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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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September 4, 2015

VIA ELECTRONIC TRANSMISSION

Mr. David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue, NW
Washington, DC 20408

Dear Mr. Ferriero:

On March 3, 2015, in response to the news that Secretary Clinton maintained a personal server to maintain custody of her official emails, NARA wrote to the State Department (the Department) and expressed concern that “Federal records may have been alienated from the Department of State’s official record keeping system.”¹ Use of a private server for official matters outside of a government facility is problematic.

Generally, removal of federal records from an agency that owns them runs afoul of regulation because the removal “allow[s] a record to leave the custody of a Federal agency without the permission of the Archivist of the United States.”² NARA is authorized to determine the disposition of Federal records under 44 U.S.C. 2904. NARA has substantial responsibility in ensuring that federal officials preserve federal records as well as oversee that federal agencies properly follow recordation protocols. One of the primary responsibilities of the Archivist is to prevent the alienation or unauthorized destruction of records.³

Department guidance during Secretary Clinton’s tenure makes clear that emails are considered federal records.⁴ Likewise, according to the Foreign Affairs Manual, all Department

¹ Paul Wester, NARA Chief Records Officer to Margaret P. Grafeld, Deputy Assistant Secretary for Global Information Services, Department of State (March 3, 2015).

² 36 C.F.R. 1230.3(b).

³ 36 C.F.R. 1228.100(a).

⁴ 5 FAM 443.1(c).

personnel must properly archive email outside of email inboxes.⁵ Significantly, the Department records schedule generally requires all of Secretary Clinton's emails to be preserved.⁶ And based on a memorandum from the Under Secretary of Management, Patrick Kennedy, it has been Department policy since 2009 that departing officials must ensure that the Department has "capture[d] electronically the email accounts of the senior officials..."⁷

Secretary Clinton did not turn over her emails to the Department until 22 months after leaving office. Even then, it was not a complete production. At least 15 emails to or from Secretary Clinton turned over to the U.S. House Select Committee on Benghazi by Sidney Blumenthal were not within the set that Secretary Clinton provided to the Department after leaving office.⁸ The fact that Secretary Clinton had to turn over 30,490 emails 22 months after leaving office illustrates that the Department failed to keep the emails preserved within its custody. Moreover, the fact that the 15 emails provided by Mr. Blumenthal were not within Secretary Clinton's production to the Department indicates that some emails about official business that appear to be federal records may have been altered or destroyed.

Federal law provides the procedure by which federal records can be destroyed.⁹ Accordingly, federal law *requires* the head of each federal agency to notify the Archivist of an actual or potential unlawful destruction or modification of a federal record if that agency head knows or has reason to believe that the record has been unlawfully removed from the agency.¹⁰ In addition, if a federal agency does not initiate an action for recovery, the Archivist *shall* request the Attorney General to initiate a recovery action and notify Congress when the request has been made.¹¹

To assist the Judiciary Committee in understanding the facts and circumstances that have occurred in the past few years as it relates to Secretary Clinton's recordation of official matters and the Department's failure to secure and safeguard those federal records, please respond to the following questions no later than September 24, 2015.

1. Did you or any other NARA staff have any reason to suspect that Secretary Clinton was using a non-government email address to send and receive official emails prior to being asked about it by the press? If so, please explain?
2. Did you grant a waiver, or other legal mechanism, permitting Secretary Clinton to destroy government records? If so, when, and under what authority did you issue it?

⁵ 5 FAM 754(b).

⁶ Department of State Records Schedule, Chapter 1.

⁷ Patrick Kennedy, Senior Officials' Records Management Responsibilities (August 28, 2014).

⁸ Michael S. Schmidt, "State Dept. Gets Libya Emails That Hillary Clinton Didn't Hand Over," THE NEW YORK TIMES (June 25, 2015).

⁹ 44 USC Chapter 33, Disposal of Records.

¹⁰ 44 USC § 3106.

¹¹ 44 USC § 3106.

3. If you knew that Secretary Clinton was using a non-government email address to send and receive official emails, what steps, if any, did you take to ensure those records were preserved according to federal law? Please explain in detail.
4. The Federal Records Act, 44 U.S.C. § 3106 (a), requires that when a deletion occurs, the head of the agency in question must notify the Archivist, and with the help of the Archivist, initiate an action through the Attorney General for the recovery of those records. Has Secretary Kerry provided such notice to you regarding the 15 emails to or from Secretary Clinton that Mr. Blumenthal produced to Congress but were not provided to the State Department by former Secretary Clinton?
 - a. If so, when? Please provide documentation.
 - b. If not, given that Secretary Kerry was notified of the 15 missing emails in June 2015 at the latest, will you now request the Attorney General initiate an action for recovery for the 15 missing emails and potentially other federal records that may have been deleted by Secretary Clinton, as required under 44 U.S.C. § 3106?¹²
 - c. If not, please explain how that decision comports with the requirements of 44 U.S.C. § 3106 (b).
5. In the last 10 years has any State Department official communicated to NARA concerns as to records keeping practices at that agency? If so, please provide the following information about those communications:
 - a. Who contacted NARA and when?
 - b. Who was the point of contact at NARA?
 - c. The content of each referral/communication.
 - d. All documentation specific to the referral to include internal NARA communications and deliberations at the staff and senior agency level to include the Office of the Archivist.
6. To date, have you initiated an investigation of the record keeping practices of Secretary Clinton during her tenure at the State Department? If so, who is leading this investigation? What is the status of the investigation and to whom will a report be generated?

¹² “In any case in which the head of a Federal agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action described in subsection (a), or is participating in, or believed to be participating in any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and *shall* notify the Congress when such a request has been made.” (emphasis added).

7. How many inspections pursuant to NARA's authority under 44 U.S.C. § 2906 has NARA conducted of the State Department during your tenure, when were they conducted, and what were the results? If none, please explain why not.
8. How many inspections pursuant to NARA's authority under 44 U.S.C. § 2906 has NARA conducted of any agency or department during your tenure, when were they conducted, of which agency or department, and what were the results? If none, please explain why not.

Please contact Paul Junge or Josh Flynn-Brown of my Committee staff at (202) 224-5225 if you have any questions about these matters. Thank you.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary