



NATIONAL  
ARCHIVES

ARCHIVIST *of the*  
UNITED STATES

DAVID S. FERRIERO

T 202.357.5900

F 202.357.5901

*david.ferriero@nara.gov*

6 November 2015

**VIA ELECTRONIC TRANSMISSION**

The Honorable Charles E. Grassley  
Chairman, Committee on the Judiciary  
United States Senate  
Washington, DC 20510-6275

Dear Mr. Chairman:

Thank you for your October 22, 2015 letter, which follows up on issues raised in my September 28, 2015, letter responding to your inquiries. Your letter raises important questions about how NARA implements our statutory authority under 44 U.S.C. § 3106 concerning allegations of unauthorized destruction or removal of federal records. Per your request, I will answer your questions in the order that they have been posed.

1. Does NARA have the statutory authority to request the Attorney General to initiate an action for the recovery of records that are known to have been, or there is reason to believe have been, unlawfully removed?

Response: Yes, NARA does have statutory authority to request the Attorney General to initiate an action for the recovery of records that are known to have been, or there is reason to believe have been, unlawfully removed, per 44 U.S.C. §§ 2905 & 3106.

2. Has the Department of Justice initiated action for the recovery of records that are known to have been or there is reason to believe have been unlawfully removed from the State Department, such as the Blumenthal emails, and the two month email gap in the beginning of Secretary Clinton's tenure, including the Petraeus emails? If not, why has NARA not requested the Attorney General to initiate an action for recovery of Secretary Clinton's emails?

NATIONAL ARCHIVES *and*  
RECORDS ADMINISTRATION

700 PENNSYLVANIA AVENUE, NW  
WASHINGTON, DC 20408-0001

*www.archives.gov*

Response: No, the Department of Justice has not initiated an action "for the recovery of records that are known to have been or there is reason to believe have been unlawfully removed from the State Department, such as the Blumenthal emails, and the two month email gap in the beginning of Secretary Clinton's tenure, including the Petraeus emails."

NARA does not believe that it is necessary or appropriate at this time to request the Attorney General to initiate an action for recovery of Secretary Clinton's emails for the following reasons. Both the Department of State and the Department of Justice are already fully engaged in addressing the issues associated with former Secretary Clinton's use of a private email account and server. The language in section 3106 to which you cite, stating that "the Archivist shall request the Attorney General to initiate," is preceded by an important temporal qualifier – i.e., when action by the agency head has not been initiated "within a reasonable period of time" – which allows time for NARA and the agency to work together to resolve the issue without immediately asking the Attorney General to resort to litigation. NARA's implementing regulations, at 36 CFR Part 1230, lay out this process, by which the agency is required to report to NARA on what it has done to address the issue. NARA's long-established policy and practice has been that as long as the agency and other relevant parties are working cooperatively, NARA has not requested legal action from the Attorney General.

Since last March, NARA and the Department of State, and subsequently DOJ, have been working collaboratively on this matter. My September 28, 2015, letter was intended to describe these interactions and provide you with relevant correspondence and documentation. For example, I attached the DOJ's Memorandum in Support of Defendants' Motion to Dismiss in the lawsuits brought by Judicial Watch and Cause of Action to explain more fully the legal reasoning behind this process. Moreover, it is my understanding that Secretary Clinton has now already provided the FBI, a component of the Department of Justice, with the server and the electronic copies of the emails, and the Department of State has asked the FBI to preserve any recoverable media and content. Per the attached November 6, 2015, letter from Under Secretary of State Patrick F. Kennedy, the Department of State has also reported to NARA on the additional steps that the Department has taken to seek recovery of email records from former Secretaries Clinton and Powell, and from senior aides to Secretary Clinton.

Please note that I did not intend to suggest in my letter of September 28, 2015, that NARA's actions in this matter are directly dependent upon whether a private party has brought litigation or upon the independent actions of the Department of Justice. Rather, the various inquiries described in my letter are all part of a continuum of factors that NARA uses to determine the appropriate course of action in response to any particular set of allegations. In this case, because the process for addressing allegations of unauthorized destruction or removal of records is ongoing and progressing, we continue to believe that it is neither necessary nor appropriate at this time to request that the Attorney General initiate an action.

As I noted in my last letter, the difficult challenge of managing email records across the government is one of my highest priorities. By the end of next year, I am expecting that all Executive branch agencies will have electronic records management systems in place for their email records, as required by the 2012 OMB/NARA Managing Government Records Directive (M-12-18). This directive, along with last year's amendments to the Federal Records Act and Presidential Records Act, should help to prevent this type of situation from happening again.

Your staff should feel free to contact John Hamilton, my Director of Congressional Affairs, if you have any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "David S. Ferriero". The signature is fluid and cursive, with a large initial "D" and "F".

DAVID S. FERRIERO

Enclosure