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United States Senate

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

March 7, 2017

The Honorable David S. Ferriero
Archivist of the United States
U.S. National Archives and Records Administration
700 Pennsylvania Ave, NW
Washington, DC 20408

Dear Archivist Ferriero:

We write today regarding concerns over compliance by President Donald Trump's Administration with the Presidential Records Act and the Federal Records Act.

As you know, we previously raised concerns over several Trump Administration recordkeeping practices. In February, we wrote to White House Counsel Donald McGahn regarding public reports that at least four senior officials in the Administration maintained active email accounts on a private email system while serving in the White House.[1] We also raised concerns last month with Department of Defense Secretary James Mattis over whether President Trump's reported use of a personal, unsecured smartphone ensures that presidential records created through the use of this device are being properly preserved.[2] Most recently, we sent a second letter to White House Counsel Donald McGahn related to White House officials' use of social media platforms, such as Twitter, that may not comply with federal recordkeeping requirements.

In addition to our prior concerns, two recent reports have since come to our attention, raising further concerns that federal recordkeeping requirements are being skirted in an effort to prevent press leaks. Public reports indicate that White House staffers, including staffers from the National Security Council and the Office of the Press Secretary, are using a smartphone app known as Confide for work-related communications.[3] Confide uses "military-grade end-to-end encryption" to allow individuals to communicate digitally through messages that self-destruct.[4]

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[1] *Carper Questions White House Staff's Use of Private Email Accounts* (Feb. 7, 2017), *available at* https://www.carper.senate.gov/public/index.cfm/pressreleases?ID=BB4D859A-85F8-48B2-BB20-D8DC6C431E35.

[2] *Carper Express Security Concerns Over President Trump's Use of a Personal Smartphone* (Feb. 13, 2017), *available at* https://www.carper.senate.gov/public/index.cfm/pressreleases?ID=2C28852C-F1C5-4AF1-BE9B-D13B3D65A3F3.

[3] Ashley Parker and Philip Rucker, *Upheaval is now Standard Operating Procedure Inside the White House*, WASHINGTON POST (Feb. 13, 2017); Annie Karni and Alex Isenstadt, *Sean Spicer Targets Own Staff in Leak Crackdown*, POLITICO (Feb. 26, 2017).

[4] *See* https://getconfide.com.

Public reports have also raised concerns about the efforts of the U.S. State Department to contain press leaks. According to a memorandum prepared by the State Department, officials have been directed to avoid discussing policy issues via email in order to prevent potential leaks.[5] Instead, the memo reportedly instructs State Department officials to make requests for policy information and guidance via telephone or in-person conversations.[6]

Each of these reports, across multiple White House offices and federal agencies, raise serious concerns. Both the Presidential Records Act and the Federal Records Act require covered officials to preserve work-related communications.[7] White House staff and federal officials should not feel pressured to avoid communicating in the manner that best facilitates the fulfilment of their professional responsibilities. The policy outlined in the State Department's memo undermines the Department's ability to work in the most effective and efficient manner possible to potentially avoid negative media coverage and congressional oversight. While our goal is not to encourage inappropriate leaks of presidential or federal records, prevention of any such leaks is not a recognized exception to federal recordkeeping requirements, nor does it outweigh statutory recordkeeping requirements.

In 2014, Congress recognized the importance of the Archivist of the United States by recently granting the Archivist final determination as to what constitutes a Federal record.[8] The National Archives and Records Administration (NARA) plays an essential role in preserving our history as the nation's federal record-keeper. In order to better understand how NARA is addressing the growing concerns over the Trump Administration's commitment to federal recordkeeping requirements, we ask that you please provide the following information by March 21, 2017:

1. Has any staff from the White House or offices within the Executive Office of the President consulted NARA since January 20, 2017 regarding compliance with the Presidential Records Act or the Federal Records Act? If so, has NARA provided any guidance to the White House or the Executive Office of the President? Please provide a copy of any written guidance.

2. Has NARA provided, or been asked to provide, guidance to any federal agency regarding methods to ensure that President Trump's communications made through this personal smartphone are preserved? If so, please provide a copy of any written guidance and a list of any agencies that have requested such guidance.

3. NARA considers President Trump's tweets as presidential records that need to be preserved for historic purposes.[9] Has NARA made a determination of whether the

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[5] Josh Rogin, *State Department Writes Anti-Leak Memo, Which Promptly Leaks*, WASHINGTON POST (Feb. 24, 2017).

[6] *Id.*

[7] Presidential Records Act, 44 U.S.C. §§ 2201–2209 (2014); Federal Records Act 44 U.S.C. §§ 3101–3107 (2014).

[8] Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2203 (codified as amended in scattered sections of 44 U.S.C.).

[9] Stephen Braun, *Trump's Tweets are Presidential Records, but Deletions?*, THE ASSOCIATED PRESS (Jan. 23, 2017).

Trump Administration must also preserve altered or deleted tweets? If so, please provide this determination. If not, please indicate when NARA anticipates making such a determination.

4. Is NARA aware of any federal agencies or offices within the Executive Office of the President using smartphone apps including, but not limited to, Confide for work-related communications? Has NARA provided any guidance to federal agencies or offices within the Executive Office of the President on the use of smartphone apps that do not preserve work-related communications? Please provide a copy of any written guidance.

5. Is NARA aware of any government official at federal agencies or offices within the Executive Office of the President who have been instructed to avoid using email as a method of work-related communication for fear of press leaks? Has NARA provided any guidance to any federal agencies or offices within the Executive Office of the President on whether, and under what circumstances, it is appropriate to instruct covered officials to avoid using email for work-related communications, or on how to preserve the content of telephonic or in-person work-related communications? Please provide a copy of any written guidance.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [redacted] Ranking Member McCaskill's office at [redacted] 202-224-2627 or [redacted] Senator Carper's office at [redacted] 202-224-2441. Thank you very much for your attention to this matter.

With best personal regards, we are

Sincerely yours,

Claire McCaskill
Ranking Member

Tom Carper
United States Senator

cc: The Honorable Ron Johnson
Chairman