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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

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March 3, 2017

Donald F. McGahn
White House Counsel
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20501

Dear Mr. McGahn:

We write again to express our concern and request information regarding the Trump Administration's compliance with the Presidential Records Act (PRA) of 1978.¹ Since January 20, 2017, the Trump White House has engaged in practices that raise serious questions about this Administration's compliance with government transparency laws, including the PRA. The American people deserve to have a transparent and accountable federal government.

The PRA governs the preservation and retention of official records of Presidents and Vice Presidents. The National Archives and Records Administration (NARA), which was established by Congress to preserve and care for the records of the United States government, notes that the PRA changed the "legal ownership of the official records of the President from private to public."² The statute created a definition of Presidential records and made clear that such records belong to the public, placing responsibility for the custody and management of incumbent Presidential records with the President. The PRA defines the term "Presidential records" as:

documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.³

¹ 44 U.S.C. §2201-2209.

² The National Archives and Records Administration, *Presidential Records Act (PRA) of 1978* (online www.archives.gov/presidential-libraries/laws/1978-act.html).

³ 44 U.S.C. §2201(1).

The PRA also has a disclosure requirement for official records created using non-official electronic messaging accounts.⁴ The statute allows for disposal of presidential records only if they “no longer have administrative, historical, informational, or evidentiary value” and once the President has obtained the views of the Archivist of the United States on the proposed disposal.⁵

Public reports and a close review of the conduct of several senior White House officials raise serious concerns regarding the Trump Administration’s commitment to compliance with the PRA. For example, the *Washington Post* recently reported that Steven Bannon, Chief Strategist and Senior Counselor to the President, may have exchanged regular text messages with Speaker of the House Rep. Paul Ryan.⁶ It remains unclear if any such messages have been preserved, but text messages present particular preservation challenges because they are not typically stored on a government server.

According to numerous public reports, members of President Trump’s White House staff are transmitting sensitive work-related information using a communications application that automatically deletes messages. *The Independent* reported that White House staffers are using a “confidential messenger” app called “Confide” that deletes messages once they have been opened on a device, leaving no record of them or their content thereafter.⁷ The company’s website indicates that Confide allows users to send messages “without the risk of what you say being forwarded on or permanently stored.”⁸ Confide messages cannot be printed or archived and the company provides “end-to-end encryption to ensure conversations remain confidential ... Even we at Confide cannot decrypt or see any messages.”⁹ The app allows users to transmit text messages, photos, documents, and voice messages, and also provides two forms of screenshot protection, which prevents recipients of an image from taking a screenshot of it. Use of private messenger applications such as Confide by White House personnel to conduct official business flies in the face of the PRA and the principles of government transparency.

⁴ 44 U.S.C. §2209.

⁵ 44 U.S.C. §2203(c).

⁶ *Does Stephen Bannon Text Paul Ryan?*, The Washington Post (Feb. 6, 2017) (online https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/02/06/does-stephen-bannon-text-paul-ryan/?utm_term=.9e1ab440e6d2#comments).

⁷ *Donald Trump’s White House Staff ‘Communicate Through App Which Automatically Deletes Messages’*, The Independent (Feb. 15, 2017) (online <http://www.independent.co.uk/news/world/americas/us-politics/donald-trump-white-house-staff-confide-communicate-app-auto-delete-messages-leaks-russia-us-a7581046.html>).

⁸ Frequently Asked Questions, Confide (online <https://getconfide.com/faq>) (accessed on Feb. 17, 2017).

⁹ *Id.*

White House officials' use of social media platforms such as Twitter also gives rise to important questions regarding PRA compliance. The PRA makes clear that its requirements also apply to presidential records created by White House personnel using non-official electronic messaging accounts. A review of the Twitter practices of several senior White House officials reveal troubling inconsistencies in the treatment of presidential records created using this digital media platform. For example, White House Chief of Staff Reince Priebus, who has maintained a personal Twitter account “@Reince” since February 2009, created an official Twitter account for use in his official capacity. Mr. Priebus’s official government Twitter account, “@Reince45” was created in November 2016 and states explicitly that “Tweets may be archived: <http://wh.gov/privacy>.”¹⁰ Although Mr. Priebus had previously used his personal Twitter account to share information regarding government business, on February 8, 2017, he tweeted from his personal Twitter account stating, “Be sure to keep up with everything going on at the @WhiteHouse by following my official account, @Reince45.”¹¹

Mr. Priebus’s deliberate segregation of his personal Twitter account from his official government Twitter feed stands in direct contrast to other senior White House officials who continue to use their personal Twitter feeds for official purposes. For example, Kellyanne Conway, whose personal Twitter account “@KellyannePolls” identifies her as “Counselor to the President”, has repeatedly used this account to report and promote official White House business.¹² On February 7, 2017, Ms. Conway tweeted “Sheriffs join @POTUS in the Oval [Office], following roundtable discussion of listening to, not lecturing, law enforcement” and posted a picture of President Trump in the Oval Office with law enforcement officials.¹³ Likewise, Omorosa Manigault, Assistant to the President and Director of Communications for the Office of Public Liaison, routinely uses her personal twitter account “@OMAROSA” to tweet about official government business in real time. On February 9, 2017, Ms. Manigault tweeted “Dinner with future leaders of this Nation- @WestPoint_USMA Cadets @VP and @SenatorTimScott” along with a picture from the event with Vice President Pence.¹⁴

The use of a personal Twitter account to conduct official business is not impermissible under the PRA, but several incidents raise questions regarding whether President Trump’s senior officials are complying with the law. After reports that Ms. Conway retweeted a white nationalist Twitter account, Ms. Conway stated: “I don’t know who had access to my account” and she subsequently deleted the tweet. It remains unclear why a senior White House official who routinely uses her personal Twitter

¹⁰ Reince Priebus, Twitter (twitter.com/Reince45).

¹¹ Reince Priebus, Twitter (twitter.com/Reince).

¹² Kellyanne Conway, Twitter (twitter.com/KellyannePolls).

¹³ Kellyanne Conway, Twitter post (Feb. 7, 2017, 7:38 a.m.) (twitter.com/KellyannePolls).

¹⁴ Omorosa Manigault, Twitter post (Feb. 9, 2017, 3:16 p.m.) (twitter.com/OMOROSA).

account for official White House business would not sufficiently maintain the security of that account or delete tweets related to her work in the White House. Ms. Manigault also deleted a tweet referring to allegations that she physically intimidated a White House reporter as “fake news.”¹⁵ Media reports indicate that in the deleted tweet Ms. Manigault accused the reporter of making up the story in an effort to increase her book sales.¹⁶ Under the PRA, presidential records should not be destroyed without prior consultation with NARA and covered officials such as Ms. Conway and Ms. Manigault could be subject to disciplinary action for failure to preserve records created on non-official accounts.¹⁷

The President’s own frequent use of Twitter and regular practice of deleting tweets raises similar PRA concerns. For example, on January 21, 2017, President Trump reportedly deleted a tweet from his personal Twitter account “@realDonaldTrump” that misspelled the word “honored.”¹⁸ The President initially tweeted, “I am honered to serve you, the great American People, as your 45th President of the United States!”¹⁹ The tweet was then quickly deleted and replaced with an identical message that spelled the word “honored” correctly. As *The Daily News* reports, President Trump has erased misspelled messages prior to assuming office, but that practice has continued since he came under the purview of the PRA.²⁰ Public reports have highlighted other instances where tweets related to government business came from the President’s personal Twitter account, but were subsequently deleted, including one tweet posted during a foreign military operation.²¹

On January 30, 2017, we wrote to you regarding public reports of senior White House officials using private email accounts through the Republican National Committee. Although the White House has not yet provided a response to that letter, the recent events detailed above demand further inquiry from Congress. The PRA states

¹⁵ *WH Reporter: Omarosa ‘Physically Intimidated’ Me, Claimed to Have ‘Dossiers’ for Blackmailing Journalists*, Mediate (Feb. 14, 2017) (online <http://www.mediaite.com/online/wh-reporter-omarosa-physically-intimidated-me-claimed-to-have-dossiers-for-blackmailing-journalists/>).

¹⁶ *Id.*

¹⁷ 44 U.S.C. §2201-2209.

¹⁸ President Trump’s deleted tweets could violate Presidential Records Act, *The Daily News* (Jan. 21, 2017) (online <http://www.nydailynews.com/news/politics/trump-deleted-tweets-violate-presidential-records-act-article-1.2952416>).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *As SEALs Fought For Their Lives, Trump’s Account Sent And Deleted A TV Tweet*, Huffington Post (Feb. 22, 2017) (online http://www.huffingtonpost.com/entry/trump-yemen-raid-twitter_us_58ae0acbe4b057efdce8c07c).

clearly that if there is an intentional violation by a covered official—including any individual who advises or assists the President or Vice President— that official can be subject to disciplinary action.²² The American people and their representatives in Congress have a right to know if White House officials are following the PRA and whether they will be held accountable if they violate the law.

In order to fully assess and understand the Administration's records preservation policies, please provide our staffs with an in-person briefing regarding compliance with the Presidential Records Act not later than March 30, 2017. In addition to the topics raised in our January 30, 2017 letter, White House staff should be prepared to discuss the steps the White House has taken, or plans to take, to determine whether President Trump, or any covered officials on President Trump's White House staff, are using ANY non-government accounts, including personal devices and social media, to conduct official business. We also ask for the following documents:

1. If your office determined or determines that President Trump, or any covered officials on President Trump's White House staff, did use or are still using such accounts for official business, please provide a list of those individuals as well as a written response outlining how the White House intends to ensure those individuals' compliance with the Presidential Records Act; and
2. With respect to President Trump's two Twitter accounts (@realDonaldTrump and @POTUS), documents and information related to how the White House is ensuring the preservation of all tweets and other records created using these accounts, including those that may be, or have been, deleted.

²² 44 U.S.C. §2209(b).

Should you have any questions regarding this inquiry, please contact Donald Sherman with Ranking Member McCaskill's staff at Donald_Sherman@hsgac.senate.gov or by phone at (202) 224-2627 or Roberto Berrios with Senator Carper's staff at Roberto_Berrios@hsgac.senate.gov or by phone at (202) 224-2441. Thank you your prompt attention to this request. We look forward to your response.

With best personal regards, we are

Sincerely yours,



Claire McCaskill
Ranking Member



Tom Carper
U.S. Senator

cc: The Honorable Ron Johnson
Chairman

The Honorable David S. Ferriero
Archivist of the United States
U.S. National Archives and Records Administration