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COMMITTEE ON THE JUDICIARY

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January 27, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable John F. Kerry
Secretary of State
U.S. Department of State
2201 C Street, NW
Washington, DC 20520

Dear Secretary Kerry:

On January 7, 2015, the Department of State Inspector General (State IG) released an evaluation titled, "Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary." On January 6, 2016, State IG briefed Senate staff on the scope, methodology, findings, and recommendations. I am deeply concerned about the evaluation's findings.

Based on the information and findings contained in the evaluation, it is clear that systemic failures exist within the Department of State's Freedom of Information Act response process. By way of example, the evaluation noted that "the Department took four and-half times as long—an average of 91 days to process simple requests and almost 535 days to process complex requests" as compared to average processing times for simple and complex process requests across the government, which were 20.5 days and 119 days, respectively.¹ Further, the findings show that the Secretary's Executive Secretariat (S/ES), "rarely searched electronic email accounts prior to 2011 and still does not consistently search these accounts, even when relevant records are likely to be uncovered through such a search."² Perhaps most troubling is the finding that State FOIA searches are inaccurate and incomplete and that "FOIA requesters have been able to produce evidence of the existence of records responsive to a FOIA request despite the attestation by S/ES that no responsive records existed."³

¹ State Department Inspector General, *Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary*, ESP-16-01, p. 6 (January 2016).

² *Id.* at 9.

³ *Id.* at 13.

On page 14 and 15 of the evaluation, State IG provides an example of a misleading response provided by the Department to a FOIA requester. In December 2012, Citizens for Responsibility and Ethics in Washington (CREW) submitted a FOIA request for records “sufficient to show the number of email accounts of, or associated with, Secretary Hillary Rodham Clinton, and the extent to which those email accounts are identifiable as those of or associated with Secretary Clinton.” The Department responded, stating “no records responsive to your request were located.”

At that time, and as the evaluation notes, Secretary Clinton’s senior staff and several senior officials throughout the Department knew that Secretary Clinton was using a personal email address to conduct official business. According to a briefing by State IG, Mr. Brock Johnson, a spokesman at the Department in 2012, emailed CREW’s FOIA request to Ms. Cheryl Mills, Secretary Clinton’s Chief of Staff. After Ms. Mills received the request, she transmitted it to Ms. Heather Samuelson, a Senior Advisor and White House Liaison at the Department, instructing her to make queries as to the status of the Department’s response to the FOIA request. Ms. Samuelson then tasked it to Mr. Josh Dorosin, a State Department attorney.

According to the briefing provided by State IG, when State IG attorneys investigating this matter approached Ms. Mills, she, through her attorney, refused to speak with them. Mr. Dorosin did speak with the investigating State IG attorneys, but when asked about the specific CREW-FOIA tasking he reportedly claimed that he had no recollection of the matter. It is not clear whether Ms. Samuelson or Mr. Johnson were interviewed.

In fact, Ms. Mills and senior Department officials knew about Secretary Clinton’s use of private email for official correspondence since they were sending emails to her non-government email address. They would have known instantly of records responsive to that request. Yet, it was approximately 5 months later before the Department officially responded to CREW’s request for email accounts associated with Secretary Clinton. And its response was misleading, at best: “no records responsive to your request were located.”⁴

As noted in the Department of Justice’s *Guide to the Freedom of Information Act*, in FOIA litigation an agency often faces challenges to the nature and extent of its search for responsive documents.⁵ Agencies generally demonstrate to the court the adequacy of their FOIA searches by filing declarations stating that the search method was reasonably calculated to uncover all relevant documents, and averring that all files reasonably expected to contain the requested records, were, in fact, searched.⁶ The State IG evaluation states that Department attorneys recalled several other instances when FOIA searches yielded inaccurate or incomplete results. Yet, “S/ES has not taken any corrective actions to ensure the accuracy and completeness of FOIA searches.” It further reported that “searches performed by S/ES do not consistently meet statutory and regulatory requirements for completeness.” Accordingly, the evaluation

⁴ *Id.*

⁵ Department of Justice, *Guide to the Freedom of Information Act* 754-59 (2009), available at: http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/litigation-considerations_0.pdf

⁶ *Id.*

warned that in FOIA litigation “[t]he Department and its leadership could [] be subject to contempt citations if they were found to have violated rules requiring candor to the court.”⁷ In light of these findings, there is a real potential that some Department officials may have provided false declarations to federal courts when they attested to taking all reasonable steps to provide complete and accurate FOIA responses.

As you are aware, this Committee exercises jurisdiction over the Freedom of Information Act. As such, it is imperative to understand the full range of facts and circumstances discussed in the report to fully understand the FOIA compliance failures, shortcomings, and any potential steps toward improvement.

To assist the Committee in understanding these circumstances, please answer the following:

1. Please provide all emails between or among the following individuals from November 31, 2012 to May 10, 2013 that refer or relate to Secretary Clinton’s email address or the CREW FOIA request:
 - a. Ms. Cheryl Mills
 - b. Mr. Brock Johnson.
 - c. Ms. Heather Samuelson.
 - d. Mr. Josh Dorosin.
 - e. Secretary Clinton.
 - f. Under Secretary Kennedy.

2. What steps will the Department take to determine whether it should correct false declarations in various FOIA cases in light of State IG’s findings?

Thank you in advance for your cooperation with this request. Please number your responses according to their corresponding questions and respond no later than February 10, 2016. If you have questions, please contact Josh Flynn-Brown of my Committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary

⁷ *Supra* note 1 at 13, 14.