



May 19, 2023

VIA CERTIFIED MAIL

The Hon. Joseph V. Cuffari
Office of the Inspector General
Department of Homeland Security
MAIL STOP 0305
245 Murray Lane SW
Washington, D.C. 20528-0305

Re: Request for Investigation – Use of Private Email Accounts for Agency Business

Dear Inspector General Cuffari:

I write on behalf of Americans for Prosperity Foundation (“AFPF”), a 501(c)(3) nonpartisan organization dedicated to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of its mission, AFPF uses investigative and legal tools to educate the public about the importance of government transparency and accountability.

AFPF is investigating the use of personal email accounts for official business at the Department of Homeland Security (“DHS”).¹ Our staff recently acquired evidence, as part of ongoing Freedom of Information Act (“FOIA”) litigation, that reflects the use of personal accounts at the highest levels of the agency. Notwithstanding whatever efforts certain officials might have undertaken to preserve copies of official correspondence sent to or from personal accounts, as required by federal law and agency policy, it remains deeply troubling that personal accounts are being used at all. Additionally, it does not seem there were exigent circumstances in all cases that justified the use of private accounts on an emergency basis for intra-agency business.

Current practice among certain high-ranking DHS officials skirts the spirit and letter of federal records-management laws. AFPF therefore believes this matter requires further investigation. We respectfully request that you investigate whether any laws or agency policies are being violated by DHS leadership. Relatedly, this letter is meant to provide you and other relevant officials, including Archivist Colleen Shogan and Secretary Alejandro Mayorkas, with notice under the Federal Records Act (“FRA”) of the possible alienation of federal records resulting from the unauthorized use of personal accounts and/or personal devices.

¹ See, e.g., Ryan Mulvey & Kevin Schmidt, *Federal officials keep using personal emails for government duties*, N.Y. POST (Mar. 18, 2023), <https://nypost.com/2023/03/18/federal-officials-are-still-using-personal-emails>.

Factual Background

In December 2022, AFPF obtained records as part of ongoing FOIA litigation against DHS over the now-defunct Disinformation Governance Board.² Among those records was a work-related email sent by Assistant Secretary for Public Affairs Marsha Espinosa to Secretary Mayorkas's personal email account.³ The Department of Justice subsequently confirmed the email in question reflected "two instances . . . [of] Secretary Mayorkas utiliz[ing] his personal email account."⁴ AFPF published a report on this discovery and announced it was filing a follow-up FOIA request to determine the full extent to which the Secretary may have used his personal accounts for official business.⁵ As AFPF acknowledged, Secretary Mayorkas and other DHS "officials could [have] *accidentally* use[d] a personal account or device. Or they may [have] face[d] an urgent circumstance that *necessitates* the one-off use of an unofficial means of communication. But such instances should be few and far between."⁶

In late March 2023, AFPF filed a second lawsuit against DHS after the agency failed to respond in timely fashion to the FOIA request concerning Secretary Mayorkas's use of private email for official business.⁷ The next month, DHS provided its first interim release which consisted of over **400 pages of work-related email and text message records** exchanged between Secretary Mayorkas's personal and DHS accounts.⁸ AFPF has published this interim production online.⁹

Official DHS policy on the use of personal accounts warns "employees [that they] may not use non-DHS e-mail accounts to create or send e-mail records that constitute DHS records" unless there is an "emergency."¹⁰ The same agency directive also requires DHS records to be "removed from the non-[DHS] email account once the employee has ensured the capture of e-mail information."¹¹ In this case, there is no publicly available evidence to confirm whether Secretary Mayorkas—or the other DHS officials with whom he was communicating via private email—properly deleted materials after forwarding records to an official record-keeping system. The unexpectedly large interim

² See generally *Ams. for Prosperity Found. v. Dep't of Homeland Sec.*, No. 22-2015 (D.D.C. filed July 12, 2022); *Americans For Prosperity Foundation Sues for Disinformation Governance Board Records*, AMS. FOR PROSPERITY (July 12, 2022), <https://americansforprosperity.org/americans-for-prosperity-foundation-sues-for-disinformation-governance-board-records>.

³ See **Exhibit 1**.

⁴ **Exhibit 2**.

⁵ Ryan Mulvey, *AFP Foundation investigates DHS secretary's use of private email while creating Disinformation Governance Board*, AMS. FOR PROSPERITY (Jan. 12, 2023), <https://americansforprosperity.org/dhs-private-email-disinformation-board>.

⁶ *Id.*

⁷ See *Ams. for Prosperity Found. v. Dep't of Homeland Sec.*, No. 23-0510 (D.D.C. filed Feb. 24, 2023); see generally *Americans For Prosperity Foundation Sues DHS Over Secretary Mayorkas' Private Email Use During Disinformation Governance Board Launch*, AMS. FOR PROSPERITY (Mar. 20, 2023), <https://americansforprosperity.org/afpf-sues-dhs-mayorkas-private-email-use>.

⁸ See **Exhibit 3**.

⁹ <https://americansforprosperity.org/wp-content/uploads/2023/04/2023-HQLI-00021-First-Release-Records.pdf>.

¹⁰ See **Exhibit 4**.

¹¹ *Id.*

production from DHS also raises serious questions about the Secretary's lack of transparency, as well as the culture of casual communication that exists among agency leadership.

In recent testimony before Congress, Secretary Mayorkas implied that any work-related message he received in his personal email accounts would have been sent "errantly."¹² Yet DHS's recent FOIA production suggests that officials—including Assistant Secretary Espinosa and Special Advisor Ricki Seidman—*intentionally communicated* with the Secretary through his private account, including in instances where there were no obvious exigent circumstances justifying deviation from required agency practice.¹³ Such use of private email is hardly "errant." Equally alarming is DHS's extensive redaction of records that passed through the Secretary's personal account; DHS withheld 56 pages in full and redacted over 200 others because they were ostensibly too sensitive to release.

It is important to acknowledge that the available evidence does not directly contradict the Secretary's public statements that he consistently forwards agency records from all private accounts and devices to official DHS systems. But, as already explained, the unexpected volume of agency communications in the Secretary's personal email accounts, and more importantly, the frequency of other DHS officials sending official business to those accounts, is alarming. One of the ways executive branch officials try to evade transparency is by using private email to conduct official business. Because private accounts are not generally subject to the FOIA, and FRA compliance is often left to self-policing, unofficial channels of communication can provide a cloak of secrecy.

Finally, it is worth noting Secretary Mayorkas is no stranger to federal-record controversies. During the Obama Administration, DHS came under fire for providing high-ranking officials—including then-Deputy Director Mayorkas—with special "waivers" to bypass an agency-wide prohibition on the use of browser-based Internet webmail on official technology systems, including personal accounts hosted by Gmail, Yahoo, and AOL.¹⁴ DHS later announced it had rescinded the "waivers" after public backlash.¹⁵ Despite that about-face, DHS still had to deal with congressional oversight efforts,¹⁶ as well as litigation by FOIA requesters seeking access to the private emails generated by DHS leadership.¹⁷

¹² Testimony of the Hon. Alejandro N. Mayorkas, Sec'y of Homeland Sec., before the U.S. S. Homeland Sec. & Gov't Affairs Comm. (April 18, 2023), *available at* <https://www.youtube.com/watch?v=FWbtXKjt814&t=4652s> ("Senator [Marshall], If somebody errantly sends me an email on my personal email that should have been sent to my work email, I forward it to my work email. That's what I do.").

¹³ See **Exhibits 5 & 6**.

¹⁴ See, e.g., Josh Rogin, *Homeland Security Leaders Bent Rules on Private Email*, BLOOMBERG (July 20, 2015), <https://www.bloomberg.com/opinion/articles/2015-07-20/homeland-security-leaders-bent-rules-on-private-e-mail>.

¹⁵ See Tal Kopan, *Report: DHS chief used personal email on work computer*, POLITICO (July 20, 2015), <https://www.politico.com/story/2015/07/report-jeh-johnson-used-personal-email-on-work-computer-120384>.

¹⁶ See Aliya Sternstein, *House Committee Now Probing Jeb Johnson's Personal Email Use at DHS*, NEXTGOV (Mar. 14, 2016), <https://www.nextgov.com/cybersecurity/2016/03/house-committee-probes-dhs-secretary-jeh-johnsons-use-private-email/126655>.

¹⁷ See, e.g., Mark Tapscott, *Judicial Watch Sues For Top Homeland Security Officials' Private Email Docs*, DAILY CALLER NEWS FOUND. (Nov. 18, 2015), <https://dailycaller.com/2015/11/18/judicial-watch-sues-for-top-homeland-security-officials-private-email-docs>.

Ultimately, in one FOIA case, a federal district court judge ordered several current or former DHS officials—including then-Secretary Johnson and now-Secretary Mayorkas—to preserve the contents of their private accounts onto portable hard drives for possible use in FOIA searches.¹⁸ News of this lawsuit prompted the National Archives and Records Administration (“NARA”) to open an investigation into the possible unauthorized disposition of federal records.¹⁹ Secretary Johnson, for his part, ended up searching through more than 26,000 emails stored in his personal account as part of an effort to identify and return records to the government.²⁰ At least some of the alienated federal records Secretary Johnson returned to the government were later disclosed to the public under the FOIA.²¹

* * *

There are serious concerns about whether Secretary Mayorkas and other high-ranking DHS officials have fully complied with agency directives and applicable records-management laws, including the FRA. The records released by DHS moreover call into question the prudence of what is apparently accepted practice among high-ranking DHS officials, namely, sending agency business to the Secretary’s private account. The track record of federal officials, especially at DHS, and the overall lack of transparency warrants further investigation by the Office of the Inspector General.

Notification of the Obligation to Preserve or Retrieve Work-Related Electronic Messages

The FRA refers to the collection of statutes and regulations that govern the creation, management, and disposal of the records of federal agencies.²² The FRA was enacted to ensure the “[a]ccurate and complete documentation of the policies and transactions of the Federal Government” and the “[j]udicious preservation and disposal of records.”²³ Among other things, the FRA requires an agency head to “establish and maintain an active, continuing program for the economical and efficient management of the records of an agency,”²⁴ and to establish “safeguards” against the removal

¹⁸ See Josh Gerstein, *Judge orders 4 Homeland Security officials to preserve private-account emails*, POLITICO (Jan. 18, 2017), <https://www.politico.com/blogs/under-the-radar/2017/01/homeland-security-jeh-johnson-email-preservation-233770>.

¹⁹ See generally *DHS Fails to Locate Records Concerning Compliance with Federal Records Act over Private Web-based Email Accounts*, CAUSE OF ACTION INST. (Mar. 8, 2018), <https://causeofaction.org/dhs-federal-records-act-email-accounts>.

²⁰ Alex Swoyer, *Jeb Johnson’s personal email use at DHS snared in growing pursuit*, WASH. TIMES (May 1, 2017), <https://www.washingtontimes.com/news/2017/may/1/jeh-johnsons-personal-email-use-at-dhs-snared-in-g>.

²¹ See, e.g., *Judicial Watch Obtains 216 Pages of Documents Containing Official Emails Sent Through Private, Unsecured Email Accounts of Former Homeland Security Secretary Jeb Johnson, Three Other Top Officials*, JUDICIAL WATCH (Feb. 13, 2017), <https://www.judicialwatch.org/judicial-watch-obtains-216-pages-documents-containing-official-emails-sent-private-unsecured-email-accounts-former-homeland-security-secretary-jeh-johnson-three-top-officials>.

²² See 44 U.S.C. chs. 21, 29, 31, 33; 36 C.F.R. pts. 1220–39.

²³ 44 U.S.C. § 2902(1), (5).

²⁴ *Id.* § 3102; see *id.* § 3301(a)(1) (defining federal records); see also 36 C.F.R. § 1220.18 (defining a federal record to include any material, “regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.”); see generally *id.* § 1222.10.

or loss of records, including notifications to agency officials and employees that records may not be alienated or destroyed unless authorized and of “the penalties provided by law for the unlawful removal or destruction of records.”²⁵

Under 44 U.S.C. § 3106, the FRA also requires the “head of each Federal agency”—in this case, Secretary Mayorkas—to notify the Archivist of the United States “of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency[.]”²⁶ In addition to notification, the FRA imposes a non-discretionary obligation on the agency head, with the assistance of the Archivist, to “initiate action *through the Attorney General* for the recovery of records the head of the Federal agency knows or *has reason to believe* have been unlawfully removed[.]”²⁷ Unlawful removal of records is defined as “selling, donating, loaning, transferring, stealing, or otherwise allowing a record to leave the custody of a Federal agency without the permission of the Archivist of the United States.”²⁸ In any situation where an agency head does not initiate action through the Attorney General for the recovery of unlawfully removed records, the Archivist is required to request the Attorney General to initiate such action and to notify Congress of that request.²⁹

In this case, to the extent Secretary Mayorkas and other high-ranking DHS officials communicated about work-related issues with personal email addresses, they created federal records as defined by the FRA. Those records belong to DHS and must be retained for preservation and disposition in accordance with NARA-approved schedules. If any such electronic messages or email records have been deleted or otherwise alienated (*i.e.*, failed to be saved to an official DHS record-keeping system), then Secretary Mayorkas has an obligation under 44 U.S.C. § 3106 to recover those records, whether from his own accounts or those of other DHS officials. Because of the possible conflict of interest, the instant notice, while provided to the Secretary and Archivist, is incorporated as part of AFPP’s request for the Office of the Inspector General to open an independent investigation into agency leadership’s email practices.

Once again, if electronic messages and email records have, in fact, been alienated and qualify as federal records, then the FRA mandates that Secretary Mayorkas (1) notify the Archivist of their alienation and (2) initiate action through the Attorney General for their recovery should any remedial recovery efforts prove unsuccessful.³⁰ As the D.C. Circuit Court of Appeals has held, the obligation

²⁵ 44 U.S.C. § 3105; *see* 36 C.F.R. § 1230.10(a) (requiring an agency head to “[p]revent the unlawful or accidental removal, defacing, alteration, or destruction of records”); *id.* § 1230.12 (“The penalties for the unlawful or accidental removal, defacing, alteration, or destruction of Federal records or the attempt to do so, include a fine, imprisonment, or both[.]”).

²⁶ 44 U.S.C. § 3106(a); *see* 36 C.F.R. § 1230.14 (providing that “[t]he agency must report promptly any unlawful or accidental removal, defacing, alteration, or destruction of records in the custody of that agency to the National Archives and Records Administration,” and also outlining the content of such report).

²⁷ 44 U.S.C. § 3106(a) (emphasis added).

²⁸ 36 C.F.R. § 1230.3(b).

²⁹ 44 U.S.C. §§ 2905(a), 3106(b).

³⁰ *Id.* § 3106(a); *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 953–54 (D.C. Cir. 2016); *id.* at 954 (“While nothing in § 3106 prevents the agency from first attempting its own remedial measures . . . the statute ‘requires the agency head and Archivist to take enforcement action’ through the Attorney General if those efforts are unsuccessful[.]” (citation omitted));

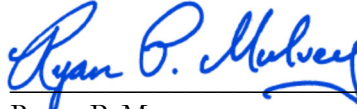
to initiate action through the Attorney General for the recovery of unlawfully removed records is a *mandatory* obligation, not subject to agency discretion.³¹ Any attempt to evade that obligation by claiming that DHS lacks legal authority to initiate recovery cannot be countenanced.

Conclusion

Given the seriousness of the proper preservation of federal records and the importance of public trust in DHS leadership complying with records-management directives, AFPF respectfully urges the Office of Inspector General to investigate this matter and take all appropriate action.

AFPF welcomes the opportunity to discuss the issues raised in this letter. If you have any questions, please feel free to contact me by telephone at (571) 444-2841 or by email at rmulvey@afphq.org. Thank you for your attention to this matter.

Sincerely,



RYAN P. MULVEY
POLICY COUNSEL

CC:

The Hon. Colleen Shogan
Archivist of the United States
National Archives and Records Administration

Mr. Laurence Brewer
Chief Records Officer of the United States
National Archives and Records Administration

The Hon. Alejandro N. Mayorkas
Secretary of Homeland Security

Ms. Michele Thomas
Chief Information Security Officer
Designated Federal Agency Records Officer
Department of Homeland Security

Armstrong v. Bush, 924 F.2d 282, 294 (D.C. Cir. 1991) (“[T]he Federal Records Act establishes one remedy for the improper removal of a “record” from the agency: the agency head, in conjunction with the Archivist, is required to request the Attorney General to initiate an action to recover records unlawfully removed from the agency.” (quoting *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980)).

³¹ *Kerry*, 844 F.3d at 954–55; *Armstrong*, 924 F.2d at 295 (“Because the FRA enforcement provisions leave *no* discretion to determine which cases to pursue, the agency head’s and Archivist’s enforcement decisions are not committed to agency discretion by law. In contrast to a statute that merely *authorizes* an agency to take enforcement action as it deems necessary, the FRA *requires* the agency head and Archivist to take enforcement action.”); accord *Cause of Action Inst. v. Tillerson*, 285 F. Supp. 3d 201, 203 (D.D.C. 2018) (“[T]he FRA directs specific rather than discretionary action[.]”).