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March 27, 2015

BY FIRST-CLASS SURFACE AND ELECTRONIC MAIL

The Honorable Trey Gowdy
United States House of Representatives
Select Committee on Benghazi
Washington, DC 20515

Dear Mr. Chairman:

This letter will respond to (1) the subpoena duces tecum issued by the Benghazi Select Committee to the Hon. Hillary R. Clinton and served by agreement on March 4, 2015; and (2) your March 19, 2015 letter requesting that former Secretary of State Clinton make her e-mail server available for third-party inspection and review.

Response to the Subpoena

As you know, the subpoena calls for the following documents, for the period January 1, 2011 through December 31, 2012, referring or relating to:

- (a) Libya (including but not limited to Benghazi and Tripoli);
- (b) weapons located or found in, imported or brought into, and/or exported or removed from Libya;
- (c) the attacks on U.S. facilities in Benghazi, Libya on September 11, 2012 and September 12, 2012; or
- (d) statements pertaining to the attacks on U.S. facilities in Benghazi, Libya on September 11, 2012 and September 12, 2012.

The subpoena requests production of any documents sent from or received by the e-mail addresses "hdr22@clintonemail.com" or "hrod17@clintonemail.com." As explained in my March 4, 2015 e-mail to your Staff Director and certain others, "hrod17@clintonemail.com" is not an address that existed during Secretary Clinton's

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tenure as Secretary of State.¹ With respect to any e-mails from Secretary Clinton's "hdr22@clintonemail.com" account, I respond by stating that, for the reasons set forth below, the Department of State—which has already produced approximately 300 documents in response to an earlier request seeking documents on essentially the same subject matters—is uniquely positioned to make available any documents responsive to your requests.

On December 5, 2014, in response to an October 28, 2014 letter request from the Department of State for assistance in ensuring its records were as complete as possible, personal attorneys for Secretary Clinton delivered to the Honorable Patrick F. Kennedy, the Under Secretary of State for Management, all e-mails from the hdr22@clintonemail.com e-mail account that were related or potentially related to Secretary Clinton's work as Secretary of State. The Secretary's personal attorneys had reviewed every sent and received (whether as "to," "cc," or "bcc") e-mail from the hdr22@clintonemail.com account during her tenure as Secretary (62,320 e-mails in total) and identified all work-related and potentially work-related e-mails (30,490 e-mails, approximately 55,000 pages)—which were provided to the State Department on December 5, 2014. The Department of State is therefore in possession of all of Secretary Clinton's work-related e-mails from the hdr22@clintonemail.com account.

Secretary Clinton has asked for release of all of those e-mails to the public. While she is eager for the release to happen as soon as possible, the State Department needs to review the 30,490 e-mails prior to their release to determine whether any action is necessary to protect sensitive diplomatic efforts of the United States or the safety or privacy of any individuals identified in the e-mails. The State Department has that process underway.

Secretary Clinton is not in a position to produce any of those e-mails to the Committee in response to the subpoena without approval from the State Department, which could come only following a review process. On March 23, 2015, I received a letter from the Under Secretary of State for Management (attached hereto) confirming direction from the National Archives & Records Administration ("NARA") that while Secretary Clinton and her counsel are permitted to retain a copy of her work-related e-

¹ See e-mail from me to P. Kiko, S. Grooms, H. Sawyer, and D. Chipman (Mar. 4, 2015) ("I hope the following is helpful: Secretary Clinton used one email account when corresponding with anyone, from Department officials to friends to family. A month after she left the Department, Gawker published her email address and so she changed the address on her account. At the time the emails were provided to the Department last year this new address appeared on the copies as the 'sender,' and not the address she used as Secretary. This address on the account did not exist until March 2013, after her tenure as Secretary.").

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mails, those e-mails should not be released to any third parties without authorization by the State Department. The letter further makes clear that any permission to release documents to third parties must be preceded by a review by the State Department for “privilege, privacy or other reasons.” Thus, while Secretary Clinton has maintained and preserved copies of the e-mails provided to the State Department, she is not in a position to make any production that may be called for by the subpoena.

I should note that the subpoena overlaps in time frame and subject matter with a prior request you sent me. While the present subpoena includes two additional categories of documents that were not specified in the previous request—any and all documents related to “(c) the attacks on U.S. facilities in Benghazi, Libya on September 11, 2012 and September 12, 2012; or (d) statements pertaining to the attacks on U.S. facilities in Benghazi, Libya on September 11, 2012 and September 12, 2012”—those two categories appear to be encompassed by category (a) of the prior request, which broadly sought all documents “authored by, sent to, or received by” hdr22@clintonemail.com referring or relating to Libya generally, including Benghazi. Thus, I do not view the subpoena to be broader in subject matter or time frame than the December 2, 2014 letter request.

As you know, in my December 29, 2014 response letter, I referred that request to the State Department for production of any responsive e-mails from the set of 30,490 work-related and potentially work-related e-mails from the hdr22@clintonemail.com account that were provided to the State Department on December 5, 2014. On February 13, 2015, the State Department produced to the Committee approximately 300 e-mails (STATE-SCB0045000–STATE-SCB0045895) in response to the Committee’s requests from their records, which include the set of the 30,490 hdr22@clintonemail.com e-mails that had been provided to the Department.

Finally, I observe that the subpoena calls for “any and all documents” during the requested time period related to the identified topics. In the event that we subsequently identify any other responsive documents, I will update this response promptly.

Response to Letter Request Regarding Server

In your March 19, 2015 letter, you requested that Secretary Clinton “make her server available to a neutral, detached and independent third-party for immediate inspection and review.” March 19 Letter at 1. I respectfully note that the March 19 letter does not offer legal authority or precedent for this request and instead relies on the various “interests” claimed to be at stake.

Each of these interests purportedly relates to various rights of access to federal records. Those interests have already been addressed by the step of ensuring that the State Department’s records are as complete as possible, through providing a copy of all of Secretary Clinton’s work-related and potentially work-related e-mails—the majority of

which was contemporaneously captured on the state.gov system—to the State Department in December 2014. Thus, the State Department has all of Secretary Clinton’s work-related and potentially work-related e-mails, regardless of whether they qualify as federal records.

The March 19 letter takes issue with Secretary Clinton’s role, through her legal representatives, as the “sole arbiter of what she considers private” and what she considers work-related. *See* March 19 Letter at 3. That procedure, however,—whereby individual officials are responsible for separating what is work-related (and potentially a federal record) from what is personal—is the very procedure that NARA and individual agencies rely upon to meet their obligations under the Federal Records Act every day. Indeed, NARA’s guidance and the State Department’s policies make clear that the reliance on individual officials to make decisions as to what e-mails must be preserved as federal records is not an “arrangement” that is “unprecedented” or “unique,” but instead the normal procedure carried out by tens of thousands of agency officials and employees in the ordinary course.

Specifically, the regulations implementing the Federal Records Act provide that “agencies must distinguish between records and nonrecord materials by applying the definition of records . . . to agency documentary materials in all formats and media.” 36 C.F.R. § 1222.12(a) (2014). The regulations further recognize that determining which materials are “[a]ppropriate for preservation” as evidence of agency activities—and therefore within the definition of a federal record—is a matter entrusted to the “judgment of the agency,” *id.* § 1222.10(b)(6) (2014). Both NARA guidance and State Department policies place the responsibility of exercising agency judgment to identify federal records on individual officials and employees. As NARA recently recognized with regard to the role of agency officials and employees in e-mail management, “[c]urrently, 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.” NARA Bulletin 2014-06, ¶ 4 (Sept. 15, 2014) (emphasis added).

Like other agencies, the State Department places the obligation of determining what is and is not appropriate for preservation on individual officials and employees. The Foreign Affairs Manual, which sets forth the Department’s policies with regard to e-mail management, provides that “[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.” *See* 5 FAM 443.2(b). The Manual supplies guidance, drawn from the language of the Federal Records Act, to assist individuals in their exercise of judgment. *See* 5 FAM 443.2(a). The Manual also notes “[t]he 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

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ensure that departmental policies, programs, and activities are adequately documented.” 5 FAM 443.2(b); *see also* 36 C.F.R. § 1222.16(b)(3) (2014) (stating that “[n]onrecord materials should be purged when no longer needed for reference. NARA’s approval is not required to destroy such materials.”).

Thus, by design, individual officials and employees indeed do serve as arbiters of what constitutes a federal record, and therefore as individual implementers of the Federal Records Act. The Committee implicitly recognized this fact when, in its December 2, 2014 letter request for documents related to Libya and weapons related to Libya, it asked Secretary Clinton to undertake a review of the hdr22@clintonemail.com account to determine whether any such documents existed on that account. The manner in which Secretary Clinton assisted the State Department in fulfilling its responsibilities under the Act here is consistent with the obligations of every federal employee.

The March 19 letter also expresses concern that Secretary Clinton’s “arrangement apparently also allowed her to delete those emails she alone determined to be personal in nature.” March 19 Letter at 3. This statement is at odds with your recognition of Secretary Clinton’s personal privacy and that “the Committee has not sought, is not seeking, and will not seek to possess, review, inspect or retain any document or email that is purely personal in nature,” as such materials are “none of the Committee’s business, and would not assist the Committee in discharging its responsibilities.” *Id.* at 5; *see also* letter from you to me (Dec. 2, 2014) at 1 (“To be clear, the Committee has no interest in any emails, documents or other tangible things not related to Benghazi.”). It is also at odds with federal regulations implementing the Federal Records Act, which provide that “personal files”—defined as “documentary materials belonging to an individual that are not used to conduct agency business”—are “*excluded from the definition of Federal records and are not owned by the Government.*” 36 C.F.R. § 1220.18 (2014) (emphasis added).

Finally, the March 19 letter expresses concern that the review process for identifying potential federal records—a process that NARA and the State Department require to be undertaken by individual officials—was potentially inadequate. The only specific concerns cited are that search terms may have been relied upon as a proxy for a document-by-document review, or that the process would have excluded from the set produced to the State Department any hybrid e-mails that contained both work-related and personal materials. These concerns, however, are addressed by the fact that the Secretary’s personal attorneys reviewed her email (search terms were employed as an aid to, not as a proxy for, that review), and that any work-related *and* potentially work-related (hybrid) e-mails were provided to the Department.

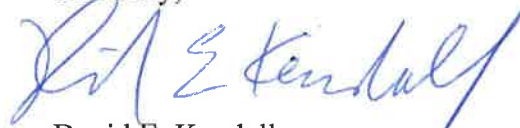
There is no basis to support the proposed third-party review of the server that hosted the hdr22@clintonemail.com account. During the fall of 2014, Secretary Clinton’s legal representatives reviewed her hdr22@clintonemail.com account for the

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time period from January 21, 2009 through February 1, 2013. After the review was completed to identify and provide to the Department of State all of the Secretary's work-related and potentially work-related emails, the Secretary chose not to keep her non-record personal e-mails and asked that her account (which was no longer in active use) be set to retain only the most recent 60 days of e-mail. To avoid prolonging a discussion that would be academic, I have confirmed with the Secretary's IT support that no e-mails from hdr22@clintonemail.com for the time period January 21, 2009 through February 1, 2013 reside on the server or on any back-up systems associated with the server. Thus, there are no hdr22@clintonemail.com e-mails from Secretary Clinton's tenure as Secretary of State on the server for any review, even if such review were appropriate or legally authorized.

As set forth above, all of Secretary Clinton's work-related and potentially work-related e-mails were provided to the State Department on December 5, 2014. Secretary Clinton has asked the Department to release these e-mails to the public as soon as possible. We understand that the State Department is working on completing procedures necessary for the release of those e-mails, and the Committee—and the public—will have access to them when that process is complete.

Sincerely,



David E. Kendall

cc: The Honorable Elijah Cummings
Dana K. Chipman, Esq.
Heather Sawyer, Esq.
The Honorable Patrick F. Kennedy

ATTACHMENT

**UNDER SECRETARY OF STATE
FOR MANAGEMENT
WASHINGTON**

MAR 23 2015

Dear Mr. Kendall,

I am writing in reference to the approximately 55,000 pages of electronic mail that were identified as potential federal records and produced on behalf of former Secretary Clinton to the Department of State on December 5, 2014 in response to its request for assistance under the Federal Records Act.

We understand that Secretary Clinton would like to continue to retain copies of the documents to assist her in responding to congressional and related inquiries regarding the documents and her tenure as head of the Department. The Department has consulted with the National Archives and Records Administration (NARA) and believes that permitting Secretary Clinton continued access to the documents is in the public interest as it will help promote informed discussion. Accordingly, Secretary Clinton may retain copies of the documents provided that: access is limited to Secretary Clinton and those directly assisting her in responding to such inquiries; steps are taken to safeguard the documents against loss or unauthorized access; the documents are not released without written authorization by the Department; and there is agreement to return the documents to the Department upon request. Additionally, following NARA's counsel, we ask that, to the extent the documents are stored electronically, they continue to be preserved in their electronic format. In the event that State Department reviewers determine that any document or documents is/are classified, additional steps will be required to safeguard and protect the information. Please note that if Secretary Clinton wishes to release any document or portion thereof, the Department must approve such release and first review the document for information that may be protected from disclosure for privilege, privacy or other reasons.

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

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I would appreciate it if the Secretary or her designee would confirm agreement to the conditions described above in writing as soon as possible.

Very truly yours,



Patrick F. Kennedy