email provider for [Secretary Powell's] former account to see if it is still possible to retrieve any official emails[.]").

<sup>6</sup> See Ex. 1; Letter from Patrick F. Kennedy, Under Sec'y for Mgmt., Dep't of State, to Laurence Brewer, Acting Chief Records Officer, Nat'l Archives & Records Admin., at 4 (Nov. 6, 2015) (attached as Exhibit 4) ("The Department has not as yet received a response [from Secretary Powell].").

<sup>7</sup> See Ex. 1; see also Letter from Paul M. Webster, Chief Records Officer, Nat'l Archives & Records Admin., to Margaret P. Grafeld, Dep. Asst. Sec'y for Global Info. Servs., Dep't of State, at 2 (July 2, 2015) (attached as Exhibit 5) ("I am requesting that the Department inquire with the internet service or email provider of former Secretary Clinton, and also of former Secretary Powell, with regard to whether it is still possible to retrieve the email records that may still be present on their servers."); Jonathan Allen, *Lawmakers will contact AOL to recover Colin Powell's missing State Department emails*, BUS. INSIDER (Sept. 8, 2016), <http://read.bi/2dx2xh2>.

<sup>8</sup> Ex. 1 at 2.

<sup>9</sup> See 44 U.S.C. chs. 21, 29, 31, 33; 36 C.F.R. pts. 1220–39.

<sup>10</sup> 44 U.S.C. §§ 2902(1), (5).



records of the agency,”<sup>11</sup> and to establish “safeguards” against the removal or loss of records, including notifications to agency officials and employees that records may not be alienated or destroyed unless authorized and of “the penalties provided by law for the unlawful removal or destruction of records.”<sup>12</sup>

Under 44 U.S.C. § 3106, the FRA requires the “head of each Federal agency”—in this case, Secretary Kerry—to notify the Archivist of the United States—in this case, Archivist Ferriero—“of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency[.]”<sup>13</sup> In addition to notification, the FRA requires that an agency head, with the assistance of the Archivist, “shall 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.”<sup>14</sup> Unlawful removal of 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.”<sup>15</sup>

In any situation where the head of the agency does not initiate action through the Attorney General for the recovery of unlawfully removed records, the Archivist is required to request the Attorney General to initiate such action and to notify Congress of that request.<sup>16</sup>

In 1995—*i.e.*, before Secretary Powell’s tenure—NARA clarified that “messages created or received on electronic mail systems may meet the definition of a record.”<sup>17</sup> The State Department adopted a similar approach the same year in the Foreign Affairs Manual, which provided, in relevant part, that “all employees must be aware that some variety of the messages being exchanged on email are important to the Department and must be preserved; such messages are considered Federal records under the law.”<sup>18</sup> With respect to the preservation of email records, the State Department instructed its employees that “until technology allowing archival capabilities for long-term electronic storage and retrieval of E-mail messages is available and installed”—a development apparently completed in February 2015<sup>19</sup>—employees were to print out and file hard copies of their electronic correspondence.<sup>20</sup> Established State

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<sup>11</sup> *Id.* § 3102; *see also id.* § 3301 (defining federal records); 36 C.F.R. § 1220.18 (The definition of record includes 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 . . . 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.”).

<sup>12</sup> 44 U.S.C. § 3105; *see also* 36 C.F.R. § 1230.10 (requiring agency heads to “[p]revent the unlawful or accidental removal, defacing, alteration, or destruction of records”); *id.* § 1230.12 (“The penalties for the unlawful or accidental removal, defacing, alteration, or destruction of Federal records or the attempt to do so, include a fine, imprisonment, or both (18 U.S.C. 641 and 2071).”).

<sup>13</sup> 44 U.S.C. § 3106(a); *see also* 36 CFR 1230.14 (providing that “[t]he agency must report promptly any unlawful or accidental removal, defacing, alteration, or destruction of records in the custody of that agency to the National Archives and Records Administration” and outlining the content of such a report).

<sup>14</sup> 44 U.S.C. § 3106(a) (emphasis added).

<sup>15</sup> 36 C.F.R. § 1230.3(b) (emphasis added).

<sup>16</sup> 44 U.S.C. §§ 2905(a), 3106(b).

<sup>17</sup> 36 C.F.R. § 1222.34(e) (1995).

<sup>18</sup> 5 FAM 443.2(d) (Oct. 30, 1995).

<sup>19</sup> *See* STATE OIG REPORT, *supra* note 3, at 8.

<sup>20</sup> 5 FAM 443.3 (Oct. 30, 1995).

October 12, 2016

Page 4

Department policy also required that every departing employee sign a separation statement, or Form DS-109, indicating the surrender of “all unclassified documents and papers relating to the official business of the Government acquired by me while in the employ of the Department.”<sup>21</sup>

In this case, there can be—and is—no dispute that the work-related emails created and received by Secretary Powell on his personal email account(s) were and are federal records as defined by the FRA.<sup>22</sup> As such, those email records belong to the State Department, not Secretary Powell.<sup>23</sup> Despite the applicable requirements relating to the preservation of State Department email records, Secretary Powell never printed out or provided copies of email containing official business from his personal email account(s), and the State Department has not otherwise secured copies, whether in electronic or hard-copy format, of those records.<sup>24</sup>

The use of a personal email account by Secretary Powell to conduct official government business without archiving or saving the email messages to an official State Department recordkeeping system and without turning those email records over to the agency upon his departure constitutes unlawful removal of the records under the FRA.<sup>25</sup> As the State Department Inspector General concluded:

Secretary Powell should have surrendered all emails sent from or received in his personal account that related to Department business. Because he did not do so at the time that he departed government service or at any time thereafter, Secretary Powell did not comply with Department policies that were implemented in accordance with the Federal Records Act.<sup>26</sup>

Under the FRA, Archivist Ferriero and Secretary Kerry have an obligation to recover all email records created or received by Secretary Powell on his personal email account(s) that

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<sup>21</sup> 5 FAM 413.9 (Oct. 30, 1995); *see also* STATE OIG REPORT, *supra* note 3, at 11. It appears, however, that this policy may have included an unofficial exception for the agency head. STATE OIG REPORT, *supra* note 3, at 17.

<sup>22</sup> *See, e.g.*, U.S. Dep’t of State Records Schedule, Chapter 01: Secretary of State, *available at* <http://coainst.org/2dXYH47> (under the approved records disposition schedule for Secretary of State records, all correspondence, briefing books, notes, agendas, memos, drafts, minutes, reports, talking points, and other such documentation relating to diplomatic activities, appearances, briefings, speeches, travel, telephone calls, scheduling, staff meetings, and other such matters relating to the responsibilities of the Secretary of State must be preserved permanently).

<sup>23</sup> *See* Memorandum from Patrick F. Kennedy, Under Sec’y of State for Mgmt., re: Senior Officials’ Records Management Responsibilities, at 1 (Aug. 28, 2014), *available at* <http://coainst.org/2dGKWtB> (“All records generated by Senior Officials belong to the Department of State.”); U.S. Dep’t of State, *Department Notice, A Message from Under Secretary for Management Patrick F. Kennedy regarding State Department Records Responsibilities and Policy*, at 2 (Oct. 17, 2014), *available at* <http://coainst.org/2dGJISE> (“All records generated by Senior Officials belong to the Department of State.”).

<sup>24</sup> *See* Ex. 1; STATE OIG REPORT, *supra* note 3, at 3, 21–22.

<sup>25</sup> *See* 44 U.S.C. § 3105 (“The head of each Federal agency shall establish safeguards against the removal or loss of records . . . . Safeguards shall include making it known to officials and employees of the agency . . . the penalties provided by law for the unlawful removal or destruction of records.”); 36 C.F.R. § 1230.3 (defining unlawful removal of federal records); *id.* § 1228.100(a) (“The Archivist of the United States and heads of Federal agencies are responsible for preventing the alienation or unauthorized destruction of records, including all forms of mutilation. Records may not be removed from the legal custody of Federal agencies or destroyed without regard to the provisions of agency records schedules (SF 115 approved by NARA or the General Records issued by NARA).”).

<sup>26</sup> STATE OIG REPORT, *supra* note 3, at 22.

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remain outside State Department custody. Although NARA asked the State Department to attempt a recovery of the email records by contacting Secretary Powell's internet service or email provider,<sup>27</sup> the State Department merely wrote to ask Secretary Powell's representative to attempt the retrieval of those records.<sup>28</sup> Such efforts by both NARA (acting on behalf of Archivist Ferriero) and the State Department (acting on behalf of Secretary Kerry) are insufficient as a matter of law. Not only has Secretary Powell refused to answer the State Department's inquiry,<sup>29</sup> the FRA mandates that (1) Secretary Kerry notify Archivist Ferriero that federal records belonging to the State Department have been unlawfully removed from the agency; and (2) Secretary Kerry and Archivist Ferriero initiate action through the Attorney General for the recovery of those federal records.<sup>30</sup> As the D.C. Circuit Court of Appeals has held, the obligation to initiate action through the Attorney General to recover unlawfully removed records is a mandatory obligation, not subject to agency discretion.<sup>31</sup> Any attempt to evade that obligation by claiming that Secretary Kerry or Archivist Ferriero (or their respective agencies) lack the legal authority to recover the email records at issue directly from Secretary Powell's internet service or email provider cannot be countenanced. Even if that claim were true in the abstract (which it cannot be since the records belong to the State Department, not Secretary Powell<sup>32</sup>), the FRA grants Secretary Kerry and Archivist Ferriero the necessary authorization in this case to recover the records through action directed by the Attorney General.

Although it is incumbent upon Secretary Kerry, acting through the Attorney General and with the assistance of Archivist Ferriero, to contact Secretary Powell's internet service or email provider directly, and to take all other action necessary to secure and recover the email records that remain outside of State Department custody, in the absence of such action by Secretary Kerry, it falls to Archivist Ferriero himself to initiate the necessary recovery efforts through the Attorney General and to contact Congress accordingly.<sup>33</sup> The Archivist must act independently whenever the agency head fails to take action through the Attorney General "within a reasonable period of time" of being notified of the unlawful removal of records.<sup>34</sup>

In this case, NARA and Archivist Ferriero have been aware of various potential FRA violations by former Secretaries of State, including violations related to the retention of Secretary

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<sup>27</sup> Ex. 5 at 2.

<sup>28</sup> Ex. 4 at 4; *see also* STATE OIG REPORT, *supra* note 3, at 22; Exs. 1–3.

<sup>29</sup> Ex. 1 at 2; Ex. 4 at 4; STATE OIG REPORT, *supra* note 3, at 22.

<sup>30</sup> 44 U.S.C. §§ 2905(a), 3106; *Armstrong v. Bush*, 924 F.2d 282, 294 (D.C. Cir. 1991) ("[T]he Federal Records Act establishes only one remedy for the improper removal of a 'record' from the agency": the agency head, in conjunction with the Archivist, is required to request the Attorney General to initiate an action to recover records unlawfully removed from the agency.") (quoting *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980)).

<sup>31</sup> *Armstrong*, 924 F.2d at 295 ("Because the FRA enforcement provisions leave *no* discretion to determine which cases to pursue, the agency head's and Archivist's enforcement decisions are not committed to agency discretion by law. In contrast to a statute that merely *authorizes* an agency to take enforcement action as it deems necessary, the FRA *requires* the agency head and Archivist to take enforcement action.").

<sup>32</sup> *See supra* note 23; *Competitive Enter. Inst. v. Office of Sci. & Tech. Pol'y*, 827 F.3d 145, 149 (D.C. Cir. 2016) ("If the agency head controls what would otherwise be an agency record, then it is still an agency record[.]").

<sup>33</sup> 44 U.S.C. §§ 2905(a), 3106(b).

<sup>34</sup> *Id.*

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Powell's work-related email, at least since March 2015.<sup>35</sup> The State Department and Secretary Kerry were aware of the unlawful removal of Secretary Powell's email records long before that date.<sup>36</sup> On March 3, 2015, and again on July 2, 2016, NARA requested information from the State Department concerning these FRA infractions,<sup>37</sup> and it ultimately directed the State Department to "inquire with Secretary Powell's 'internet or email provider' to determine whether it is still possible to retrieve the email records that might remain on its servers."<sup>38</sup> The State Department did not undertake that additional inquiry.<sup>39</sup> In light of the extended period of time that has passed since NARA, the State Department, Archivist Ferriero, and Secretary Kerry became aware of the alienation of the records in question, and in the absence of any effort by Secretary Kerry to initiate action through the Attorney General for the recovery of those records, it is now past time for the Archivist to take independent action as required by 44 U.S.C. § 2905(a) and 44 U.S.C. § 3106(b).

## II. FREEDOM OF INFORMATION ACT REQUEST

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), CoA Institute hereby requests access to the following records. Unless otherwise noted, the time period for all items of this request is January 20, 2001 to the present.<sup>40</sup>

1. All records reflecting any permission, clearance, or approval granted to Secretary Powell by the Archivist or NARA for the use of any personal email account for the conduct of official State Department business. The time period for this item of the request is January 20, 2001 to January 26, 2005.
2. All records reflecting notification from the State Department to the Archivist or NARA pursuant to 44 U.S.C. § 3106 and/or 36 C.F.R. § 1230.14 concerning State

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<sup>35</sup> See Letter from Paul M. Webster, Jr., Chief Records Officer, Nat'l Archives & Records Admin., to Margaret P. Grafeld, Deputy Assistant Sec'y for Global Info. Sys., Bureau of Admin., Dep't of State (Mar. 3, 2015) (attached as Exhibit 6) ("NARA is concerned that Federal records may have been alienated from the Department of State's official recordkeeping systems," including with respect to "the Federal email records created or received by former Secretaries of State dating back to Secretary Madeleine K. Albright"); see also STATE OIG REPORT, *supra* note 3, at 17–18; Letter from Margaret P. Grafeld, Deputy Assistant Sec'y for Global Info. Sys., Bureau of Admin., Dep't of State, to Paul M. Webster, Jr., Chief Records Officer, Nat'l Archives & Records Admin., at 2 (Apr. 2, 2015) (attached as Exhibit 7) ("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.").

<sup>36</sup> See, e.g., STATE OIG REPORT, *supra* note 3, at 17–18 n.75 (the State Department first made "formal, written requests to the representatives of Secretaries Albright, Powell, Rice and Clinton to produce any Federal records in personal accounts" in October 2014); see also Ex. 2.

<sup>37</sup> See Ex. 5; STATE OIG REPORT, *supra* note 3, at 18 n. 78.

<sup>38</sup> STATE OIG REPORT, *supra* note 3, at 22 n.92; see also Ex. 5 at 2.

<sup>39</sup> See Ex. 1.

<sup>40</sup> For purposes of this request, the term "present" should be construed as the date on which the agency begins its search for responsive records. See *Pub. Citizen v. Dep't of State*, 276 F.3d 634 (D.C. Cir. 2002). The term "record" means the entirety of the record any portion of which contains responsive information. See *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, No. 15-5201, 2016 WL 4056405, at \*7–9 (D.C. Cir. July 29, 2016) (admonishing agency for withholding information as "non-responsive" because "nothing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure").

Department records created or received by Secretary Powell on any personal email account.

3. All records, including but not limited to email, memoranda, or letters, reflecting internal NARA responses to any record responsive to Item Two of this request.
4. All communications between the Archivist or NARA and the State Department concerning efforts to retrieve, recover, or retain State Department records created or received by Secretary Powell on any personal email account.
5. All communications between the Archivist or NARA and the Attorney General of the United States concerning efforts to retrieve, recover, or retain State Department records created or received by Secretary Powell on any personal email account.
6. All notifications under 44 U.S.C. § 2905(a) and/or 44 U.S.C. § 3106(b) to the U.S. Congress relating to State Department records created or received by Secretary Powell on any personal email account.
7. All communications between the Archivist or NARA and the Executive Office of the President (including, but not limited to, the Office of the White House Counsel or the Office of the President) concerning Secretary Powell's use of any personal email account.
8. All communications between the Archivist or NARA and Secretary Powell or his representatives concerning his use of any personal email account, including all communications concerning efforts to retrieve, recover, or retain State Department records created or obtained on such an account.

### **Request for Expedited Processing**

CoA Institute requests expedited processing of its request because (1) it is “primarily engaged in disseminating information” and (2) the requested records concern “actual or alleged Federal government activity.” about which there exists an “urgency to inform the public.”<sup>41</sup>

#### ***1. CoA Institute is primarily engaged in disseminating information as a representative of the news media.***

As discussed below, CoA Institute is primarily engaged in disseminating information because it qualifies as a news media organization.<sup>42</sup> CoA Institute gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

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<sup>41</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II); 36 C.F.R. § 1250.28(a)(3).

<sup>42</sup> *Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (referencing *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).

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**2. *There is an urgency to inform the public about actual Federal government activity.***

In *Al-Fayed v. Central Intelligence Agency*, the U.S. Court of Appeals for the District of Columbia Circuit established a multi-factor test to determine whether a FOIA requester properly satisfies the “urgency to inform” standard.<sup>43</sup> These factors include: (1) whether a request concerns a “matter of current exigency to the American public”; (2) whether the consequences of delaying a response would “compromise a significant recognized interest”; (3) whether the request concerns “federal government activity”; and, (4) whether the requester has proffered credible “allegations regarding governmental activity.”<sup>44</sup>

In this case, the requested records concern high-ranking agency officials possibly violating federal laws and agency rules and regulations. The issue has been widely covered by the news media and Congressional interest in the subject is naturally acute.<sup>45</sup> In short, CoA Institute does not seek records of merely “newsworthy” topics, but rather “subject[s] of a currently unfolding story.”<sup>46</sup> These records unquestionably concern the activity of the Federal government, insofar as they reflect communications between high-ranking State Department officials, NARA, and employees of the Office of the White House Counsel and the Executive Office of the President. The communications may reveal potential impropriety in the manner and content of the correspondence, as well as in agency efforts, or lack thereof, to recover the work-related email correspondence of Secretary Powell. Importantly, NARA and other agencies have granted CoA Institute its prior requests for expedited processing of requests concerning the use of private email by agency heads and potential attendant FRA violations.<sup>47</sup>

Delay in the production of this FOIA request would compromise a significant and recognized public interest in government accountability. The Supreme Court has stated that the “core purpose of the FOIA” is to allow the American people access to information that might “contribute significantly to public understanding of the operations or activities of the government.”<sup>48</sup> The ability of a “watchdog” like CoA Institute to secure such records as those sought in this request for the purposes of government accountability,<sup>49</sup> especially where a current exigency and unfolding story exists, thus weighs in favor of expedited processing.

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<sup>43</sup> 254 F.3d 300, 310–11 (D.C. Cir. 2001).

<sup>44</sup> *Id.*

<sup>45</sup> See *supra* notes 2–4 and accompanying text; see also *supra* note 7.

<sup>46</sup> *Al-Fayed*, 254 F.3d at 311.

<sup>47</sup> See Email from FOIA@nara.gov, Nat’l Archives & Records Admin., to CoA Inst. (Jan. 28, 2015) (granting expedited processing of request NGC16-124) (on file with CoA Inst.); Email from Adrienne M. Santos, Gov’t Info. Specialist, OSD/JA FOIA Office, Dep’t of Def. (Dec. 24, 2015) (granting expedited processing of request 16-F-0338) (on file with CoA Inst.); Email from FOIA@nara.gov, Nat’l Archives & Records Admin., to CoA Inst. (Oct. 2, 2015) (granting expedited processing of request NGC15-648) (on file with CoA Inst.); Email from Joseph A. Scanlon, FOIA & Privacy Officer, Nat’l Archives & Records Admin., to CoA Inst. (Mar. 30, 2015) (granting expedited processing of request NGC15-159) (on file with CoA Inst.); Letter from Requester Commc’ns Branch, Office of Info. Programs & Servs., Dep’t of State, to CoA Inst. (Apr. 14, 2015) (granting expedited processing of request F-2015-4785) (on file with CoA Inst.).

<sup>48</sup> *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989).

<sup>49</sup> See *Balt. Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001) (“[O]btaining information to act as a ‘watchdog’ of the government is a well-recognized public interest in the FOIA.”); see also *Ctr. to Prevent Handgun Violence v. Dep’t of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) (“This self-appointed watchdog role is recognized in our system.”).

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### **Request for a Public Interest Fee Waiver**

CoA Institute requests a waiver of any and all applicable fees. The FOIA and applicable regulations provide that NARA shall furnish the 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 understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”<sup>50</sup>

In this case, the requested records will unquestionably shed light on the “operations or activities of the government,” namely, the extent to which Secretary Powell used a personal email account to conduct official business in contravention of agency policies, as well as efforts by the agency to retrieve these records for proper preservation. Disclosure will “contribute significantly” to public understanding of such matters because, to date, the public has not known the details of how the State Department attempted to retrieve records of email from Secretary Powell, and prior to September 8, 2016, it was unknown that the agency had refused to contact Secretary Powell’s email provider directly in the absence of a response from Secretary Powell or his representatives. Public interest in these matters is particularly acute in light of scandals surrounding the use of personal email by former Secretary Hillary Clinton and the heads of the Departments of Defense and Homeland Security, as well as broader congressional efforts to prevent the use of personal email for government business.<sup>51</sup>

CoA Institute has the intent and ability to make the results of this request available to a reasonably broad public audience through various media. Its staff has significant experience and expertise in government oversight, investigative reporting, and federal public interest litigation. 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 through CoA Institute’s regularly published online newsletter, memoranda, reports, or press releases.<sup>52</sup> In addition, as CoA Institute is a non-profit organization as defined under Section 501(c)(3) of the Internal Revenue Code, it has no commercial interest in making this request.

### **Request To Be Classified as a Representative of the News Media**

For fee status purposes, CoA Institute also qualifies as a “representative of the news media” under the FOIA.<sup>53</sup> As the D.C. Circuit recently held, the “representative of the news media” test is properly focused on the requestor, not the specific FOIA request at issue.<sup>54</sup> CoA

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<sup>50</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 36 C.F.R. § 1250.56; see *Cause of Action v. Fed. Trade Comm’n*, 799 F.3d 1108, 1115–19 (D.C. Cir. 2015) (discussing proper application of public-interest fee waiver test).

<sup>51</sup> See, e.g., Colleen McCain Nelson, *In Wake of Clinton, Disclosures, Bill Bans Spending on Private Email*, WALL ST. J. (Dec. 16, 2015), <http://goo.gl/IGEY6l>; Michael S. Schmidt, *Defense Secretary Conducted Some Official Business on a Personal Email Account*, N.Y. TIMES (Dec. 16, 2015), <http://goo.gl/pnWJvM>; Byron Tau, *In Lawsuit, Journalist Seeks Hillary Clinton’s Deleted Emails*, WALL ST. J. (Dec. 8, 2015), <http://goo.gl/A6WoLB>; Mark Tapscott, *Judicial Watch Sues For Top Homeland Security Officials’ Private Email Docs*, DAILY CALLER (Nov. 18, 2015), <http://goo.gl/b3xlaZ>; Rachel Witkin, *Sec. Jeh Johnson: ‘Whoops’ on Using Personal Email at DHS*, NBC NEWS (July 21, 2015), <http://goo.gl/KH3SA7>.

<sup>52</sup> See also *Cause of Action*, 799 F.3d at 1125–26 (holding that public interest advocacy organizations may partner with others to disseminate their work).

<sup>53</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 22 C.F.R. § 171.14(b)(5)(ii)(C).

<sup>54</sup> See *Cause of Action*, 799 F.3d at 1121.

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Institute satisfies this test because it 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.<sup>55</sup> Although it is not required by the statute, CoA Institute gathers the news it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. It does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, newsletters, and congressional testimony and statements for the record.<sup>56</sup> These distinct works are distributed to the public through various media, including CoA Institute's website, Twitter, and Facebook. CoA Institute also provides news updates to subscribers via email.

The statutory definition of a "representative of the news media" contemplates that organizations such as CoA Institute, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities."<sup>57</sup> In light of the foregoing, numerous federal agencies have appropriately recognized CoA Institute as a news media organization in connection with its FOIA requests.<sup>58</sup>

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<sup>55</sup> CoA Institute notes that the NARA definition of "representative of the news media" (36 C.F.R. § 1250.3(q)) is in conflict with the statutory definition and controlling case law. NARA has improperly retain the outdated "organized and operated" standard that Congress abrogated when it provided a statutory definition in the OPEN Government Act of 2007. *Id.* at 1225 ("Congress . . . omitted the 'organized and operated' language when it enacted the statutory definition in 2007. . . . [T]here is not basis for adding an 'organized and operated' requirement to the statutory definition."). Under either definition, however, CoA Institute qualifies as a representative of the news media.

<sup>56</sup> See, e.g., *Cause of Action Testifies Before Congress on Questionable White House Detail Program* (May 19, 2015), available at <http://coainst.org/2aJ8UAA>; COA INSTITUTE, 2015 GRADING THE GOVERNMENT REPORT CARD (Mar. 16, 2015), available at <http://coainst.org/2as088a>; *Cause of Action Launches Online Resource: ExecutiveBranchEarmarks.com* (Sept. 8, 2014), available at <http://coainst.org/2aJ8sm5>; COA INSTITUTE, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://coainst.org/2aFWxUZ>; COA INSTITUTE, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://coainst.org/2apTwqP>; COA INSTITUTE, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://coainst.org/2aJh901>.

<sup>57</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II).

<sup>58</sup> See, e.g., FOIA Request 1355038-000, Fed. Bureau of Investigation, Dep't of Justice (Aug. 2, 2016); FOIA Request CFPB-2016-222-F, Consumer Fin. Prot. Bureau (Apr. 20, 2016); FOIA Request CFPB-2016-207-F, Consumer Fin. Prot. Bureau (Apr. 14, 2016); FOIA Request 796939, Dep't of Labor (Mar. 7, 2016); FOIA Request 2015-HQFO-00691, Dep't of Homeland Sec. (Sept. 22, 2015); FOIA Request F-2015-12930, Dept. of State (Sept. 2, 2015); FOIA Request 14-401-F, Dep't of Educ. (Aug. 13, 2015); FOIA Request HQ-2015-01689-F, Dep't of Energy (Aug. 7, 2015); FOIA Request 2015-OSEC-04996-F, Dep't of Agric. (Aug. 6, 2015); FOIA Request OS-2015-00419, Dep't of Interior (Aug. 3, 2015); FOIA Request 780831, Dep't of Labor (Jul 23, 2015); FOIA Request 15-05002, Sec. & Exch. Comm'n (July 23, 2015); FOIA Request 145-FOI-13785, Dep't of Justice (Jun. 16, 2015); FOIA Request 15-00326-F, Dep't of Educ. (Apr. 08, 2015); FOIA Request 2015-26, Fed. Energy Regulatory Comm'n (Feb. 13, 2015); FOIA Request HQ-2015-00248, Dep't of Energy (Nat'l Headquarters) (Dec. 15, 2014); FOIA Request F-2015-106, Fed. Commc'n Comm'n (Dec. 12, 2014); FOIA Request HQ-2015-00245-F, Dep't of Energy (Dec. 4, 2014); FOIA Request F-2014-21360, Dep't of State, (Dec. 3, 2014); FOIA Request LR-2015-0115, Nat'l Labor Relations Bd. (Dec. 1, 2014); FOIA Request 201500009F, Exp.-Imp. Bank (Nov. 21, 2014); FOIA Request 2015-OSEC-00771-F, Dep't of Agric. (OCIO) (Nov. 21, 2014); FOIA Request OS-2015-00068, 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).



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### **Record Preservation Requirement**

CoA Institute requests that the disclosure officer responsible for the processing of this request issue an immediate hold on all records responsive, or potentially responsive, to this request, so as to prevent their disposal until such time as a final determination has been issued on the request and any administrative remedies for appeal have been exhausted. It is unlawful for an agency to destroy or dispose of any record subject to a FOIA request.<sup>59</sup>

### **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 a certain portion of responsive records can be produced more readily, CoA Institute requests that those records be produced first and the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions, please contact me by email at [ryan.mulvey@causeofaction.org](mailto:ryan.mulvey@causeofaction.org) or by telephone at (202) 499-4232. Thank you for your attention to this matter.



RYAN P. MULVEY  
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<sup>59</sup> See 36 C.F.R. § 1230.3(b) (“Unlawful or accidental destruction (also called unauthorized destruction) means . . . disposal of a record subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.”); *Chambers v. Dep’t of the Interior*, 568 F.3d 998, 1004–05 (D.C. Cir. 2009) (“[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under the FOIA or the Privacy Act.”); *Judicial Watch, Inc. v. Dep’t of Commerce*, 34 F. Supp. 2d 28, 41–44 (D.D.C. 1998).

# EXHIBIT

1

**United States House of Representatives Committee on Oversight and Government Reform**  
Hearing: *“Examining FOIA Compliance at the Department of State”*

Partial Transcript Prepared by Cause of Action Institute

LINK TO HEARING VIDEO: <https://www.youtube.com/watch?v=Hn7lZtX7a8>

@43:18

**Rep. Stephen Lynch (D-MA):**

I have a letter that you sent on November 12, 2014. I ask unanimous consent to submit it in the record. In your letter you ask Secretary Powell’s representative to provide all of Secretary Powell’s records that were not in the State Department’s record keeping system. Is that correct?

**Under Secretary Patrick Kennedy:**

Yes, sir.

**Rep. Lynch:**

OK. That would have included emails from his AOL account that were work-related, right?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

Ok. Did Secretary Powell . . . let me ask you, how many emails did he produce pursuant to your request?

**Under Sec’y Kennedy:**

Secretary Powell responded that he did not have access anymore to any of those records, sir.

**Rep. Lynch:**

He didn’t have access to them?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

So that number would be zero?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

I have another letter from you dated October 21, 2015. In this letter you ask Secretary Powell’s representative to contact AOL to determine whether any of his emails were still on their system. Is that correct?

**Under Sec’y Kennedy:**

Yes, sir.

**Rep. Lynch:**

OK. To the best of your knowledge, did Secretary Powell follow-up and do this?

**Under Sec’y Kennedy:**

We never received a response to that request, sir.

**Rep. Lynch:**

Ok. I’ve got another letter from you, Ambassador Kennedy, dated November 6, 2015. In this letter, you inform the National Archives that Secretary Powell never contacted AOL. Isn’t that right?

**Under Sec’y Kennedy:**

That is correct, sir.

**Rep. Lynch:**

Ok. Again, Ambassador Kennedy, in July 2015, the Chief Records Officer for the National Archives asked the State Department to contact AOL directly to determine, and I quote, “whether it is still possible to retrieve the email records that may still be present.” Close quote. Mr. Kennedy, did you ever contact AOL?

**Under Sec’y Kennedy:**

Our lawyers advised, sir, that we are not a party to . . .

**Rep. Lynch:**

Would that answer be a “no”? Did you contact AOL?

**Under Sec’y Kennedy:**

No, sir, we did not contact AOL.

**Rep. Lynch:**

OK. So you got the Chief Records Officer asking you to contact AOL. And you’re saying “no” and your attorneys are telling you “no.”

**Under Sec’y Kennedy:**

They’re telling that we cannot make a request for someone else’s records from their provider. That request has to be made by them, sir.

**Rep. Lynch:**

Now, at some point the Inspector General informed you that Secretary Powell sent classified information from his AOL account. Did you contact AOL then?

**Under Sec’y Kennedy:**

Again, it’s the same answer, sir. We asked that Secretary Powell contact AOL.

**Rep. Lynch:**

So that answer would be “no.” I mean . . . but you have a responsibility here though. You admit that, by virtue of your position?

**Under Sec’y Kennedy:**

Yes, we contacted Secretary Powell.

[. . .]

@46:53

**Rep. Lynch:**

To your knowledge, has anybody at the State Department ever picked up the phone and called AOL about these questions?

**Under Sec’y Kennedy:**

As I said in response to your earlier questions, sir, it is . . . we cannot get records of another individual from their provider. They have to do it.

**Rep. Lynch:**

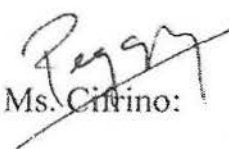
I don’t get this. This is ridiculous. This is the National Archives asking you to contact AOL. But you didn’t do that. You asked Secretary Powell to contact AOL. He didn’t do that. [. . .]

# EXHIBIT

2

UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON

NOV 12 2014

  
Dear Ms. Cifrino:

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.

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

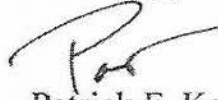
-2-

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 extending from the end.

Patrick F. Kennedy



# EXHIBIT

3

**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

OCT 21 2015

Peggy Cifrino  
Principal Assistant to General Colin Powell  
Office of General Colin L. Powell, USA (Ret)  
909 North Washington Street, Suite 700  
Alexandria, Virginia 22314

Dear Ms. Cifrino:

I am writing regarding the Department's November 12, 2014 request that former Secretary of State Colin Powell provide it with any federal records in his possession, such as an email sent or received on a personal email account while serving as Secretary of State, if there is reason to believe that it may not otherwise be preserved in the Department's recordkeeping system.

You previously advised, with respect to official emails sent on Secretary Powell's private account during his time in office, that the account he used has been closed for a number of years. Based on advice we have received from the National Archives and Records Administration, the Department would nevertheless encourage you – if you have not already done so – to check with the internet service or email provider for the former account to see if it is still possible to retrieve any official emails from Secretary Powell's tenure at the Department. If you do recover any such emails, we would appreciate your forwarding them to the Department.

Thank you for considering this request.

Sincerely,

  
Patrick F. Kennedy

# EXHIBIT

4

**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

November 6, 2015

Laurence Brewer  
Acting Chief Records Officer  
National Archives and Records Administration  
700 Pennsylvania Avenue, NW  
Washington, DC 20408

Dear Mr. Brewer,

The Department of State has been working these past months with the National Archives and Records Administration (NARA) regarding the emails of former Secretary of State Hillary Clinton. I am writing to provide NARA additional information regarding the Department's efforts, including information relevant to Paul M. Wester, Jr.'s July 2 letter to Margaret P. Grafeld, Deputy Assistant Secretary for Global Information Services.

Mr. Wester inquired as to steps the Department is taking to implement records management directives it issued in 2014 with respect to senior Department officials. As you know, in March of this year, Secretary Kerry asked the Department's Office of Inspector General ("OIG") to review and make recommendations for improving the Department's recordkeeping practices. Although OIG has not yet issued recommendations, Secretary Kerry appointed a Transparency Coordinator in September to work with Department bureaus and offices on improving Department records systems. It is expected that the Transparency Coordinator will be able to build on the work of the OIG as well as on the ongoing efforts of the Department's records management program, which has been instrumental in reminding all Department employees, including senior officials, of their records management responsibilities, including those regarding email.

The Department is reviewing email management options for the Department through an Electronic Records Management Working Group (ERMWG) that was established in order to meet the requirements for email management by December 31, 2016, as mandated by the President's Managing Government Records Directive. Although a long-term solution will be in place by the end of 2016, the

Department is working on several short-term steps to preserve senior officials' email. In February 2015, the Department's Executive Secretariat began journaling the email of 85 senior officials; as of October, the Executive Secretariat was journaling 112 senior officials. This includes the Deputy Secretaries, Under Secretaries, several senior advisers, as well as the Secretary's staff ranging from his chief of staff to staff assistants. The Department is also automatically journaling Secretary Kerry's email. Any email sent or received on Secretary Kerry's state.gov account is automatically copied and remotely saved electronically. In addition to the above listed officials, the Department began journaling the email accounts of Assistant Secretaries, Principal Deputy Assistant Secretaries, and a limited number of other senior officials in October 2015.

The Department updated its email policy in the Foreign Affairs Manual in October reminding employees that personal email accounts should only be used for official work in very limited circumstances and that under the Presidential and Federal Records Act Amendments of 2014, employees are prohibited from creating or sending a record using a non-official email account unless the employee (1) copies the employee's official email account in the original creation or transmission, or (2) forwards a complete copy of the record (including any attachments) to the employee's official email account not later than 20 days after the original creation or transmission. In addition, the Department's Foreign Service Institute (FSI) provides a variety of training courses, both classroom and online, that include records management. These courses include records management training for Office Management Specialists, Information Management Officers, and orientation courses for new employees. FSI also offers a specialized records management course for all levels of employees and training for State Messaging and Archive Retrieval Toolset (SMART) users.

The Secretary's Executive Secretariat regularly hosts record-keeping workshops for all Seventh Floor Department Principals' offices and employees, including five sessions in 2015. Representatives from the Office of Information Programs and Services (A/GIS/IPS) and the Correspondence, Records and Staffing Division of the Executive Secretariat Staff review senior officials' responsibilities for creating records necessary to document their activities and for the proper management and preservation of their records regardless of physical format or media. They also discuss departing senior officials' responsibility to identify their records prior to departure and to 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. Adherence to Department email

requirements in accordance with the Presidential and Federal Records Act Amendments of 2014 is also emphasized at these workshops.

The Executive Secretariat also requires a briefing for all incoming and departing employees assigned to Seventh Floor Department Principals' offices on their record keeping requirements and responsibilities. Upon notification of a senior official's departure, the Executive Secretariat Staff briefs and assists each departing Principal's office with the proper preservation of official records.

In his letter, Mr. Wester also requested that the Department contact former Secretary Clinton's representatives to request the native electronic version with the associated metadata of the approximately 55,000 pages of emails provided to the Department. As set forth in the Department's and NARA's September 17 motion to dismiss in the consolidated cases of *Judicial Watch v. Kerry*, No. 1:15-cv-00785-JEB and *Cause of Action Institute v. Kerry*, No. 1:15-cv-01068-JEB, the Department requested on May 22 that former Secretary Clinton provide an electronic copy of the approximately 55,000 pages of emails, and Secretary Clinton's attorney responded that they would do so. The electronic copy was not, however, provided; Secretary Clinton's counsel advised on August 12 that the email server that was used to store Secretary Clinton's emails while she was Secretary of State and the thumb drives that included electronic copies of the documents she had provided to the Department had been turned over to the Federal Bureau of Investigation (FBI). On September 14, 2015, the Department sent a letter to the FBI requesting an electronic copy of the approximately 55,000 pages. We have not yet received such a copy.

Mr. Wester also advised that the Department may want to reach out to both former Secretary Clinton and former Secretary Colin Powell to see if Department emails could be recovered from any internet service and email providers that they used. On October 2, 2015, the Department requested Secretary Clinton's counsel to confirm that "with regard to her tenure as Secretary of State, former Secretary Clinton has provided the Department with all federal records in her possession, regardless of their format or the domain on which they were stored or created, that may not otherwise be preserved in the Department's recordkeeping system. To the extent her emails might be found on any internet service and email providers, we encourage you to contact them." (Attachment A). On October 8, former Secretary Clinton's counsel wrote to:

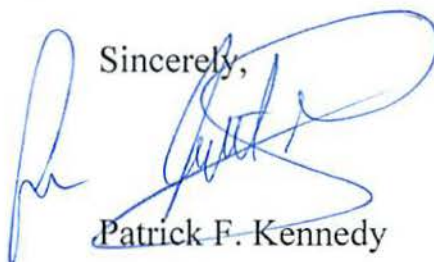
confirm that, with regard to her tenure as Secretary of State, former Secretary Clinton has provided the Department on December 5, 2014, with

all federal e-mail records in her custody, regardless of their format or the domain on which they were stored or created, that may not otherwise be preserved, to our knowledge, in the Department's recordkeeping system. She does not have custody of e-mails sent or received in the first few weeks of her tenure, as she was transitioning to a new address, and we have been unable to obtain these. In the event we do, we will immediately provide the Department with federal record e-mails in this collection. (Attachment B).

On October 21, the Department sent a letter to Secretary Powell's principal assistant similarly encouraging them to check with the internet service or email provider for Secretary Powell's former account to see if it is still possible to retrieve any official emails from his tenure at the Department. (Attachment C). The Department has not as yet received a response.

Finally, please be advised that in letters of March 11, 2015, the Department also requested of former aides to former Secretary Clinton -- Cheryl Mills, Huma Abedin, Jacob Sullivan, and Philippe Reines -- that should any of them be aware or become aware of a federal record in his or her possession, such as an email sent or received on a personal email account while serving in an official capacity at the Department, that such record be made available to the Department. We also advised them of NARA's records management guidance *Bulletin 2013-03* and the additional NARA guidance on managing email issued on September 15, 2014, some or all of which post-dated their service to the Department. The Department has received over one hundred thousand pages of documents from Ms. Mills, Ms. Abedin, Mr. Sullivan, and Mr. Reines collectively, through their representatives in response to the Department's request.

We hope that this information assists in NARA's understanding of this matter. As always, thank you for our continued close collaboration.

Sincerely,  
  
Patrick F. Kennedy

Enclosures

# EXHIBIT

5





NATIONAL  
ARCHIVES

JUL 02 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:

I am in receipt of your letter of April 2, 2015, responding to the National Archives and Records Administration's (NARA) formal request of March 3, 2015, that you provide us with the report required in 36 CFR 1230.14 concerning the potential alienation of Federal email records created and received by former Secretary of State Hillary R. Clinton.

I appreciate the details you have provided to date; however, recognizing that the situation continues to be fluid, there are currently two major questions or concerns that the Department needs to address.

First, in your response you described and forwarded key policy directives issued by the Department in 2014, on records management in general, including specific guidance related to the management of email and other electronic records of senior agency officials. Related to these policies, I am requesting additional information on how the Department implemented these directives with senior officials. More specifically, we would like to understand the specific training, procedures, and other controls the Department employed to ensure the key directives were implemented. This will allow NARA to evaluate whether there are appropriate safeguards in place to prevent the alienation of records from occurring in the future.

Second, as we have discussed, I would like to reiterate our request that the Department contact the representatives of former Secretary Clinton to secure the native electronic versions with associated metadata of the approximately 55,000 hard copy pages of emails provided to the

NATIONAL ARCHIVES *and*  
RECORDS ADMINISTRATION

8601 ADELPHI ROAD  
COLLEGE PARK, MD 20740-6001

[www.archives.gov](http://www.archives.gov)


Department. If the Department is unable to obtain the electronic versions of these messages from Secretary Clinton, I am requesting that the Department inquire with the internet service or email provider of former Secretary Clinton, and also of former Secretary Powell, with regard to whether it is still possible to retrieve the email records that may still be present on their servers. As stated in the OMB/NARA M-12-18 *Managing Government Records Directive*, Federal agencies are required by the end of 2016 to maintain all electronic records, including email, in their native electronic format to facilitate active use and future access.

I am aware that there are multiple ongoing inquiries into the details of this case, including by Congressional oversight committees and the Department's Inspector General, which may already be addressing the requests that I have made. I would therefore appreciate continuing updates on the current status of these activities to the extent possible, particularly where the investigations may reveal that the collection Secretary Clinton provided to the Department is incomplete. I also look forward to receiving copies of the final reports of all such investigations, as well as the Department's plans for corrective action. This documentation will assist us in understanding this situation and the Department plans to ensure a comparable situation will not happen in the future.

In closing, I would like to convey my appreciation for the Department's efforts in following up with the representatives of the former Secretary on the many concerns that have surfaced in the past several months. We share many of the Department's concerns and stand ready to provide advice when needed on the records management issues that arise.

I look forward to receiving your response and appreciate your continued attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Paul M. Wester, Jr." in a cursive script.

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

6



NATIONAL  
ARCHIVES

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.

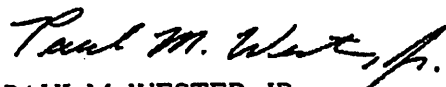
We request that you provide us with a report as required and described in 36 CFR 1230.14 within 30 days of the date of this letter.

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.

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,



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

7



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).<sup>1</sup> Specifically, the Department requested the secretaries provide any federal records in

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<sup>1</sup> 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



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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CAUSE OF ACTION INSTITUTE	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 16-2145
	)	
JOHN F. KERRY,	)	
	)	
and	)	
	)	
DAVID S. FERRIERO,	)	
	)	
Defendants.	)	

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**EXHIBIT 8 TO COMPLAINT**



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).<sup>1</sup> Specifically, the Department requested the secretaries provide any federal records in

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With continued best regards,



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

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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CAUSE OF ACTION INSTITUTE	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 16-2145
	)	
JOHN F. KERRY,	)	
	)	
and	)	
	)	
DAVID S. FERRIERO,	)	
	)	
Defendants.	)	

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**EXHIBIT 9 TO COMPLAINT**



NATIONAL  
ARCHIVES

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.

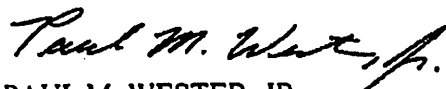
We request that you provide us with a report as required and described in 36 CFR 1230.14 within 30 days of the date of this letter.

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.

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,



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