

# **Appendix B Attachments**



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.

NATIONAL ARCHIVES and  
RECORDS ADMINISTRATION

3601 ADELPHI ROAD  
COLLEGE PARK, MD 20740-6001  
[www.archives.gov](http://www.archives.gov)

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

Thank you for your cooperation.

Sincerely,



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

Official file – ACNR  
Reading file –AC, ACNR

cc:

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

NGC (Stern)  
NCON (Hamilton)  
Clavelli

S: \Alleged\State Clinton 030315\_final

PMW/pmw

mistress  
america  
august 14**The New York Times** <http://nyti.ms/1EcfJjU>

POLITICS

# Hillary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules

By **MICHAEL S. SCHMIDT** MARCH 2, 2015

WASHINGTON — Hillary Rodham Clinton exclusively used a personal email account to conduct government business as secretary of state, State Department officials said, and may have violated federal requirements that officials' correspondence be retained as part of the agency's record.

Mrs. Clinton did not have a government email address during her four-year tenure at the State Department. Her aides took no actions to have her personal emails preserved on department servers at the time, as required by the Federal Records Act.

It was only two months ago, in response to a new State Department effort to comply with federal record-keeping practices, that Mrs. Clinton's advisers reviewed tens of thousands of pages of her personal emails and decided which ones to turn over to the State Department. All told, 55,000 pages of emails were given to the department. Mrs. Clinton stepped down from the secretary's post in early 2013.

Her expansive use of the private account was alarming to current and former National Archives and Records Administration officials and government watchdogs, who called it a serious breach.

"It is very difficult to conceive of a scenario — short of nuclear winter —

where an agency would be justified in allowing its cabinet-level head officer to solely use a private email communications channel for the conduct of government business,” said Jason R. Baron, a lawyer at Drinker Biddle & Reath who is a former director of litigation at the National Archives and Records Administration.

A spokesman for Mrs. Clinton, Nick Merrill, defended her use of the personal email account and said she has been complying with the “letter and spirit of the rules.”

Under federal law, however, letters and emails written and received by federal officials, such as the secretary of state, are considered government records and are supposed to be retained so that congressional committees, historians and members of the news media can find them. There are exceptions to the law for certain classified and sensitive materials.

Mrs. Clinton is not the first government official — or first secretary of state — to use a personal email account on which to conduct official business. But her exclusive use of her private email, for all of her work, appears unusual, Mr. Baron said. The use of private email accounts is supposed to be limited to emergencies, experts said, such as when an agency’s computer server is not working.

“I can recall no instance in my time at the National Archives when a high-ranking official at an executive branch agency solely used a personal email account for the transaction of government business,” said Mr. Baron, who worked at the agency from 2000 to 2013.

Regulations from the National Archives and Records Administration at the time required that any emails sent or received from personal accounts be preserved as part of the agency’s records.

But Mrs. Clinton and her aides failed to do so.

How many emails were in Mrs. Clinton’s account is not clear, and neither is the process her advisers used to determine which ones related to her work at the State Department before turning them over.

“It’s a shame it didn’t take place automatically when she was secretary of state as it should have,” said Thomas S. Blanton, the director of the National

Security Archive, a group based at George Washington University that advocates government transparency. “Someone in the State Department deserves credit for taking the initiative to ask for the records back. Most of the time it takes the threat of litigation and embarrassment.”

Mr. Blanton said high-level officials should operate as President Obama does, emailing from a secure government account, with every record preserved for historical purposes.

“Personal emails are not secure,” he said. “Senior officials should not be using them.”

Penalties for not complying with federal record-keeping requirements are rare, because the National Archives has few enforcement abilities.

Mr. Merrill, the spokesman for Mrs. Clinton, declined to detail why she had chosen to conduct State Department business from her personal account. He said that because Mrs. Clinton had been sending emails to other State Department officials at their government accounts, she had “every expectation they would be retained.” He did not address emails that Mrs. Clinton may have sent to foreign leaders, people in the private sector or government officials outside the State Department.

The revelation about the private email account echoes longstanding criticisms directed at both the former secretary and her husband, former President Bill Clinton, for a lack of transparency and inclination toward secrecy.

And others who, like Mrs. Clinton, are eyeing a candidacy for the White House are stressing a very different approach. Jeb Bush, who is seeking the Republican nomination for president, released a trove of emails in December from his eight years as governor of Florida.

It is not clear whether Mrs. Clinton’s private email account included encryption or other security measures, given the sensitivity of her diplomatic activity.

Mrs. Clinton’s successor, Secretary of State John Kerry, has used a government email account since taking over the role, and his correspondence is being preserved contemporaneously as part of State Department records,

according to his aides.

Before the current regulations went into effect, Secretary of State Colin L. Powell, who served from 2001 to 2005, used personal email to communicate with American officials and ambassadors and foreign leaders.

Last October, the State Department, as part of the effort to improve its record keeping, asked all previous secretaries of state dating back to Madeleine K. Albright to provide it with any records, like emails, from their time in office for preservation.

“These steps include regularly archiving all of Secretary Kerry’s emails to ensure that we are capturing all federal records,” said a department spokeswoman, Jen Psaki.

The existence of Mrs. Clinton’s personal email account was discovered by a House committee investigating the attack on the American Consulate in Benghazi as it sought correspondence between Mrs. Clinton and her aides about the attack.

Two weeks ago, the State Department, after reviewing Mrs. Clinton’s emails, provided the committee with about 300 emails — amounting to roughly 900 pages — about the Benghazi attacks.

Mrs. Clinton and the committee declined to comment on the contents of the emails or whether they will be made public.

The State Department, Ms. Psaki said, “has been proactively and consistently engaged in responding to the committee’s many requests in a timely manner, providing more than 40,000 pages of documents, scheduling more than 20 transcribed interviews and participating in several briefings and each of the committee’s hearings.”

A version of this article appears in print on March 3, 2015, on page A1 of the New York edition with the headline: Clinton Used Personal Email at State Dept.



United States Department of State

Washington, D.C. 20520 *PMW*

*04-07-2015*

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



Attachment 1

United States Department of State

*Under Secretary of State  
for Management*

*Washington, D.C. 20520*

09/05/2014  
2:29 PM

UNCLASSIFIED

AUG 28 2014

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

**From:**

M - Patrick F. Kennedy *PK*

**SUBJECT:** Senior Officials' Records Management Responsibilities

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

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

**Defining and Managing Records**

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

Additionally, Senior Official records should include the following:

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

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

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

**Specific Email Requirements and Procedures**

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

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

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

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

**Attachments:**

**Tab 1 – List of Designated Senior Official Positions**

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

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

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## **DRAFT: Designated Senior Official Positions – March 5, 2014**

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

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

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

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

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

## **5 FAM 441 ELECTRONIC RECORDS MANAGEMENT**

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

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

### **a. Electronic Data files.**

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

**b. Documents.**

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

**c. Spreadsheets.**

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

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

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

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

g. Administrators of electronic records systems shall make certain that storage media meet applicable requirements prescribed in 36 CFR 1234.28. These requirements are also contained in FIRMR Bulletin B-1 and are discussed in the RMH, 5 FAH-4 H-219 .

h. Retention of electronic records.

- (1) The information in electronic records systems and related documentation and indexes must be scheduled for disposition no later than one year after the implementation of the system.
- (2) Procedures must be established for systematically backing up, copying, reformatting, and providing other necessary maintenance for the retention and usability of electronic records throughout their prescribed life cycles.

i. Destruction of electronic records.

- (1) Electronic records may be destroyed only in accordance with a records disposition authority approved by the Archivist of the United States. This authority is obtained through the Records Management Branch (OIS/RA/RD).
- (2) This process is exclusive, and records of the United States Government, including electronic records, may not be alienated or destroyed except through this process.
- (3) Electronic records scheduled for destruction must be disposed of in a manner that ensures protection of any sensitive, proprietary or national security information. Magnetic recording media are not to be reused if the previously recorded information can be compromised in any way. Refer to 12 FAM for requirements regarding the security of magnetic media.

j. All automated information systems (AIS) or facsimile machines used to process or store electronic records must comply with the security regulations contained in 12 FAM.

## **5 FAM 442 FACSIMILE RECORDS**

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

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

## **5 FAM 442.1 Facsimile Label**

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

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

## **5 FAM 442.2 FAX Transmittal Forms**

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

- a. Form DS-1890, Unclassified Facsimile Transmittal Cover Sheet, and Form DS-1890-A, Classified Facsimile Transmittal Cover Sheet, are Department forms that are available for use in transmitting documents. Their use is not mandatory. These forms are available on the INFOFORMS disk, which is part of the Department's INFOEXPRESS application. At a minimum, the transmittal form which is used by an office, should contain the following information:
  - date of transmittal
  - sending and receiving office information (symbol, name, voice & fax telephone numbers)
  - subject information, including TAGS/Terms to help properly file the documents
  - any comments regarding the transmission
  - appropriate security classification, when using a secure fax machine.
- b. Transmittal cover sheets containing substantive comments are to be filed with related record material. Those containing informal messages can be destroyed upon receipt or when no longer needed.

## **5 FAM 443 ELECTRONIC MAIL (E-MAIL) RECORDS**

### **5 FAM 443.1 Principles Governing E-Mail Communications**

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

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

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

## **5 FAM 443.2 Which E-Mail Messages are Records**

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

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

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

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

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

## **5 FAM 443.3 How to Preserve E-Mail Records**

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

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

## **5 FAM 443.4 Records Management Reviews**

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

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

## **5 FAM 443.5 Points to Remember About E-Mail**

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

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

## **5 FAM 443.6 Future Technology**

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

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

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

**5 FAM 444 THROUGH 449 UNASSIGNED**

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

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

- a. For "Mailbox" content, use the user name followed by "\_MB".
- b. i.e., Smith\_John H\_MB. If the mailbox exceeds the capacity of one CD, use: Smith\_John H\_MB1 for the first .PST created by the system administrator and Smith\_John H\_MB2 for the second .PST created by the system administrator, etc. (System administrators can decide where/how to split the content among multiple CDs.)
- c. For existing (user created) .PSTs, aka "personal folders", (this is a misnomer used by Microsoft since the content is "official", not "personal"), use the user name followed by "\_PF" i.e. Smith, John H\_PF . If the existing PSTs exceed the capacity of one CD, or there are multiple .PSTs, use Smith, John H\_PF1 for the first .PST, Smith, John H\_PF2 for the second .PST, etc. (System administrators can decide where/how to split the content among multiple CDs.)

10) CD markings:

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

11) Distributed System Administrator roles:

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

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

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

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

Attachment 2



Office of Origin: M  
Announcement Number: 2014\_10\_115  
Date of Announcement: October 17, 2014

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

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

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

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

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

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

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

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

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

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

Patrick F. Kennedy

Under Secretary for Management

◀ [Return to Department Notices index](#)

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

UNCLASSIFIED



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

1. As the Senior Agency Official (SAO) for records, it is my responsibility to ensure that we maintain the documentation of all that we do in the performance of our official duties, not only because it is required by law and is a good business practice, but because it is the right thing to do.
2. The Office of Management and Budget (OMB) and the National Archives and Records Administration (NARA) have recently issued joint guidance on managing email that is consistent with Department policy. This guidance serves as a reminder to ALL employees regardless of rank or position -- including Foreign Service and Civil Service employees, contractors, When Actually Employed (WAEs) employees, and Locally Employed Staff (LES) of the Department -- that we are responsible for creating records necessary to document our activities, in addition to the proper management and preservation of records. These responsibilities are applicable to all records made or received in the conduct of agency business, regardless of physical format or media, including e-mail.
3. In short, as a condition of our employment with the USG, employees at every level have both a legal responsibility and a business obligation to ensure that the documentation of their official duties is captured, preserved, managed, protected and accessible in official government systems. This includes email.
4. Through Presidential initiatives and under the leadership of OMB and NARA, this Administration is moving aggressively to ensure we capture the essential documentation of what we do for ourselves and for posterity. It's important for you to know that the public appetite for our contemporary records is huge. The historical records of the State Department are the most accessed of all the agency records archived at the National Archives. So, in continuing our long standing tradition of record keeping - of preserving our history - it is imperative we

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

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

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

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

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

**Signature:** Kerry

---

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

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**Dissemination Rule:** Archive Copy

**UNCLASSIFIED**

Attachment 4

**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

NOV 12 2014

*Cheryl*  
Dear Ms. Mills:

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

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

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

Enclosures - 3

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

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

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

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

Sincerely,

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

Patrick F. Kennedy

Attachment 5

**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

  
Dear Ms. Cifrino:

NOV 12 2014

The Department of State has a longstanding and continuing commitment to preserving the history of U.S. diplomacy, established in authorities under the Federal Records Act of 1950. I am writing to you, the representative of Secretary of State 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.

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

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

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

Sincerely,

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

Patrick F. Kennedy

Attachment 6

UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON

OCT 28 2014

Dear Mr. Bellinger:

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

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

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

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

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', written in a cursive style.

Patrick F. Kennedy

Attachment 7

**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

NOV 12 2014

Dear Ms. Stewart:

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

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

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

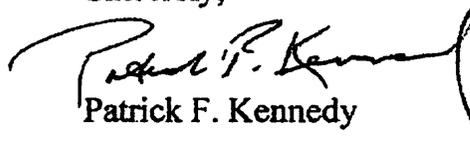
Ms. Jan Stewart,  
Albright Stonebridge Group,  
1101 New York Avenue NW, Suite 900,  
Washington, DC 20005.

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,



Patrick F. Kennedy

Attachment 8

**cdmillsGroup**

*endeavors that matter*

**VIA HAND DELIVERY**

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

December 5, 2014

Dear Under Secretary Kennedy:

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

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

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

Sincerely,



Cheryl Mills

THE SECRETARY OF STATE  
WASHINGTON

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

MAR 25 2015

Dear Inspector General Linick:

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

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

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

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

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

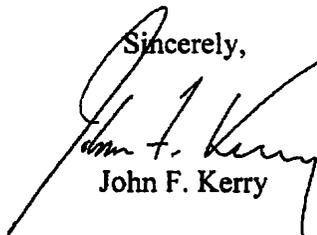
Several of the questions that have been brought to our attention are set forth below for your consideration. I welcome your insights on these and related matters:

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

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

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

Sincerely,



John F. Kerry

**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

*JMW*  
*06-18-2015*

JUN 12 2015

Dear Mr. Wester:

As the Senior Agency Official for Records Management at the Department of State, I am providing a response to your request of May 6, 2015 seeking additional information on the management of email in Federal agencies. Both of these questions are repeated below, followed by my response.

- 1) Have you discussed the responsibilities for managing Federal records in government and personal email accounts with your agency head? **Yes.**
- 2) Can you confirm that Federal records created or received in a personal email account used by your agency head are captured in an agency recordkeeping system? **Yes.**

Please feel free to contact me for more detailed information as you may find necessary. We look forward to continuing the close collaboration with you and your staff on records management issues. The Department of State's primary contact for records management is Margaret (Peggy) Grafeld, Deputy Assistant Secretary for Global Information Services. She may be reached at 202-261-8300 or by e-mail at [GrafeldMP@state.gov](mailto:GrafeldMP@state.gov).

Sincerely,



Patrick F. Kennedy

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



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

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,



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



United States Department of State

Washington, D.C. 20520

September 2, 2015

James A. Baker  
General Counsel  
Federal Bureau of Investigations  
935 Pennsylvania Avenue, NW  
Washington, D.C. 20535-0001

*Jing*  
Dear Mr. Baker:

I am writing to you regarding a request the Department of State (“Department”) has been ordered to make of the Federal Bureau of Investigation (“FBI”) in a Freedom of Information Act (“FOIA”) case, *Judicial Watch v. Department of State* (D.D.C. No. 13-cv-1363).

The underlying FOIA request at issue in the above-referenced case seeks the following information:

- Any and all SF-50 (Notification of Personnel Action) forms for Huma Abedin;
- Any and all contracts (including, but not limited to, personal service contracts) between the Department of State and Ms. Abedin; and
- Any and all records regarding, concerning, or related to the authorization for Ms. Abedin to represent individual clients and/or otherwise engage in outside employment while employed by and/or engaged in a contractual arrangement with the Department of State.

Pursuant to the Court’s order of August 20, 2015 (the “Order”), a copy of which is attached, the Department requests that the FBI “inform it about any information recovered from [former Secretary Hillary] Clinton’s server and the related thumb drive that is: (a) potentially relevant to the FOIA request at issue in this case; and (b) not already in the Department’s possession.”

Please confirm receipt of this letter and respond to the above request for information in writing on or before September 14, 2015, as the Court has directed the Department to file a status report with the Court no later than September 21, 2015, informing the Court of “the process agreed upon between the FBI and the State Department for sharing of information relevant to this lawsuit.”

Sincerely,

Mary E. McLeod  
Principal Deputy Legal Adviser

**From:** [DCD\\_ECFNotice@dcd.uscourts.gov](mailto:DCD_ECFNotice@dcd.uscourts.gov)  
**To:** [DCD\\_ECFNotice@dcd.uscourts.gov](mailto:DCD_ECFNotice@dcd.uscourts.gov)  
**Subject:** Activity in Case 1:13-cv-01363-EGS JUDICIAL WATCH, INC. v. DEPARTMENT OF STATE Order  
**Date:** Thursday, August 20, 2015 4:26:35 PM

---

**This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.**

**\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

District of Columbia

#### Notice of Electronic Filing

The following transaction was entered on 8/20/2015 at 4:25 PM and filed on 8/20/2015

**Case Name:** JUDICIAL WATCH, INC. v. DEPARTMENT OF STATE

**Case Number:** [1:13-cv-01363-EGS](#)

**Filer:**

**Document Number:** No document attached

#### Docket Text:

**MINUTE ORDER.** For the reasons stated by the Court at the August 20, 2015 status hearing, and as agreed to by Defendant's counsel, the State Department is hereby ordered to request that the Federal Bureau of Investigation (FBI) inform it about any information recovered from Mrs. Clinton's server and the related thumb drive that is: (a) potentially relevant to the FOIA request at issue in this case; and (b) not already in the State Department's possession. The State Department shall file a status report, no later than Monday, September 21, 2015 at 12:00 p.m., informing the Court of the following: (1) the process agreed upon between the FBI and the State Department for the sharing of information relevant to this lawsuit; (2) the status of the Inspector General of the State Department's report regarding Mrs. Clinton's use of a private server; and (3) a timetable for the completion of any ongoing searches related to this lawsuit. Signed by Judge Emmet G. Sullivan on August 20, 2015. (lcegs4)

1:13-cv-01363-EGS Notice has been electronically mailed to:

Paul J. Orfanedes [porfanedes@judicialwatch.org](mailto:porfanedes@judicialwatch.org), [jwlegal@judicialwatch.org](mailto:jwlegal@judicialwatch.org)

Peter T. Wechsler [peter.wechsler@usdoj.gov](mailto:peter.wechsler@usdoj.gov)

Michael Bekesha mbekesha@judicialwatch.org, jwlegal@judicialwatch.org

**1:13-cv-01363-EGS Notice will be delivered by other means to::**

**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

SEP 14 2015

Dear Mr. Comey:

We understand that the Federal Bureau of Investigation (FBI) has obtained the private server used by former Secretary Clinton to operate her personal email account along with one or more related thumb drives. While we do not want to interfere with the FBI's review, the Department of State has an interest in preserving its federal records and, therefore, requests the FBI's assistance.

On May 22, 2015, the Department requested from former Secretary Clinton's attorney, David Kendall, that he provide an electronic copy of the approximately 55,000 pages identified as potential federal records and produced on behalf of former Secretary Clinton to the Department of State on December 5, 2014. (See Enclosure A) On June 15, 2015, Mr. Kendall replied that, pursuant to my request, he would "copy onto a disc the electronic version of the e-mails previously produced in hard copy to the Department on December 5, 2014." (See Enclosure B) Before Mr. Kendall could provide that disc to the Department, however, we understand that the FBI obtained the relevant electronic media. Accordingly, we request from the FBI an electronic copy of the approximately 55,000 pages identified as potential federal records and produced on behalf of former Secretary Clinton to the Department of State on December 5, 2014. This request is in accordance with counsel we have received from the National Archives and Records Administration (NARA). (See Enclosure C)

Additionally, to the extent the FBI recovers any potential federal records that may have existed on the server at various points in time in the past, we request that you apprise the Department insofar as such records correspond with Secretary Clinton's tenure at the Department of State. Because of the Department's commitment to preserving its federal records, we also ask that any recoverable media and content be preserved by the FBI so that we can determine how best to proceed.

The Honorable  
James B. Comey,  
Director,  
Federal Bureau of Investigation,  
935 Pennsylvania Avenue, N.W.,  
Washington, D.C. 20535-0001.

We thank you in advance for your attention to this matter and look forward to coordinating with you.

Sincerely,

  
Patrick F. Kennedy

Enclosures:

As stated.

cc: James A. Baker, FBI/OGC  
Gary Stern, NARA/OGC

**UNDER SECRETARY OF STATE  
FOR MANAGEMENT  
WASHINGTON**

MAY 22 2015

CORRECTED COPY

David E. Kendall, Esq.  
Williams & Connolly LLP  
725 12th Street, NW  
Washington, DC 20005

Dear Mr. Kendall:

I am writing in reference to the following e-mail that is among the approximately 55,000 pages that were identified as potential federal records and produced on behalf of former Secretary Clinton to the Department of State on December 5, 2014: E-mail forwarded by Jacob Sullivan to Secretary Clinton on November 18, 2012 at 8:44 pm (Subject: Fw: FYI- Report of arrests – possible Benghazi connection).

Please be advised that today the above referenced e-mail, which previously was unclassified, has been classified as “Secret” pursuant to Section 1.7(d) of Executive Order 13526 in connection with a review and release under the Freedom of Information Act (FOIA). In order to safeguard and protect the classified information, I ask – consistent with my letter to you dated March 23, 2015 - that you, Secretary Clinton and others assisting her in responding to congressional and related inquiries coordinate in taking the steps set forth below. A copy of the document as redacted under the FOIA is attached to assist you in your search.

Electronic Records

- 1) Consistent with my March 23 letter, and to the extent the documents are stored electronically, please copy onto a digital video disc (DVD) or compact disc (CD) the approximately 55,000 pages. If available, the Department would ask that the documents be provided in native electronic format with the associated metadata. These steps are in accordance with counsel we have received from the National Archives and Records Administration.
- 2) Once the copy has been made place the disc(s) in a brown envelope, seal it, address it to Richard Visek, Deputy Legal Adviser, U.S. Department of State, Washington, D.C., and mark the word “SECRET” on the outside of that envelope. Once that is done, please notify us and we will pick up the envelope from your office.
- 3) **Once you have made the electronic copy of the documents for the Department, please locate any electronic copies of the above-referenced classified document in your possession. If you locate any electronic copies, please delete them. Additionally, once you have done that, please empty your “Deleted Items” folder.**

Non-Electronic Copies

- 1) Please locate any non-electronic copies of the classified document in your possession.
- 2) Place any copies of the document that you locate in a brown envelope, seal it, address it to Richard Visek, Deputy Legal Adviser, U.S. Department of State, Washington, D.C., and mark the word "SECRET" on the outside of that envelope. Once that is done, please notify us and we will pick up the envelope from your office.

Finally, please note that the classification of this document pursuant to Executive Order 13526, Section 1.7(d), does not in itself indicate that any person previously acted improperly with respect to the document or the information contained therein.

If you should have any questions regarding the steps set forth above, please contact Richard Visek in the Office of the Legal Adviser. In the meantime, I ask that you confirm receipt of this letter as soon as possible.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Patrick F. Kennedy". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Patrick F. Kennedy

LAW OFFICES  
**WILLIAMS & CONNOLLY LLP**  
725 TWELFTH STREET, N.W.

WASHINGTON, D. C. 20005-5901

(202) 434-5000

FAX (202) 434-5029

DAVID E. KENDALL  
(202) 434-5145  
dkendall@wc.com

EDWARD BENNETT WILLIAMS (1020-1000)  
PAUL R. CONNOLLY (1020-1070)

*rec'd 6/15/15*

June 15, 2015

**BY HAND**

Mr. Patrick F. Kennedy  
Under Secretary of State for Management  
United States Department of State  
2201 C Street NW  
Washington, DC 20520-6421

Dear Mr. Kennedy:

Thank you for your letter dated May 22, 2015, referencing an e-mail which former Secretary Clinton produced to the State Department on December 5, 2014 (e-mail forwarded by Jacob Sullivan to Secretary Clinton on November 18, 2012, at 8:44 pm (Subject: Fw: FYI-Report of arrests—possible Benghazi connection)). You note that this e-mail, while previously unclassified, was recently classified "Secret", pursuant to Section 1.7(d) of Executive Order 13526, following a Freedom of Information Act review by the State Department.

This will confirm receipt of your letter and that, pursuant to your request, we have located all non-electronic copies of this document in our possession and placed them in a sealed brown envelope, addressed to Deputy Legal Adviser Richard Visek. The envelope was picked up by a State Department representative on May 28, 2015.

This will also confirm that, pursuant to your request, we will copy onto a disc the electronic version of the e-mails previously produced in hard copy to the Department on December 5, 2014. We will arrange for delivery of this disc to the Department as requested in your letter.

This will also confirm that, pursuant to your request, we have deleted all electronic copies of this document, with the following exception. I have received document preservation requests pertaining to the 55,000 pages of e-mails from the House of Representatives Select Committee on Benghazi, the Inspector General of the State Department, and the Inspector General of the Intelligence Community (DNI). I have responded to each preservation request by confirming to the requestor that I would take

WILLIAMS & CONNOLLY LLP

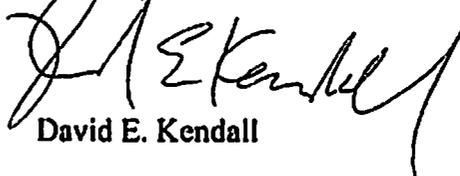
Mr. Patrick F. Kennedy  
June 15, 2015  
Page 2

Department, and the Inspector General of the Intelligence Community (DNI). I have responded to each preservation request by confirming to the requestor that I would take reasonable steps to preserve these 55,000 pages of former Secretary Clinton's e-mails in their present electronic form. I therefore do not believe it would be prudent to delete, as you request, the above-referenced e-mail from the master copies of the PST file that we are preserving.

Once the document preservation requests referenced above expire, we will proceed to make the requested deletions. This present arrangement would cover the single document recently classified "Secret". Should there be further reclassifications during the Department's FOIA review of former Secretary Clinton's e-mails, it also would cover any such additional documents.

We would be grateful for the return of the 1246 e-mails which the Department, in consultation with the National Archives and Records Administration, has determined not to be federal records, as referenced in the May 6, 2015 letter from NARA's Paul Wester to Ms. Margaret Grafeld, Deputy Assistant Secretary for Global Information Services at the Department.

Sincerely,



David E. Kendall

DEK/bb

WILLIAMS & CONNOLLY LLP

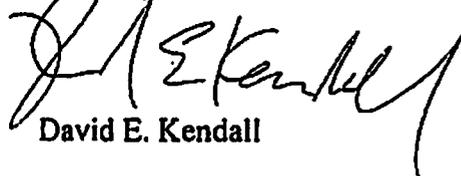
Mr. Patrick F. Kennedy  
June 15, 2015  
Page 2

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Sincerely,



David E. Kendall

DEK/bb



**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.**

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**NATIONAL ARCHIVES and  
RECORDS ADMINISTRATION**

**8601 ADELPHI ROAD  
COLLEGE PARK, MD 20740-6001**

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

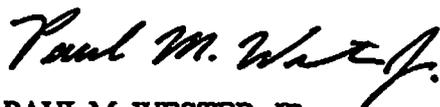
Department. If the Department is unable to obtain the electronic versions of these messages from Secretary Clinton, I am requesting that the Department inquire with the internet service or email provider of former Secretary Clinton, and also of former Secretary Powell, with regard to whether it is still 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.

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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,



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**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

JOHN F. KERRY, in his official capacity  
as SECRETARY OF STATE OF THE  
UNITED STATES,

Defendant.

Case No. 1:15-cv-00785-JEB

CAUSE OF ACTION INSTITUTE,

Plaintiff,

v.

JOHN F. KERRY, in his official capacity  
as SECRETARY OF STATE OF THE  
UNITED STATES, and  
DAVID S. FERRIERO, in his official  
capacity as ARCHIVIST OF THE  
UNITED STATES,

Defendants.

Case No. 1:15-cv-01068-JEB

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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## **INTRODUCTION**

In these consolidated cases, plaintiffs ask the Court to order the Department of State (“State”) or the National Records and Archives Administration (“NARA”) to take action under the Federal Records Act (“FRA”), including initiating legal action through the Attorney General, to recover records from former Secretary of State Hillary Clinton and/or her private email server. But the FRA confers broad discretion on the agencies to determine the steps they will take when recovering records. Here, defendants have already made, and continue to make, extensive efforts to recover the records in question, consistent with the administrative scheme of the FRA. Because defendants have already taken significant steps to recover former Secretary Clinton’s records, and had done so at the time that the Complaints in this case were filed, plaintiffs can receive no further relief from this Court under the FRA, and thus their claims are not redressable. Furthermore, even if the Court were to determine – contrary to the government’s argument – that plaintiffs had standing at the time that the Complaints were filed to seek further agency action, State has in fact taken additional steps to recover the documents, which render plaintiffs’ claims moot. Therefore, the consolidated cases should both be dismissed.

First, State has already asked for and recovered from former Secretary Clinton copies of emails constituting federal records. Before plaintiffs filed their Complaints, State had requested that former Secretary Clinton provide emails from her personal account that amounted to federal records, and she responded by providing approximately 55,000 pages of emails. The FRA gives the agency broad discretion in determining how to recover federal records, and does not allow a private party to compel the agency to request that the Attorney General commence litigation to recover those records – which is the only relief available to private litigants under the FRA – where the agency has already taken steps to recover the federal records at issue. Importantly, the

law does not require that it be shown that every record has been recovered; instead it only looks at whether the steps taken in that effort fall within a broad range of appropriate discretion.

Accordingly, plaintiffs lack standing because State had already satisfied its obligations under the statute at the time the suits were filed and thus the Court cannot provide them with meaningful relief.

In the alternative, even if this Court disagrees and thinks a private litigant could, at the time the suits were filed, have compelled the agencies to engage in further action to recover the records, State has taken further action to retrieve records since the filing of the Complaints, mooting the plaintiffs' claims. Former Secretary Clinton's personal attorney has stated that a private email server and thumb drives containing electronic copies of the emails former Secretary Clinton provided to State have been provided to the Federal Bureau of Investigation ("FBI"). State, in consultation with NARA, has requested that the FBI provide it with electronic copies of the emails Secretary Clinton previously provided to State, that it be advised if the FBI recovers any potential federal records corresponding to her tenure at State, and that it preserve both the media and any content recovered. State has accordingly reasonably exercised its discretion under the FRA to determine what steps are necessary to recover records, and has taken such steps. Therefore, plaintiffs' claims are also moot.

Finally, dismissal is also warranted because plaintiffs' Administrative Procedure Act ("APA") claims fail to state a cause of action upon which relief can be granted. An APA action would only obtain here if the agencies had failed to take any action. Because both State and NARA had already exercised their discretion to take action by the time plaintiffs filed their Complaints, those Complaints fail to state a claim that the agencies have withheld mandatory action under the FRA. Once the agency and/or NARA has taken action, they retain discretion as

to whether and how to proceed further. Requesting action by the Attorney General is not a mandatory duty in these circumstances and, accordingly, plaintiffs do not have a cause of action under the APA for withheld agency action.

For all these reasons, both Complaints, including plaintiff Cause of Action Institute's ("COAI's") duplicative mandamus request, should be dismissed.

## **BACKGROUND**

### **I. STATUTORY AND REGULATORY FRAMEWORK**

The FRA is "a collection of statutes governing the creation, management, and disposal of records by federal agencies." *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999); *see* 44 U.S.C. §§ 2101-20, 2901-11, 3101-07, 3301-14. These statutory provisions "establish a unified system for handling the 'life cycle' of federal records – covering their creation, maintenance and use, and eventually their disposal by either destruction or deposit for preservation." *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 36 (D.C. Cir. 1983).

Under the FRA, each agency head is required to "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," 44 U.S.C. § 3102, and to "establish safeguards against the removal or loss of records the head of such agency determines to be necessary and required by regulations of the Archivist" of the United States. *Id.* § 3105. A "record" includes materials, "regardless of physical form or characteristics, made or received by a Federal agency . . . and preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them." *Id.* § 3301(a)(1)(A).

The Archivist acts in concert with the various federal agencies and agency heads in implementing the FRA. The FRA mandates that the Archivist must “provide guidance and assistance to Federal agencies with respect to . . . ensuring proper records disposition,” 44 U.S.C. § 2904(a), “promulgate standards, procedures, and guidelines with respect to records management,” *id.* § 2904(c)(1), and “conduct inspections or surveys of the records and the records management programs and practices within and between Federal agencies,” *id.* § 2904(c)(7).

The FRA further sets forth the exclusive means for records disposal. *See* 44 U.S.C. § 3314; *Citizens for Responsibility & Ethics in Wash. v. Executive Office of the President*, 587 F. Supp. 2d 48, 53 (D.D.C. 2008). In general, agencies may only dispose of records in accordance with terms approved by the Archivist. 44 U.S.C. § 3303; 36 C.F.R. § 1226.10. In order to manage the disposition process efficiently, agencies may create records schedules – negotiated with and approved by NARA – to govern recurring types of records. 44 U.S.C. § 3303(3); 36 C.F.R. §§ 1225.10-1225.26. Records may be deemed temporary or permanent, the former designation leading to destruction after a set period, and the latter to preservation and eventually transfer to the National Archives of the United States. 36 C.F.R. §§ 1225.14, 1225.16.

The FRA includes statutory provisions addressing records that have been removed or destroyed. 44 U.S.C. §§ 2905(a), 3106(a) & (b); *see Armstrong v. Bush*, 924 F.2d 282, 294 (D.C. Cir. 1991) (*Armstrong I*). The primary responsibility for recovering such records rests with the agency whose records are at issue. Each agency head is first required to “notify the Archivist 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>1</sup> 44 U.S.C. § 3106(a); *see also* 36 C.F.R. pt. 1230 (NARA’s regulations addressing the removal, alienation, or destruction of records). For “records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency[,]” the agency head “with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records[.]” 44 U.S.C. § 3106(a). If, on the other hand, the Archivist learns of the “actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency,” then he or she “shall notify” the relevant agency head. *Id.* § 2905(a). The Archivist also shall “assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law.” *Id.* If the agency head “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,” the Archivist is to “request the Attorney General to initiate such an action, and . . . notify the Congress when such a request has been made.” *Id.*; *see also id.* § 3106(b).

As this Court has explained in interpreting this statute, the manner in which the agency carries out its duty to restore agency records “is left to the agency’s discretion” and it “has choices regarding the ‘manner of its action.’” *Citizens for Responsibility & Ethics in Wash. v. U.S. S.E.C.*, 916 F. Supp. 2d 141, 149 (D.D.C. 2013) (*CREW v. SEC*) (citing *Armstrong I*). Pursuant to this statutory scheme, and contrary to plaintiffs’ contentions, the agency head or the Archivist is not required to initially attempt to recover records by seeking the initiation of legal action. Instead, the FRA contemplates that the agency head and Archivist may proceed first by

<sup>1</sup> Defendants do not concede that the records at issue in this case have been unlawfully removed or destroyed, but assume for the purposes of this motion to dismiss that this statutory regime applies in these circumstances.

invoking the agency's "safeguards against the removal or loss of records," 44 U.S.C. § 3105, and by taking a variety of intra-agency corrective actions, as appropriate. *Armstrong I*, 924 F.2d at 296 n.12; *see also* *CREW v. SEC*, 916 F. Supp. 2d at 150 (discussing *Armstrong I*).

The FRA does not authorize a private right of action to enforce any of its provisions, *see Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 149-50 (1980), and only limited judicial review of compliance with the FRA is available under the APA. *Armstrong I*, 924 F.2d at 291. The D.C. Circuit has held that the FRA precludes APA claims seeking to prevent the destruction or removal of records. *Id.* at 294 ("Because it would clearly contravene this system of administrative enforcement to authorize private litigants to invoke federal courts to prevent an agency official from improperly destroying or removing records, we hold that the FRA precludes judicial review of such actions."); *see also* 44 U.S.C. §§ 2101-20, 2901-11, 3101-07, 3301-14. Instead, the APA authorizes a private party to bring suit only (1) to compel notification of NARA or (2) to compel the agency or NARA to initiate action through the Attorney General to recover removed records. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d 101, 111 (D.D.C. 2007) (*CREW v. DHS*); *CREW v. SEC*, 916 F. Supp. 2d at 146.

## **II. FACTUAL BACKGROUND**

Hillary Rodham Clinton served as Secretary of State from January 21, 2009, until February 1, 2013. The Complaints allege that, while heading the State Department, Secretary Clinton sent and received emails pertaining to government business from her personal email account.<sup>2</sup> *See* Compl., *Judicial Watch v. Kerry*, No. 1:15-cv-00785-JEB (ECF No. 1) ("JW Compl."), ¶ 5. These emails were maintained on a personal – not a government – server. *Id.*

<sup>2</sup> For purposes of this motion only, the government assumes as true the facts as alleged in

In October and November, 2014, the Under Secretary of State for Management, Patrick F. Kennedy, sent letters to a representative of Secretary Clinton (as well as to representatives of three other former Secretaries of State) requesting that copies of any emails from their personal email accounts that constituted federal records be made available to the State Department, if there was reason to believe those records may not otherwise be preserved in the Department's recordkeeping system.<sup>3</sup> See Exh. 4 to Compl., *Cause of Action Institute v. Kerry*, No. 1:15-cv-01068-JEB (ECF No. 1) ("COAI Compl."). In response, on December 5, 2014, Secretary Clinton, through her representative, provided to State approximately 55,000 pages of documents that she believed were responsive to that request.<sup>4</sup> *Id.*; JW Compl. ¶ 6. Secretary Clinton has since declared, under penalty of perjury, that she had "directed that all [her] emails on clintonemail.com in [her] custody that were or potentially were federal records be provided to the Department of State, and on information and belief, this has been done." See Decl. of Hillary Rodham Clinton, *Judicial Watch v. U.S. Dep't of State*, No. 13-1363 (D.D.C. filed Aug. 10, 2015) (ECF No. 22-1). Thus, at the time the Complaints were filed (on May 28, 2015 and July 8, 2015), State had already taken steps to recover the federal records that are the subject of the Complaints. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Warren v. Dist. of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004).

<sup>3</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 Exh. 4 to COAI Compl.

<sup>4</sup> The number of pages provided by former Secretary Clinton was originally estimated as "approximately 55,000" pages See Decl. of John F. Hackett ¶ 10, *Leopold v. U.S. Dep't of State*, No. 15-123 (RC) (D.D.C. May 18, 2015) (ECF No. 12-1). However, once the digitizing process was complete, State was able to provide a more precise count. See Def.'s Status Report at 1, *id.* (Jul. 7, 2015) (ECF No. 20) (reporting that former Secretary Clinton provided 53,988 pages, approximately 1,533 pages of which were identified, in consultation with NARA, as "entirely personal correspondence, that is, documents that are not federal records," leaving approximately 52,455 pages). This brief will continue to use the "approximately 55,000" number to refer to the size of this production.

Complaints, and had received from former Secretary Clinton approximately 55,000 pages of emails in December 2014.

Also before the Complaints were filed, on March 3, 2015, Paul Wester, Chief Records Officer for the U.S. Government at NARA, wrote to State pursuant to NARA's authority under 44 U.S.C. chapter 29 and its implementing regulations, 36 C.F.R. pt. 1230, requesting that State explore the matter of the email records of the former secretaries of state, including Secretary Clinton, and provide NARA with a report. COAI Compl., Exh. 2. State responded on April 2, 2015, *see* COAI Compl., Exh. 4, explaining the efforts it had made to recover records and that it had received approximately 55,000 pages of emails from former Secretary Clinton.

Additional events have occurred relating to State's efforts to recover records since the filing of the Complaints. On May 22, 2015, State requested that former Secretary Clinton provide an electronic copy of the approximately 55,000 pages of emails produced to State, and Secretary Clinton's attorney responded that he would do so. *See* Enclosures A & B to Letter from Patrick F. Kennedy, State, to James B. Comey, Director, FBI (Sept. 14, 2015) (Exh. 1 hereto). On July 2, 2015, NARA requested follow-up information from State concerning the email records. *See* Enclosure C, *id.* On August 10, 2015, State requested that Secretary Clinton not delete any federal documents, electronic or otherwise, in her possession or control, and provide appropriate assurances to the Government that she will not delete any such documents. *See* Def.'s Objections to Pl.'s Proposed Preservation Order, at 7-8, *Judicial Watch v. U.S. Dep't of State*, No. 12-2034 (D.D.C. Sept. 9, 2015) (ECF No. 28). On August 12, 2015, former Secretary Clinton's attorney, David Kendall, provided the requested assurances and advised State that the email server that was used to store Secretary Clinton's emails while she was Secretary of State and several thumb drives that he indicated included electronic copies of the

documents she had provided to State, had been turned over to the FBI. *See* Letter from David E. Kendall to Patrick F. Kennedy (Aug. 12, 2015), Exh. E to Def.’s Aug. 12, 2015 Status Report, *Judicial Watch v. Dep’t of State*, No. 13-1363 (D.D.C. Aug. 12, 2015) (ECF No. 24-1).

On September 14, 2015, the State Department sent a letter to the FBI that, first, requested from the FBI “an electronic copy of the approximately 55,000 pages identified as potential federal records and produced on behalf of former Secretary Clinton to the Department of State on December 5, 2014.” *See* Exh. 1 hereto. Second, State requested that, “to the extent the FBI recovers any potential federal records that may have existed on the server at various points in time in the past, [the FBI] apprise the [State] Department insofar as such records correspond with Secretary Clinton’s tenure at the Department of State.” *Id.* Third, State requested that, “[b]ecause of the Department’s commitment to preserving its federal records, . . . any recoverable media and content be preserved by the FBI so that we can determine how best to proceed.” *Id.*

### **III. THE LAWSUITS**

Plaintiff Judicial Watch states that it is a non-profit, educational organization dedicated to promoting “transparency, accountability, and integrity in government.” JW Compl. ¶ 3. Judicial Watch alleges that, during Secretary Clinton’s tenure, it submitted over 100 FOIA requests to the State Department, and that it currently has at least 20 FOIA requests pending “for records which likely include emails of former Secretary Clinton and other State Department employees.” *Id.*

On May 28, 2015, Judicial Watch filed Civil Action No. 1:15-cv-00785-JEB against current Secretary of State John Kerry, seeking to compel defendant Kerry’s compliance with the FRA with regard to former Secretary Clinton’s email records. Judicial Watch asserts that defendant Kerry has violated his duties under the FRA “by failing to notify the Archivist

concerning the unlawful removal of the Clinton emails and by failing to initiate action through the [A]ttorney [G]eneral to recover the Clinton emails.” JW Compl. ¶ 25.<sup>5</sup> Judicial Watch requests that the Court (1) declare the Clinton emails to be records subject to the FRA; (2) declare that defendant Kerry’s failure to take any action to recover the Clinton emails is “arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the FRA”; and (3) “order Defendant Kerry to take action to recover the Clinton emails in accordance with the FRA.” *Id.* at 7.

Plaintiff Cause of Action Institute (“COAI”) states that it is a non-profit “strategic oversight group committed to ensuring that the regulatory process is transparent, fair, and accountable.” COAI Compl. ¶ 21. COAI alleges that it regularly requests access to the public records of federal agencies, entities, and offices, and currently “has a pending Freedom of Information Act request before the State Department for records that likely include emails to and from former Secretary Clinton.” *Id.*; *see* Exh. 5 to COAI Compl. (requesting, *inter alia*, certain communications between Secretary Clinton and certain other State employees or NARA).

On July 8, 2015, COAI filed Civil Action No. 1:15-cv-01068-JEB against defendants Kerry and Archivist of the United States David S. Ferriero. COAI’s suit seeks to compel defendants “to comply with their statutory duty to initiate legal action . . . for recovery of federal records unlawfully removed from the custody of the Department of State . . . and stored on a personal computer server in the exclusive control and custody of former Secretary of State Hillary Rodham Clinton.” COAI Compl., at 1-2. COAI asserts that the defendants have violated their duties under the FRA “by failing to initiate action through the Attorney General to recover

<sup>5</sup> The JW Complaint defines the “Clinton emails” as emails sent or received by former Secretary Clinton “to and from the personal email accounts of State Department employees, including chief of staff Cheryl Mills, adviser Philippe Reines, personal aide Huma Abedin, and adviser Jake Sullivan.” JW Compl. ¶ 6.

the unlawfully removed records” and, in defendant Ferriero’s case, by failing to notify Congress of such action. *Id.* ¶¶ 61-62. COAI further asserts that “recovery of unlawfully removed or destroyed records” is a “non-discretionary, mandatory dut[y].” *Id.* ¶ 66. COAI requests that the Court (1) declare Clinton’s emails to be subject to the FRA and that Clinton violated the FRA; (2) declare that defendants, “by their failure to initiate legal action in this case, violated the” FRA; and (3) order defendants “in the form of injunctive and mandamus relief, . . . to comply with [the FRA] by initiating legal action against Clinton through the Attorney General to take Clinton’s computer server and recover the unlawfully removed and/or destroyed email records.” *Id.* at 12-13.

On August 4, 2015, the Court consolidated the two cases.

#### **STANDARD OF REVIEW**

Defendants seek dismissal of these two consolidated cases (1) under Federal Rule of Civil Procedure 12(b)(1), on the ground that the Court lacks subject-matter jurisdiction both because plaintiffs lack standing and because the case is moot, and (2) under Rule 12(b)(6), on the ground that plaintiffs fails to state a claim upon which relief may be granted. When a defendant files a motion under Rule 12(b)(1), the plaintiff bears the burden of demonstrating the existence of subject-matter jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Courts should “presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record.” *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal quotation marks and citations omitted). “Although a court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1),” the factual allegations in the complaint “will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim.” *Wright v. Foreign Serv. Grievance Bd.*, 503 F.

Supp. 2d 163, 170 (D.D.C. 2007) (citations omitted). The Court “may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.” *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

In order to withstand a motion to dismiss under Rule 12(b)(6), a complaint must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). The plaintiff must, accordingly, plead facts that allow the court “to draw the reasonable inference that the defendant is liable for the misconduct alleged” and offer “more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678. “In determining whether a complaint states a claim, the court may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice.” *Stewart v. National Educ. Ass’n*, 471 F.3d 169, 173 (D.C. Cir. 2006).

## **ARGUMENT**

### **I. PLAINTIFFS’ CLAIMS SEEKING ENFORCEMENT ACTION SHOULD BE DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION**

The Complaints in these two consolidated cases must be dismissed under Rule 12(b)(1) for failure to establish subject-matter jurisdiction, both because plaintiffs lack standing and because, even if they do have standing, their claims are now plainly moot. Defendants have taken substantial actions to comply with their FRA obligations and there is accordingly no basis for plaintiffs to require defendants to do more.

**A. Plaintiffs Lack Standing**

For a federal court to have jurisdiction over an action, a plaintiff must establish that his or her case meets the case-or-controversy requirement of Article III. The doctrine of standing is an essential aspect of this case-or-controversy requirement and demands that a plaintiff have “a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (internal quotation marks omitted). At its “irreducible constitutional minimum,” the standing doctrine requires satisfaction of three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent, (2) a causal connection between the injury and defendants’ challenged conduct, and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 560. Where a plaintiff does not establish each of the elements of standing, a court must dismiss that claim for lack of subject matter jurisdiction. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-76 (1982) (“Those who do not possess Article III standing may not litigate as suitors in the courts of the United States.”); *George v. Napolitano*, 693 F. Supp. 2d 125, 128-29 (D.D.C. 2010) (“Lack of standing is a defect in subject matter jurisdiction.”).

As relevant here, to satisfy the redressability element, a plaintiff must allege that it is “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)); *see also Judicial Watch, Inc. v. Nat’l Archives & Records Admin.*, 845 F. Supp. 2d 288, 298-99 (D.D.C. 2012). To meet this standard in a case seeking declaratory or injunctive relief, a plaintiff must establish either that the violation sought to be corrected was ongoing at the time plaintiff filed his complaint or that future violations are imminent. *See Steel*

*Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108-09 (1998) (finding no standing for declaratory or injunctive relief where defendant filed the missing forms before suit was filed). In other words, if the violation has ceased or been corrected, and no future violation is likely, then there is no injury to be redressed by the Court.

Plaintiffs' Complaints fail this test. Plaintiffs generally request that the Court order defendants to take action to "recover emails of former Secretary of State Hillary Clinton and other U.S. Department of State . . . employees." JW Compl. at 1. Specifically, plaintiff Judicial Watch wants defendant Kerry "to notify the Archivist concerning the unlawful removal of the Clinton emails and . . . to initiate action through the [A]ttorney [G]eneral to recover the Clinton emails." JW Compl. ¶ 25. And plaintiff COAI wants both defendants to "initiate legal action through the Attorney General to recover the unlawfully removed records," COAI Compl. ¶ 61, and more specifically seeks a court order directing defendants to request the Attorney General to take custody of Secretary Clinton's email server and "attempt[] to recover the allegedly deleted emails from that server." *Id.* ¶ 67.

But even before the Complaints were filed, State had already taken action to recover those Clinton emails that are federal records, and approximately 55,000 pages of emails were provided. In October and November 2014, State had requested that Secretary Clinton provide to the State Department any federal records in her possession, if she had reason to believe that they may not already be captured within State. In December 2014, the former Secretary responded, providing approximately 55,000 pages of emails. She has declared under penalty of perjury that she had "directed that all [her] emails on clintonemail.com in [her] custody that were or potentially were federal records be provided to the Department of State, and on information and belief, this has been done." Decl. of Hillary Rodham Clinton, *supra*; see also Letter from David

E. Kendall to Patrick F. Kennedy (Aug. 12, 2015), *supra*. Importantly, under policies issued by NARA, individual officers and employees are permitted and expected to exercise judgment to determine what constitutes a federal record. *See* NARA Bulletin 2014-06, ¶ 4 (Sept. 15, 2014) (“Currently, in many agencies, employees manage their own email accounts and apply their own understanding of Federal records management. This means that all employees are required to review each message, identify its value, and either delete it or move it to a recordkeeping system.”).<sup>6</sup> Further, regarding plaintiffs’ claim concerning State’s duty to notify the Archivist of any destruction of records, the exhibits attached to COAI’s Complaint demonstrate that the Archivist is already well aware of the potential loss or destruction of emails and, since before the Complaints have been filed, has been working with State to resolve the issues, consistent with the FRA and NARA’s own regulations. *See* 44 U.S.C. § 2905(a); 36 C.F.R. § 1230.16 (describing when and how NARA is to contact the agency); *see also, e.g.*, Exhs. 2 & 4 to COAI Compl. Accordingly, both State and NARA have fully complied with any mandatory duties under the FRA with regard to removed or alienated records, *i.e.*, State has taken actions to recover the records, and NARA initiated contact with State to address any issues presented by the situation.

Because the agencies took steps that are within the range of appropriate discretion to recover the records prior to the filing of this suit, there is no additional relief that the Court could properly order under the FRA in these circumstances. *See CREW v. SEC*, 916 F. Supp. 2d at 150. The D.C. Circuit has held that, with regard to private suits under the FRA, a federal court has jurisdiction only to review an agency head’s or the Archivist’s failure to seek initiation of an enforcement action by the Attorney General. *Armstrong I*, 924 F.2d at 292-95; *see also CREW v.*

<sup>6</sup> <http://www.archives.gov/records-mgmt/bulletins/2014/2014-06.html>.

*DHS*, 527 F. Supp. 2d at 111-12. “Notably, the FRA specifies only these enforcement roles and does not provide an express cause of action for private litigants to redress the unlawful removal of agency records.” *CREW v. DHS*, 527 F. Supp. 2d at 109; *see also Kissinger*, 445 U.S. at 149-50 (the FRA does not authorize a private right of action to obtain recovery of documents). However, a court’s authority to compel such an agency action under 44 U.S.C. §§ 2905 and 3106 does not apply when both the agency and NARA have taken remedial steps within the broad discretion conferred by the FRA to remediate a loss of records. *See CREW v. SEC*, 916 F. 2d at 149.

This is not a case where “the agency head or Archivist *does nothing* while an agency official destroys or removes records in contravention of agency guidelines and directives.” *Armstrong I*, 924 F.2d at 295 (emphasis supplied); *see also Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1288 n.12 (D.C. Cir. 1993) (upholding district court’s order requiring Archivist to seek Attorney General’s assistance on the ground that “[i]n this case, the Archivist had failed to take any actions – formal or informal – necessary to prevent the statutory violations.”). Here, State and NARA have done the opposite of “nothing” – rather, before these suits were filed, State proactively moved to recover records from former Secretary Clinton, and NARA contacted State to obtain information about the situation. Importantly, there is no legal requirement that it be shown that every federal record has been recovered, or that the agency has exhausted all means to obtain lost records. *CREW v. SEC*, 916 F. Supp. 2d at 150-51 (“whether Plaintiff . . . believes the SEC should have engaged in further recovery efforts is simply beside the point”). Accordingly, in light of the actions taken by the Defendants, the Court lacks jurisdiction to provide any relief under the FRA here. *See id.* at 150 (approving of agency actions where record reflected “an agency [that is] aware of the potential enormity of the task at

hand, but attempting to clarify the scope of the problem, making some efforts to retrieve documents that might still exist, identifying additional sources of information regarding the relevant documents, and counseling employees regarding future document preservation”).

In sum, no Article III case or controversy existed when plaintiffs filed suit because State had already acted appropriately to recover the records (and in fact obtained approximately 55,000 pages of federal records) and NARA has already been involved in reviewing this process. These actions obviate the need for, and this Court’s authority to order, the agencies to seek initiation of enforcement action from the Attorney General. These cases should therefore be dismissed.

**B. Even if Plaintiffs Did Have Standing, Their Claims Are Now Moot**

Because of the steps that State had taken to recover federal records prior to the filing of these suits, plaintiffs’ claims were not redressable – and thus plaintiffs lacked standing – at the time their Complaints were filed. The Court should dismiss plaintiffs’ claims on this ground alone. But even if this Court determines that plaintiffs might have had a redressable claim that further steps were necessary at the time their suits were filed, the additional actions that State has taken since that time render such a claim moot.

Subject-matter jurisdiction is not a static concept to be evaluated once, and thereafter forgotten. “To qualify as a case for federal-court adjudication, ‘an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.’” *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). “A case becomes moot – and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III – ‘when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.’” *Already, LLC v. Nike, Inc.*, --- U.S. ---, 113 S. Ct. 721, 726-27 (2013). The burden of establishing mootness rests

with the party seeking dismissal. *Honeywell Int'l, Inc. v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 576 (D.C. Cir. 2010).

With regard to redressability, “[a] case becomes moot when ‘intervening events make it impossible to grant the prevailing party effective relief.’” *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008). “If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot.” *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001); *see also LaRoque v. Holder*, 679 F.3d 905, 909 (D.C. Cir. 2012) (case is moot when “appellants have obtained everything that they could recover from this lawsuit” (internal quotation marks and modifications omitted)).

Here, the additional steps taken by State and NARA after the filing of these suits have removed any possibility that the Court can grant plaintiffs the order they seek, even if such an order was a possibility at the time the suits were filed (which, as explained above, it was not). Specifically, former Secretary Clinton’s attorney has represented that the electronic media potentially containing any additional records (the email server and several thumb drives) are now in the possession of the FBI. *See* Letter from David E. Kendall to Patrick F. Kennedy (Aug. 12, 2015), *supra*. After learning of this reported transfer, State, acting in consultation with NARA, wrote to request that the FBI (1) provide an electronic copy of the approximately 55,000 pages identified as potential federal records and provided on behalf of former Secretary Clinton, (2) apprise State as to whether any potential federal records corresponding to Clinton’s tenure as Secretary of State are recovered in the course of the FBI’s investigation, and (3) preserve any recoverable media and content so that State can determine how best to proceed. As a practical matter, these requests by State – along with State’s prior recovery of approximately 55,000 pages

of emails from Secretary Clinton – fall comfortably within the discretion conferred by the FRA on the agencies to address a loss of records. *See CREW v. SEC*, 916 F. Supp. 2d at 150. No further court-ordered recovery efforts are required by the FRA, and, in any event, State has demonstrated that it is continuing to review the situation and seek recovery where appropriate, in consultation with NARA. As State has acted and continues to exercise its discretion appropriately in this matter, along with NARA, the only relief that plaintiffs could obtain from this suit, a request to the Attorney General for enforcement action, is foreclosed, and the case is moot.

Finally, neither of the two exceptions to the mootness doctrine – the exception for cases that are capable of repetition, yet evading review, or the voluntary cessation exception – applies here. *See Del Monte Fresh Produce Co. v. U.S.*, 570 F.3d 316, 321 (D.C. Cir. 2009). Under the capable of repetition yet evading review exception to mootness, the plaintiff must demonstrate that “(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.” *Id.* at 322. The challenged events here are not inherently too short to be reviewed, and it is unlikely that something like this will happen again.<sup>7</sup> And the voluntary cessation exception is rarely applied against the government, and certainly should not be here where State took action to recover the federal records before these suits were even filed. *See Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990). Thus, nothing in the circumstances here save plaintiffs’ cases from mootness.

<sup>7</sup> The FRA now prohibits “[a]n officer or employee of an executive agency” from “creat[ing] or send[ing] a record using a non-official electronic messaging account,” unless such officer or employee copies his or her government email account or forwards a complete copy of the email to his or her government email account within 20 days. 44 U.S.C. § 2911(a) (added 2014).

**II. PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED**

For essentially the same reasons as discussed in section I.A above, plaintiffs' Complaints also fail to state a cause of action under the APA and the FRA, and therefore the cases should in the alternative be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

As explained above, the APA is plaintiffs' only option for enforcing the FRA, because the FRA itself does not contain a private right of action. *See Kissinger*, 445 U.S. at 148-49.

Plaintiffs' Complaints must therefore be read as a challenge to agency inaction under 5 U.S.C. § 706(1) (permitting courts to "compel agency action unlawfully withheld"), the only applicable APA provision here. In order to prevail on a claim challenging agency inaction, a plaintiff must "assert[] that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (*SUWA*) (emphasis in original).

Here, the Complaints do not assert a viable claim that defendants have "failed to take a discrete action that [they are] required to take" because, as the Complaints make clear, defendants had already taken significant and appropriate action to recover records at the time the Complaints were filed. *See* JW Compl. ¶ 6; COAI Compl. ¶¶ 7, 10-12. In the absence of complete inaction by the agency and NARA, the agency (here, State) and NARA have broad discretion as to the types of actions that they will take. *See Armstrong I*, 924 F.3d at 296 n.12 (emphasizing that court did "not mean to imply . . . that the Archivist and agency head must initially attempt to prevent the unlawful action by seeking initiation of legal action" but instead they may proceed by discretionary, interim steps); *see also CREW v. SEC*, 916 F. Supp. 2d at 149 (describing steps taken by SEC and explaining that it "has not abused its discretion in taking a series of internal remedial steps and has thereby fulfilled any duty so imposed"). As explained above, the Complaints indicate that State and NARA had already taken a number of affirmative

steps to recover federal records at the time suit was filed. The FRA contemplates nothing more. Accordingly, plaintiffs have not alleged a mandatory duty that defendants have violated, and FRCP 12(b)(6) provides an alternative basis for dismissal.

**III. PLAINTIFF COAI'S MANDAMUS COUNT IS DUPLICATIVE AND CANNOT SEPARATELY JUSTIFY RELIEF**

Plaintiff COAI's Second Claim for Relief is based on the Mandamus Act, 28 U.S.C. § 1361, and seeks an order compelling defendants "to initiate legal action against Clinton through the Attorney General." COAI Compl. ¶ 68. This mandamus claim is entirely duplicative of COAI's First Claim for Relief, and therefore this claim must be dismissed regardless of the disposition of the First Claim for Relief.

As an initial matter, COAI's mandamus claim suffers from the same defects described in Sections I and II above. There is no mandatory legal duty to initiate enforcement action in these circumstances. For those same reasons, COAI's mandamus claim should be dismissed.

Even aside from those defects, however, there are still additional reasons why COAI cannot establish an entitlement to mandamus relief. "The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances. Mandamus is available only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (internal quotation marks and citations omitted). Even if a plaintiff can carry its burden of satisfying these three elements, "whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (*en banc*).

Here, there are two additional reasons to reject COAI's claim. First, as discussed above, even if there was a duty for defendants to undertake enforcement efforts, the execution of that duty would involve the exercise of discretion and thus could not be enforceable through

mandamus. See *CREW v. SEC*, 916 F. Supp. 2d at 149 (*Armstrong I*'s “gloss on § 3106 appears to give the agency broad discretion regarding what internal remedial steps it may take in response to a loss of records”). Specifically, defendants’ enforcement duty would involve discretionary decisions about whether to take preliminary enforcement steps, when to take those steps, and what constitutes a reasonable amount of time before initiating action through the Attorney General. This reservation of discretion to the agency head and the Archivist in how to enforce this statutory provision precludes issuance of mandamus. *Id.* (declining to issue writ of mandamus because “any duty the SEC was under to take action to recover destroyed documents was a discretionary one”); see *Consol. Edison Co. v. Ashcroft*, 286 F.3d 600, 605 (D.C. Cir. 2002) (“Where the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.” (internal quotation marks and modifications omitted)). The use of the word “shall” in the statute (see 44 U.S.C. § 3106(a)) is not to the contrary. “The word ‘shall’ in statutory language defining agency authority often contemplates permission, not obligation.” *Knapp v. U.S. Dep’t of Agric.*, --- F.3d ---, 2015 WL 4604914, at \*14 (5th Cir. July 31, 2015) (citing *Heckler v. Chaney*, 470 U.S. 821, 835 (1985) (finding precatory a statutory provision stating that violators “shall be imprisoned . . . or fined,” and listing other statutes that use “shall” to convey executive discretion)); see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005) (declining to read “shall” as mandatory in statute intended to give local police broad powers to enforce domestic abuse restraining orders in light of the “well established tradition of police discretion”). As this court recognized in *CREW v. SEC*, “the statute merely requires the agency to act, but does not prescribe the manner of the agency’s action.” 916 F. Supp. at 151.

Second, COAI's mandamus claim is entirely duplicative of its first claim (the APA claim). The two counts seek virtually identical forms of relief and are premised on the same underlying legal theory. Thus, COAI's mandamus claim is prohibited because the APA provides an adequate alternative. *See CREW v. SEC*, 916 F. Supp. 2d at 152 (denying mandamus claim for similar reasons); *see also Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (among the requirements for mandamus "are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires"); *see also Power*, 292 F.3d at 787 ("[W]here there are alternative means of vindicating a statutory right, a plaintiff's preference for one over another is insufficient to warrant a grant of the extraordinary writ."). Even if COAI's other, APA claim did not have the potential to provide plaintiff with the relief it seeks, it would still be adequate for purposes of precluding mandamus relief. *See Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) ("[H]owever unsatisfactory the CSRA's approach may appear to the plaintiffs, the fact that a remedial scheme chosen by Congress vindicates rights less efficiently than a collective action does not render the CSRA remedies inadequate for purposes of mandamus."); *Am. Chiropractic Ass'n v. Shalala*, 108 F. Supp. 2d 1, 11 (D.D.C. 2000) (noting that availability of review under APA precludes alternative relief for a writ of mandamus).

In short, because COAI has not shown that defendants owe a specific, mandatory duty to restore destroyed documents, and because it has failed to show that it does not have an alternative remedy through its APA-based action, mandamus is inappropriate here.

**CONCLUSION**

For the foregoing reasons, the Court should dismiss both Complaints for lack of subject-matter jurisdiction (Fed. R. Civ. P. 12(b)(1)) or, in the alternative, for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)).

Dated: September 17, 2015

Respectfully submitted,

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U.S. Department of Justice

Federal Bureau of Investigation

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In Reply, Please Refer to  
File No.

September 21, 2015

Mary McLeod, Esq.  
U.S. Department of State  
2201 C Street, NW  
Washington, DC 20520

*Mary*  
Dear Ms. McLeod:

I have received your letter dated September 2, 2015 regarding the FOIA case, *Judicial Watch v. Department of State* (D.D.C. No. 13-cv-1363) and your request for information pursuant to the Court's order of August 20, 2015. I understand that the Bureau's response to your letter may be presented to the Court. At this time, consistent with long-standing Department of Justice and FBI policy, we can neither confirm nor deny the existence of any ongoing investigation, nor are we in a position to provide additional information at this time.

Sincerely,

A handwritten signature in blue ink that reads "James A. Baker".

James A. Baker  
General Counsel