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United States Senate

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

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August 10, 2022

The Honorable Lloyd J. Austin III
Secretary
Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Secretary Austin:

I am writing to inquire about troubling reporting that the text messages of former senior officials at the Department of Defense (DoD) have been deleted, including messages of potential importance to ongoing investigations of the January 6, 2021 attack on the U.S. Capitol. According to this reporting, DoD revealed in a court filing that the messages of several former officials were deleted when they left the agency in January 2021 during a time of presidential transition.¹ I was encouraged to see the department move to require the capture of all data on government mobile devices when they are turned in by employees, but serious concerns remain.² While I recognize that you may not yet have been serving in your position at the time some of these deletions occurred, I appreciate you answering my questions to the best of your ability.

In the filing, which was made pursuant to a Freedom of Information Act (FOIA) lawsuit, the department reportedly stated that employee phones are wiped when they leave the agency. “For those custodians no longer with the agency, the text messages were not preserved...,” read the filing, “although it is possible that particular text messages could have been saved into other records systems such as email.”³ This suggests that the department routinely erases messages when an employee leaves the agency, seemingly without taking appropriate steps to ensure compliance with the Federal Records Act.

These messages were relevant to a request for information sent to you from Congress, and they were likely required to be preserved under the Federal Records Act (FRA).⁴ National Archives and Records Administration (NARA) guidance clearly states that “electronic messages created or received in the course of agency business are Federal records,” and that text messages are

¹ Jan. 6 text messages wiped from phones of key Trump Pentagon officials, CNN (Aug. 2, 2022) (<https://www.cnn.com/2022/08/02/politics/defense-department-missing-january-6-texts/index.html>).

² Memorandum from Kathleen Hicks, Deputy Secretary of Defense, to DoD Leadership (Aug. 3, 2022).

³ Id.

⁴ Letter from Sen. Gary C. Peters, et al, to Ms. Jennifer A. Hemingway, et al (Feb. 8, 2021)

included in this description.⁵ In the wake of the events of January 6th, it is concerning that the department would not take particular care to ensure that the records of outgoing officials would be preserved.

To better understand the decisions to erase these messages, the department's policies on retaining federal records, and decisions on preservation of records requested by Congress, I am writing to request additional information and documents related to this incident. I respectfully request that you provide the following documents and information as soon as possible and no later than August 31, 2022:

1. When did the department first learn that the text messages of former acting Secretary of Defense Chris Miller had been deleted?
 - a. When did the department first learn that the text messages of former chief of staff Kash Patel had been deleted?
 - b. When did the department first learn that the text messages of former Secretary of the Army Ryan McCarthy had been deleted? When were Mr. McCarthy's messages deleted?
 - c. When did the department first learn that the text messages of former General Counsel Paul Ney had been deleted?
 - d. When did the department first learn that the text messages of former Army General Counsel James McPherson had been deleted? When were Mr. McPherson's messages deleted?
 - e. What did you or department leadership do when the department learned of each of these incidents?
2. Is it regular department procedure to reset official government devices when an employee leaves office? Prior to the August 3, 2022 memorandum, did the department have a regular policy to back up the contents of these phone prior to their reset? Please provide any policy, procedures, or guidance related to resetting devices for departing personnel prior to August 3, 2022.
3. Which other DoD employees' government devices were wiped? Are there other deleted text messages?
4. Was this same process followed for previous Administration officials?
5. Did the department notify the Archivist of the United States of these deletions, as required by the FRA (44 U.S.C. § 3106)? If so, please provide a record of this notification. If not, why not?

⁵ Bulletin 2015-02, National Archives and Records Administration (July 29, 2015) (<https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html>).

6. When DoD received the oversight request from Congress related to investigations into the events of January 6th, what steps did the agency take to ensure relevant electronic messages were preserved?
 - a. Did the agency alert personnel that text messages could be among the documents that should be preserved pursuant to these requests? Please provide any messages sent to personnel related to compliance with document preservation requests.
7. FOIA requests were filed for these text messages, among other documents, on January 12, 2021. Why were the devices of departing employees wiped when the department had already received these requests?
8. Please provide any relevant policy, guidance, or training prior to the August 3, 2022 memorandum, including any DoD records management policies or guidance relevant to electronic message preservation, about preserving texts and other electronic messages, including SMS, iMessages, and other mobile application messages, pursuant to the Federal Records Act and NARA guidance.
 - a. Prior to the August 3, 2022 memorandum, did DoD have policy, plans, procedures, guidance, or training on employee use and preservation of mobile messaging in their official capacity, including SMS, iMessage, or other mobile messaging applications? If so, please provide such policy, guidance, or training.
 - b. Does DoD know the extent to which employees use mobile messaging applications? If so, please provide details of this use.
 - c. Please provide DoD's plans, policies, procedures, guidance, or training prior to the August 3, 2022 memorandum to ensure that mobile messages, including SMS, iMessages, or other mobile application messages, are automatically backed up.
9. What attempts has DoD made to recover the deleted text messages, and are these efforts ongoing?
 - a. Were any devices using Apple's iCloud for backups, and if so, what steps has DoD taken to fully explore options with Apple to recover backups?
 - b. Were any messages preserved in another cloud system, and if so, what efforts have been made to recover data from that cloud system?
10. Does DoD disable employees from utilizing iMessages? Is DoD considering, or has DoD previously considered, disabling iMessage? If so, please provide any documents or communications pertaining to this consideration.
11. Does DoD use, or has DoD considered using, any service to back up text messages through the telecommunications carrier, such as Verizon's Message Archive? If so, please provide any communications or documents pertaining to the use or consideration of these services.

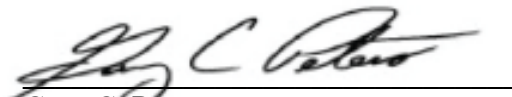
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The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate and Section 12(e) of S. Res. 70 (117th Congress) to investigate the “efficiency, economy, and effectiveness of all agencies and departments of the Government” and “processes as tested against the requirements imposed by the rapidly mounting complexity of national security problems... [and] legislative and other proposals to improve these methods, processes, and relationships.”⁶

Sincerely,

A handwritten signature in black ink, appearing to read "Gary C. Peters", is written above a horizontal line.

Gary C. Peters
Chairman

⁶S. Rule XXV, S. Res. 70 (117th Congress).