

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074  
MINORITY (202) 225-5051

<http://oversight.house.gov>

March 8, 2017

The Honorable Betsy Devos  
Secretary  
Department of Education  
400 Maryland Avenue, S.W.  
Washington, D.C. 20202

Dear Madam Secretary:

Federal recordkeeping and government transparency laws such as the Federal Records Act and the Freedom of Information Act (FOIA) ensure the official business of the government is properly preserved and accessible to the American public.<sup>1</sup> As the Committee with legislative jurisdiction over these laws, we have a longstanding interest in ensuring compliance with their provisions.<sup>2</sup> Over the past decade, our oversight has included monitoring trends in federal employees' use of technology in order to ensure the statutory requirements of these laws keeps pace with their original purpose. The Committee has authored several updates to these laws, such as the Presidential and Federal Records Act Amendments of 2014 and the FOIA Improvement Act of 2016.<sup>3</sup> We plan to pursue additional efforts to update these laws.

Federal Records Act challenges have spanned across administrations. A 2013 report by the Inspector General for the Commodities Futures Trading Commission found that former Chairman Gary Gensler used his personal email consistently.<sup>4</sup> Documents produced as part of the Committee's investigation into the Department of Energy's disbursement of funds under the Recovery Act showed that the former Executive Director of the Loan Program Office Jonathan Silver often used his personal email account to conduct official business.<sup>5</sup>

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<sup>1</sup> Pub. L. No. 81-754 (1950); Pub. L. No. 89-487 (1967).

<sup>2</sup> See, e.g., letter from Hon. Henry Waxman, Chairman, Comm. on Oversight & Gov't Reform, to Hon. Michael Astrue, Comm'r, U.S. Soc. Sec. Admin., *et al.* (Apr. 12, 2007); letter from Hon. Darrell Issa, Chairman, Comm. on Oversight & Gov't Reform, to Hon. Jeffrey Zients, Acting Dir. for Mgmt., Office of Mgmt. & Budget, *et al.* (Dec. 13, 2012); MAJORITY STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT (2016).

<sup>3</sup> Pub. L. No. 113-187 (2014); Pub. L. No. 114-185 (2016).

<sup>4</sup> OFFICE OF INSPECTOR GEN., COMMODITY FUTURES TRADING COMM'N, REVIEW OF THE COMMODITY FUTURES TRADING COMMISSION'S OVERSIGHT AND REGULATION OF MF GLOBAL, INC. (May 16, 2013).

<sup>5</sup> See Carol D. Leonnig and Joe Stephens, *Energy Department loan program staffers were warned not to use personal e-mail*, WASH. POST, Aug. 14, 2012, [http://articles.washingtonpost.com/2012-08-14/politics/35490043\\_1\\_personal-e-mail-e-mails-email](http://articles.washingtonpost.com/2012-08-14/politics/35490043_1_personal-e-mail-e-mails-email).

Where a federal employee conducts any business related to the work of the government from a non-governmental email account, such as a personal email account, the Federal Records Act requires that the employee copy their official account or forward the record to their government email account within 20 days.<sup>6</sup> Official business must be conducted in such a way as to preserve the official record of actions taken by the federal government and its employees.

Recent news reports suggest federal employees may increasingly be turning to new forms of electronic communication, including encrypted messaging applications like Signal, Confide, and WhatsApp, that could result in the creation of federal records that would be unlikely or impossible to preserve.<sup>7</sup> The security of such applications is unclear.<sup>8</sup> Generally, strong encryption is the best defense against cyber breaches by outside actors, and can preserve the integrity of decision-making communications. The need for data security, however, does not justify circumventing requirements established by federal recordkeeping and transparency laws.

To assist the Committee in better understanding your agency's policies on these issues, please provide the following information as soon as possible, but by no later than March 22, 2017:

1. Identify any senior agency officials who have used an alias email account to conduct official business since January 1, 2016. Include the name of the official, the alias account, and other email accounts used by the official to conduct official business.
2. Identify all agency policies referring or relating to the use of non-official electronic messaging accounts, including email, text message, messaging applications, and social media platforms to conduct official business, including but not limited to archiving and recordkeeping procedures.
3. Identify all agency policies referring or relating to the use of official text message or other messaging or communications applications, and social media platforms to conduct official business, including but not limited to archiving and recordkeeping procedures.
4. Identify agency policies and procedures currently in place to ensure all communications related to the creation or transmission of federal records on official electronic messaging accounts other than email, including social networking platforms, internal agency instant messaging systems and other communications applications, are properly captured and preserved as federal records.

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<sup>6</sup> 44 U.S.C. § 2911 (2017).

<sup>7</sup> Andrew Restuccia, Marianne Levine, and Nahal Toosi, *Federal workers turn to encryption to thwart Trump*, POLITICO, Feb. 2, 2017, <http://www.politico.com/story/2017/02/federal-workers-signal-app-234510>; Jonathan Swan and David McCabe, *Confide: The app for paranoid Republicans*, AXIOS, Feb. 8, 2017, <https://www.axios.com/confide-the-new-app-for-paranoid-republicans-2246297664.html>.

<sup>8</sup> Sheera Frenkel, *White House Staff Are Using A "Secure" App That's Not Really So Secure*, BUZZFEED NEWS, Feb. 16, 2017, <https://www.buzzfeed.com/sheerafrenkel/white-house-staff-are-using-a-secure-app-thats-really-not-so>.

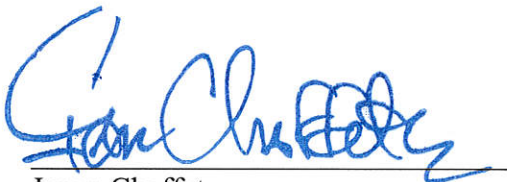
5. Explain how your agency complies with FOIA requests that may require searching and production of documents stored on non-official email accounts, social networking platforms, or other messaging or communications.
6. Provide the status of compliance by the agency with the Managing Government Records Directive issued by the Office of Management and Budget on August 24, 2012.<sup>9</sup>

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment to this letter provides additional information about responding to the Committee's request. Please note that Committee Rule 16(b) requires counsel representing an individual or entity before the Committee or any of its subcommittees, whether in connection with a request, subpoena, or testimony, promptly submit the attached notice of appearance to the Committee.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X.

For any questions about this request, please have your staff contact Jeff Post of the Majority staff at (202) 225-5074 or Krista Boyd of the Minority staff at (202) 225-9493. Thank you for your attention to this matter.

Sincerely,



Jason Chaffetz  
Chairman



Elijah E. Cummings  
Ranking Member

Enclosures

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<sup>9</sup> Jeffrey D. Zients, Acting Director, Office of Management and Budget and David S. Ferriero, Archivist of the United States, National Archives and Records Administration, *Managing Government Records Directive* (Aug. 24, 2012) (M-12-18).

## **Responding to Committee Document Requests**

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
  - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;  
  
BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,  
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,  
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,  
CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,  
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,  
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,  
BEGATTACH.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.



7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

### **Definitions**

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES  
115<sup>TH</sup> CONGRESS**

**NOTICE OF APPEARANCE OF COUNSEL**

**Counsel submitting:** \_\_\_\_\_

**Bar number:** \_\_\_\_\_ **State/District of admission:** \_\_\_\_\_

**Attorney for:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**Telephone:** ( \_\_\_\_\_ ) \_\_\_\_\_ - \_\_\_\_\_

**Pursuant to Rule 16 of the Committee Rules, notice is hereby given of the entry of the undersigned as counsel for \_\_\_\_\_ in (select one):**

**All matters before the Committee**

**The following matters (describe the scope of representation):**

\_\_\_\_\_  
\_\_\_\_\_

**All further notice and copies of papers and other material relevant to this action should be directed to and served upon:**

**Attorney's name:** \_\_\_\_\_

**Attorney's email address:** \_\_\_\_\_

**Firm name (where applicable):** \_\_\_\_\_

**Complete Mailing Address:** \_\_\_\_\_

\_\_\_\_\_

**I agree to notify the Committee within 1 business day of any change in representation.**

\_\_\_\_\_  
**Signature of Attorney**

\_\_\_\_\_  
**Date**