

**MEMORANDUM**  
**October 27, 2017**

**To: Homeland Security and Governmental Affairs Committee Democratic Members**  
**Fr: Homeland Security and Governmental Affairs Committee Democratic Staff**  
**Re: Briefing from White House Counsel on Private Email Use**

On October 5, 2017, representatives from the Office of White House Counsel briefed the staff of the Senate Homeland Security and Governmental Affairs Committee concerning the White House's compliance with the Presidential Records Act.<sup>1</sup> The briefing was scheduled following a letter from Chairman Ron Johnson to White House Counsel Donald McGahn requesting a "staff-level briefing on White House compliance with federal record-keeping requirements as well as training and guidance provided to White House employees about official email practices."<sup>2</sup> This memorandum provides the members of the Committee with information provided at the briefing.

**I. GUIDANCE ON THE PRESIDENTIAL RECORDS ACT**

White House officials provided information to the Committee regarding its legal compliance and ethics program, which includes information on compliance with the Presidential Records Act (PRA). This program consists of written guidance, introductory training on ethics compliance for all new staff, and upcoming annual compliance training.<sup>3</sup>

On February 22, 2017, attorneys from the Office of the White House Counsel circulated a memorandum for all personnel regarding their obligations to preserve and maintain presidential records, as required by the Presidential Records Act. The memorandum defined categories of materials that are considered presidential records, and outlined the steps taken to preserve the records. The memorandum specifically addresses electronic records, stating:

**Electronic Records.** You must preserve electronic communications that are presidential records. **You are required to conduct all work-related communications on your official EOP email account**, except in emergency circumstances when you cannot access the EOP system and must accomplish time sensitive work. Emails and attachments sent to and from your EOP account are automatically archived.

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<sup>1</sup> The presenters included Stefan Passantino, Deputy Assistant to the President and Deputy Counsel to the President, Uttam Dhillon, Special Assistant to the President and Senior Associate Counsel to the President, and Daniel Epstein, Associate Counsel to the President.

<sup>2</sup> Letter from Senator Ron Johnson, Chairman, U.S. Senate Committee on Homeland Security and Governmental Affairs, to Donald F. McGahn III, White House Counsel, The White House (Sept. 26, 2017).

<sup>3</sup> White House officials characterized their legal compliance and ethics program as "the most robust, comprehensive in history" and "the best compliance program." They also stated several times that they were eager to provide a briefing on this topic because it is a "very good news story."

*If you ever send or receive email that qualifies as a presidential record using any other account, you **must** preserve that email by copying it to your official EOP email account or by forwarding it to your official email account within twenty (20) days. After preserving the email, you must delete it from the non-EOP account. **Any employee who intentionally fails to take these actions may be subject to administrative or even criminal penalties.***

The same rules apply to other forms of electronic communication, including text messages. ***You should not use instant messaging systems, social networks, or other internet-based means of electronic communication to conduct official business without the approval of the Office of the White House Counsel.*** If you ever generate or receive presidential records on such platforms, you must preserve them by sending them to your EOP email account via a screenshot or other means. After preserving the communications, you must delete them from the non-EOP platform.<sup>4</sup>

White House officials provided further explanation to the Committee staff, stating “under no circumstances is anyone allowed to conduct official communications over personal email, over text, over an encrypted service.” If official communications do occur over personal email, representatives from White House Counsel advise that staff respond by copying their official email account and requesting the sender to direct further communication to the recipient’s official email address. According to officials, this method ensures that the entire conversation, rather than just the last email, is captured within the official account.

The White House Counsel’s office further advises White House personnel that they have 20 days to forward emails with official business to their official email accounts to ensure compliance with the PRA.<sup>5</sup> White House officials highlighted that in the circumstances where an official email is sent to a personal account, a message must be forwarded if an individual creates a presidential record by engaging with the sender, however staff is not required to forward unanswered emails received in their personal account to their official account.

Phones and other electronic devices issued by White House operations do not have texting capabilities and cannot download web-based applications. Political communications are not permitted to occur on official devices. Additionally, White House officials explained that although employees are permitted to have encrypted texting applications on personal phones, Mr. Passantino emphasized that “all I can say is it’s not permitted for official use.” White House Counsel advises employees that if texts occur involving official records on personal devices,

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<sup>4</sup> The White House, *Memorandum for All Personnel, through Donald F. McGahn, Counsel to the President, Presidential Records Act* (Feb. 22, 2017) (emphasis in original).

<sup>5</sup> Office of the White House Counsel officials told Committee staff that the Trump Administration is the first to deal with the expansion of the Presidential Records Act and, as a result, has made “unprecedented” changes to ethics program. Contrary to these assertions, the Democratic staff was informed on October 11, 2017, by a former employee of the Office of White House Counsel that Obama-era ethics training for all staff in 2015 and 2016 included information on the Presidential and Federal Records Act Amendments of 2014.

individuals should screenshot the text and email it their official account to be captured under PRA.

They stressed that, while they can and do track attendance at compliance trainings, they cannot track personal email, text messages, or social media accounts and therefore do not have a way of knowing whether staff is in compliance with ethics statutes, stating: “what you can’t see is the absence of information.”

## **II. DEVELOPMENT OF ETHICS GUIDANCE**

Representatives from White House Counsel informed the committee that they began to implement the ethics program prior to the inauguration. They explained that Mr. Passantino is the first Deputy-level attorney addressing ethics issues present at the beginning of an administration.<sup>6</sup> White House officials informed the committee that on his first day “there was not a single piece of paper” telling Mr. Passantino how to do his job.<sup>7</sup> Mr. Passantino explained that he and his deputy visited the Office of Government Ethics (OGE) on his first day in the administration, noting that “this is a relationship game” and that he wanted OGE to feel like they had a relationship with his office.<sup>8</sup>

White House officials invited the National Archives and Records Administration (NARA) to participate in developing the White House guidance on PRA. NARA supplied White House Counsel with written materials on compliance, some of which was incorporated into the formal written guidance document issued in February 2017.<sup>9</sup>

## **III. TRAINING ON PRESIDENTIAL RECORDS ACT**

On the first day of the Trump Administration, representatives from White House Counsel provided personal briefings to all new White House employees on ethics compliance, including recordkeeping responsibilities under the PRA. Every thirty days, White House Counsel holds similar trainings for new staff. This monthly briefing includes presentation slides. Notices of

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<sup>6</sup> At the beginning of the Obama Administration, Norm L. Eisen was named the Special Counsel for Ethics and Government Reform.

<sup>7</sup> Despite this characterization, the Democratic staff was informed on October 11, 2017, by a former employee of the Office of White House Counsel that the current Chief of Staff for the Office of White House Counsel was provided multiple examples of Obama-era ethics memoranda during the Trump-Pence Transition period.

<sup>8</sup> White House officials noted that representatives from their office currently remain in “weekly, sometimes daily communication with the Office of Government Ethics.”

<sup>9</sup> The Government Accountability Office reports: “OGE also offered assistance to the [Trump-Pence] Transition Team in regard to setting up the White House ethics program, such as consulting on ethics training and procedures. According to OGE officials, OGE provided detailees to the White House, but has not been asked to provide any additional technical assistance.” U.S. Government Accountability Office, *Presidential Transition: Information on Ethics, Funding, and Agency Services* (Sept. 7, 2017) (GAO-17-615R).

the monthly ethics trainings for new employees is sent to the entire White House staff as all employees with an official White House account receive the notices. Mr. Passantino stated repeatedly that it was “impossible not to know” about the compliance guidelines.

White House Counsel tracks the compliance of all employees in attending the ethics briefing. These personnel files include an employee’s ethics agreement, disclosure agreement, and certifications that they attended the proper trainings. Representatives from White House Counsel clarified that an ethics officer does not have the authority or the ability to tell if someone is in compliance of the PRA; rather he can tell “who has not signed in for a training.” White House officials acknowledged they “do not have the ability to go and audit anyone’s personal email account.” As a result, everything that is seen by White House Counsel is “by definition compliant” due the automatic archiving built into the White House networks. White House officials recognize that “what you can’t see is the absence of information,” and therefore cannot determine whether every White House employee is in compliance with the PRA.

White House Counsel intends to complete annual recertification training on ethics in November 2017.

#### **IV. TWITTER AND PRESIDENTIAL RECORDS ACT**

White House officials briefed Committee staff on official Twitter accounts, which are the only type of account allowed on official phones issued by White House operations. The Office of White House Counsel and the White House Office of Administration tracks and captures official accounts as presidential records “in real time” and further explained, “when the president tweets we capture it immediately.” White House officials explained that “deleted tweets are still captured so it is not a violation” of the PRA. The administration takes these recordkeeping measures internally rather than relying on Twitter or another outside company to document compliance with the PRA. White House officials informed the committee that direct messages sent to official Twitter accounts are not automatically captured. These direct messages to official Twitter accounts would have to be screenshot and forwarded by email to an official account to be captured under PRA.

#### **V. ADDITIONAL WHITE HOUSE INTERVENTION FOLLOWING PRESS REPORTS**

Following public reporting that at least six White House advisers used private email accounts to discuss official matters,<sup>10</sup> representatives from White House Counsel took additional action. On September 26, 2017, Mr. Passantino recirculated the compliance memoranda he distributed in February 2017. White House Counsel held their monthly training for new staff on ethics compliance issues on September 28, 2017, and approximately 80 people attended.

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<sup>10</sup> *At Least 6 White House Advisers Used Private Email Accounts*, The New York Times (Sept. 25, 2017); *Kushner Used Private Email to Conduct White House Business*, Politico (Sept. 24, 2017).

White House officials confirmed that the six individuals named in press reporting had been briefed previously on compliance with the Presidential Records Act. White House officials informed the committee they discussed recordkeeping requirements again with the six individuals named publicly following the publication of the articles. White House officials also contacted former employees who were identified in press reports as having used private email accounts for official business – explicitly naming Steve Bannon and Reince Priebus as individuals that have been contacted – and “admonished them not to delete anything.”

White House officials also referenced “a number” of litigation holds, resulting in “folks ... holding stuff they are not even required to hold,” including copies of scanned reports and notes to self. Mr. Passantino summarized that “we are holding pretty much everything.”

White House officials are conducting internal reviews of official accounts, but refused to brief the committee on the status of these assessments. Minority staff inquired about whether these assessments would include an analysis of electronic content transmitted over unsecure networks that would potentially be classified under Executive Order 13526. White House officials responded that this question was outside of the scope of the briefing and would need to be discussed in a secure setting. Minority staff encouraged White House Counsel to incorporate a review of information for classification concerns to mitigate the potential that White House advisers transmitted classified material over unsecured, unclassified networks.

White House officials declined to answer if any staff have been subject to discipline for their recordkeeping practices. White House officials also referred all questions regarding cooperation with law enforcement relating to recordkeeping practices to Ty Cobb, White House Special Counsel.

White House officials also informed the Committee that the Office of Government Ethics has been invited to perform a program review of the compliance of White House recordkeeping systems. OGE has informed the White House that it will not be ready to begin to conduct a review of the compliance program until January or February 2018.