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Government Operations

Clinton E-mail Controversy a Lesson In Federal Record-Keeping Policies

The recent controversy over former Secretary of State Hillary Clinton's use of a private server to store work-related e-mails has resulted in the widespread education of federal employees about the proper handling and retention of their e-mails, a State Department official said at a committee hearing.

Sen. John Cornyn (R-Texas), one of the chief sponsors of bipartisan legislation (S. 337) to update the Freedom of Information Act, said the presumption should be that information held by the U.S. government should be open and accessible to the public.

The Center for Effective Government recently gave the State Department a grade of F on FOIA compliance (47 DER A-16, 3/11/15), "an embarrassing failure of the agency," Cornyn said.

"But what really bothers me is when people plan in a premeditated and deliberate sort of way to avoid the Freedom of Information Act and federal government requirements that require them to make public information available to the public," Cornyn said, pointing to the Clinton e-mail controversy.

Message Sent. Joyce Barr, assistant secretary at the Bureau of Administration at State and the official in charge of FOIA compliance there, responded to questions about the controversy at the hearing called by the Senate Judiciary Committee.

"I think that the actions that we've taken in the course of recovering these e-mails have made it very clear what people's responsibilities are with regard to record-keeping," Barr said. "We continue to do training, but we've sent department notices, telegrams, we've talked to directors and I think the message is loud and clear that that is not acceptable."

Judiciary Chairman Charles Grassley (R-Iowa) cited an inspector general's report finding that out of more than 1 billion e-mails sent by State Department employees in 2011, only about 61,000 of them were properly archived.

Congress Slow to Modernize. Sen. Al Franken (D-Minn.) suggested that Congress has been slow to modernize federal laws related to government transparency, such as the Federal Records Act, privacy and FOIA laws.

It was not until 2014, after Clinton had left the State Department, that the government required agency employees using personal e-mail accounts for official pur-

poses to make sure a copy went to their work e-mail account, Franken said.

"So it strikes me, that is one of the many instances where federal law lags behind the technology," Franken said. "And in general I think this is an issue that Congress needs to grapple with."

Separately, White House press secretary Josh Earnest told reporters May 6 that the guidance given to administration officials is that they should use their government e-mail when they are conducting official business.

Leahy: Pass Bill. The committee in February reported out bipartisan legislation (S. 337) called the FOIA Improvement Act to both establish a presumption of openness and to make it easier for the public to access government information through a single, online portal.

Those testifying at the May 6 hearing said this bill, along with enforcement of electronic records policies, are needed to improve federal government transparency.

Sen. Patrick Leahy (D-Vt.), the ranking member of the committee and a chief co-sponsor of the FOIA bill along with Cornyn, urged the Senate to take up and pass the bill, as it has in previous years, without further delay.

"There are no objections on the Democratic side to moving forward with this legislation and I hope we can bring it before the full Senate for consideration and pass this important bill," Leahy said.

Failing Grade for State. The State Department's failing grade in March was part of the Center for Effective Government's annual evaluation of responsiveness by 15 federal agencies that process most FOIA requests.

"While some agencies showed improvement from last year, the results are once again disappointing," Leahy said. "Two agencies, including the State Department testifying before us today, received a failing grade for their handling of FOIA requests."

According to the report, only 7 percent of FOIA requests the State Department received were responded to within the 20 days required, Leahy said. State denied FOIA requests in their entirety almost 50 percent of the time. And administrative appeals have taken on average 540 days, or over a year and a half, to process, he said.

Link to Records Management. Nikki Gramian, the acting director of the Office of Government Information Services at the National Archives and Records Administration, noted the "important interplay" between records management and access.

“It has long been OGIS’s observation that access to records under the FOIA is linked to and greatly enhanced by good records management,” Gramian said.

Linking improvements to FOIA with improvements to records management programs is a best practice promoted by OGIS, she said.

Within the federal government, NARA is a leader in the area of records management, in coordination with the Office of Management and Budget, Gramian said.

In 2012, the two offices issued a government records directive that established important requirements for electronic record-keeping, which will begin to take effect in 2016, Gramian said (166 DER A-7, 8/28/12).

Irony in Clinton Case. Thomas Blanton, director of the non-governmental National Security Archive at the George Washington University, testified that his group has brought White House e-mail lawsuits against every president from Ronald Reagan to Barack Obama.

The result has been “hundreds of millions” of saved e-mail messages and a new standard for digital preservation at the White House that the rest of government has not achieved, Blanton said.

Blanton credited the State Department for having one of the “very best” online reading rooms in the federal government. It is robust, easily searchable and uploaded quarterly with released documents, he said.

However, widespread use of a personal e-mail account for official business by federal employees would be the “end” of the Federal Records Act and FOIA, Blanton said. “And it’s an enormous challenge and it’s wrong.”

In the case of Clinton, it was wrong because as the head of a federal agency, she was responsible under the Federal Records Act for records systems that preserve agency records, Blanton said.

There was not a “specific prohibition” against what she did, because the rule about transferring e-mails to a work system was not yet in place, but it was still wrong, he contended.

“And yet I would point out the irony—it’s actually more of a tragedy because it’s a commentary on our whole record-keeping system—that we’re probably going to end up with more saved, preserved e-mails from those materials handed over by Ms. Clinton, because she had them on a private server, than if she had kept them all on a State.gov system, because the State.gov system was totally broken,” Blanton said.

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