

Page, Lisa C. (OGC) (FBI)

From: Page, Lisa C. (OGC) (FBI)
Sent: Thursday, September 01, 2016 4:11 PM
To: Moffa, Jonathan C. (CD) (FBI); Strzok, Peter P. (CD) (FBI)
Cc: [redacted] (OGC) (FBI)
Subject: FW: Outline of what we will report tonight

b6 -1
b7C -1

FYSA. It's pretty inaccurate, but there's not much to do about it.

From: Quinn, Richard P. (DO) (FBI)
Sent: Thursday, September 01, 2016 4:06 PM
To: Page, Lisa C. (OGC) (FBI); [redacted] (OGC) (FBI)
Subject: FW: Outline of what we will report tonight

b6 -1
b7C -1

FYI...as discussed...will likely run this evening around 9:00.

*Richard P. Quinn
Federal Bureau of Investigation
Media/Investigative Publicity*

[redacted]

b6 -1
b7C -1

From: John Solomon [redacted]
Sent: Thursday, September 01, 2016 3:33 PM
To: Kortan, Michael P. (DO) (FBI)
Cc: John Solomon; Quinn, Richard P. (DO) (FBI)
Subject: Outline of what we will report tonight.

b6 -3

Appreciate any final guidance

On cell at [redacted]

b6 -3

John

Though it was not their primary mission, FBI agents who investigated Hillary Clinton's email collected significant evidence that she and her team violated federal record-keeping laws, including persisting to use a private Blackberry and server to conduct State Department business after being warned they posed legal and security risks, government sources tell Circa. The evidence was compelling enough to force multiple witnesses in the FBI investigation to assert their Fifth Amendment right against self-incrimination and even convinced Director James Comey that the Clinton team had not complied with the law, the sources said. But in the end the bureau chose to defer to Mrs. Clinton's former employer, the State Department, to decide whether to recommend anyone to the Justice Department for misdemeanor criminal prosecution or administrative action, the sources said, speaking only on condition of anonymity. Each transmission of a government document across private email that was not preserved or turned over to the State Department from Mrs. Clinton's tenure could theoretically be considered a violation of the Federal Records Act, the main law governing preservation of government records and data. Intentionally concealing, removing or destroying federal records as defined under the Act, including those kept in private email, carries a fine and imprisonment of up to three years. But such a conviction carries an even more devastating political impact for a candidate seeking to occupy the White House, because the law states that any violator "shall forfeit his office and be disqualified from holding any office

under the United States.”

The FBI “indirectly documented hundreds, and likely thousands, of violations of the Records Act,” one source with direct knowledge of the FBI’s investigation told Circa. Using forensics, the FBI recovered from computer drives and other witnesses about 15,000 emails from Mrs. Clinton’s private account that dealt with government business covered by the Records Act and had not been turned over by her or her aides, the sources said. Some of the recovered records impacted document requests under the Freedom of Information Act or pending congressional investigations at the time they were deleted or not turned over, the sources added.

Accounts from witnesses suggested the efforts to keep Mrs. Clinton’s government email communications on a device and server outside the reach of the law – and therefore away from public or congressional disclosure – were “systemic and intentional” and began as soon as Mrs. Clinton took office in 2009, one source told Circa.

For instance, the sources said agents secured testimony and documents suggesting that Mrs. Clinton’s team:

- Was informed in 2009 that she an obligation under the records law to forward any government-related records contained in private email to a new record preservation system known as SMART but chose not to do so because her office wanted to keep control over “sensitive” data.
- Was specifically questioned in 2009 by a State Department aide who worked on her private email server in the Clinton family home in New York whether the arrangement was appropriate for a government official under the federal records law. A top aide to Mrs. Clinton dismissed his concerns.
- Wanted to keep her private Blackerry email service because of fears a government email address would be subject to public scrutiny under the Freedom of Information Act.
- Were aware that government officers complying with congressional or FOIA requests did not have access to search Mrs. Clinton’s private email for responsive records.
- Persisted in allowing her to use private email to conduct State Department business even after a cable was sent under her name in 2011 to all diplomats worldwide urging them to stop using private email because of foreign hacking fears.
- Allowed Clinton to keep using the private email system after after she personally received a 2011 classified presentation warning of dangers of the private email for government business.
- Failed to preserve private emails from Clinton that clearly involved significant government business, including discussions with Army Gen. David Petraues, Benghazi, meeting with foreign leaders and the State Department’s quadrennial policy and performance review.
- Had prior reason from earlier legal cases involving their conduct to know that emails covering government business were legally required to be preserved and turned over to their agency and the National Archives.

During a brief aside at a House Judiciary Committee hearing in July, FBI Director James Comey was asked by a congressman if he believed Clinton complied with State Department procedures and federal recordkeeping laws.

“I don’t think so. I know you have the State inspector general here, who’s more of an expert on all the department’s policies, but at least in some respects, no,” he answered. Comey, however, offered no explanation why charges weren’t filed.

Attorney General Loretta Lynch said in mid-July that she did not believe her department had assessed whether Clinton or her team violated the Federal Records Act. “I don’t know if that was under the purview of the investigation. I don’t recall a specific opinion on that,” she said.

The Clinton campaign did not respond to a request for comment. But Mrs. Clinton has said she regrets using private email to conduct official State Department business and wishes she could do it over. Her former chief of staff Cheryl Mills also expressed some regret, saying Mrs. Clinton thought her records would be preserved because her private emails usually went to other government accounts but that was mistaken.

Former President Bill Clinton was less apologetic, strongly dismissing Comey’s and the FBI’s criticism of his wife. “This is the biggest load of bull I ever heard,” he said a few weeks ago.

A retired federal prosecutor told Circa the FBI and DOJ could easily have brought a case if the evidence

pointed toward intentional violations.

"If you get enough instances of people violating the Federal Records Act and if it's a group of folks then you could look at things like a conspiracy, or a criminal enterprise, that could bump it up to a felony," said Matt Whitaker, who served as U.S. Attorney for Iowa under President George W. Bush and President Barack Obama and now runs a conservative-leaning government ethics group.

"There are a lot of intentional acts including the setting up of the private email server that probably could go to a question of was this intentional and was this violation of both the records act and the handling of classified material."

Whitaker said he believes a special prosecutor should be appointed to review the Records Act questions because "in this political silly season it appears that the FBI and especially the Department of Justice doesn't have the stomach to pursue the potential charges that emanate from this behavior." Ronald Hosko, who retired two years ago as the Assistant FBI Director in charge of the bureau's criminal division, agreed Mrs. Clinton's actions at the State Department showed a disregard for her obligation to preserve and protect sensitive government information.

Such responsibilities were "taken seriously" inside the FBI but that "does not appear to be the case in the State Department under Hillary Clinton. To me, this was a systemic failure at State, top to bottom." But Hosko said a misdemeanor case wouldn't be sexy enough for an FBI -- stretched by higher terrorism, organized crime and cybersecurity priorities -- to pursue, especially against a candidate leading the presidential race right now in a polarizing election.

"The FBI is an agency with finite resources. Seldom do you expend resources when the top available penalty is a misdemeanor," he said. ".... I'm not saying you don't consider it or contemplate it. I would say you contemplate it if the facts are so compelling and the intent is so overwhelmingly clear, that her desire was to violate that statute

"But we are in a hyper-politicized time in America. Would the electorate take to that? You have to take that all into consideration."

Sources directly familiar with the FBI's thinking said the bureau was not concerned about the election and did make a short reference to Federal Records Act issues in its final report to the Justice Department.

But it chose to defer to State to decide if criminal charges should be filed. "It's their records and their determination to make," one source said, describing the philosophy that governed the FBI's final decision.

In a noninvestigative report in June, the State Department's internal watchdog concluded Mrs. Clinton was one of only three senior department officials in the last two decades to use a private email account exclusively for government business and that her team did not comply with record-keeping policies of the Federal Records Act.

Douglas Welly, a spokesman for the State IG, said Thursday the office has no further work planned on the Clinton email scandal. "The OIG has completed its work. The OIG does not comment on whether or not it has referred, or will refer, any particular matter to DOJ," he wrote in an email to Circa.

State Department officials declined comment.

The Federal Records Act was passed by Congress 66 years ago to ensure federal agencies properly managed and maintained government records so they are preserved for historical purposes at the National Archives and for public access and congressional oversight. The law was updated by lawmakers in 2014, legislation that President Obama himself signed.

A separate law provides criminal penalties for intentional violations of the Act.

Since the late 1990s, the State Department has made clear to its employees that emails were public records covered by the Act, even those sent on their private accounts.

Much of the focus during the presidential race has been on the more than 100 emails that moved between Mrs. Clinton and her top aides that contained intelligence classified at the confidential, secret and top-secret level at the time it was transmitted.

Comey announced earlier this summer that Mrs. Clinton's and her staff's handling of intelligence was "extremely careless" but the bureau decided not to request criminal charges for violating national security laws because agents found insufficient evidence of intent and motive.

After her private email system was discovered, Mrs. Clinton eventually turned over 55,000 pages from about 30,000 emails involving State Department work. But FBI officials recovered about 15,000 additional emails on her private account that involved government business by sweeping her old devices and servers or scouring the government emails of other people she corresponded with.

"There was plenty of evidence from our interviews, especially from technical and compliance staff, as to the intention of creating a private email system outside the State Department's record keeping. It was well known, and it persisted even after people raised legal and security concerns," one source told Circa.

Multiple witnesses in the technical community involved in setting up, maintaining or wiping Clinton's email equipment were concerned enough about their legal liability to invoke their Fifth Amendment right against self-incrimination, the sources said. At least one cited concerns about records laws, the sources said.

One witness who initially invoked the Fifth and got immunity from prosecution was Bryan Pagliano, a former State Department worker who helped on the side to set up and maintain Mrs. Clinton's private email server at her home in New York. Sources familiar with his account say he told the FBI he inquired with Mrs. Clinton's inner circle whether the server arrangement ran afoul of any federal records laws and was assured there were no problems.

Among the strongest evidence gathered by investigators occurred in late 2010, when Mrs. Clinton was directly approached by one of her top deputies and informed that her government emails from her private account were not reaching State Department officials and possibly were going to spam. Mrs. Clinton was encouraged to get an official State email address.

Mrs. Clinton told her deputy she was willing to get a government email address if she could be assured her personal emails wouldn't be "accessible" to the public. Rather than create the government email address, State officials went to a technical person maintaining her private server and made adjustments to the server to ensure emails wouldn't be treated by the agency's email screening systems as spam, the sources said.

Around the same time, two information management employees inside State began raising concerns that material in Clinton's personal email server likely contained government records that needed to be preserved under the Federal Records Act. One raised the concern to a supervisor at a staff meeting but was scolded and eventually told never to raise the issue of Secretary Clinton's personal email account again, according to the sources.

Agents also found evidence Mrs. Clinton herself was acutely aware of the security and legal dangers of using her private Blackberry to conduct government business. For instance:

- In 2009, Mrs. Clinton and her chief of staff were briefed in a classified memo from the Assistant Secretary for Diplomatic Security on the security dangers of private Blackberry service and the secretary of state responded to that official a few days later that she "gets it."
- Mrs. Clinton received a second classified email in March 2011 about foreign government hacking attempts specifically aimed at State Department officials. The memo included this warning: "We also urge Department users to minimize the use of personal Web email for business" citing evidence of "compromised home systems." A version of that briefing was found in Mrs. Clinton's personal files at State.
- In June 2011, a cable entitled "securing personal email accounts" was sent to all U.S. diplomatic posts worldwide under Clinton's own name that highlighted growing cybersecurity threats and specifically warned "to avoid conducting official department business from your personal email accounts."
- By that time, officials maintaining Mrs. Clinton's private email server had detected attempts to hack into it but still she persisted in using the private email to conduct government business.

Agents also found evidence hinting at a possible motive for Clinton's team to maintain a private email server: a fear records on it could be obtained by the public via FOIA.

In 2011, shortly after the information management staff raised concerns about her private email, Mrs. Clinton's top aides discussed replacing her private Blackberry with a government-owned device, but that idea was scrapped after a top aide warned the materials on the government Blackberry would be subject to FOIA.

"You should be aware that any email would go through the Department's infrastructure and be subject to FOIA searches," a top State official warned.

The government Blackberry was never issued.

When Mills, Clinton's former chief of staff, was recently deposed in a civil lawsuit over FOIA practices brought by the watchdog group Judicial Watch, she admitted that State Department FOIA officers would not have had access to Mrs. Clinton's private email to search for responsive records.

"No is the answer," Mills testified. "I don't think I reflected on were there occasions where there might still be something with respect to a personal e-mail where someone had either e-mailed me or I had responded back or the system had been down and we ultimately needed to use it, that there was information that hadn't been captured. And I wish it had."

Regret for lost government records isn't new to the Clinton political machine:

Both Mills and Mrs. Clinton were mentioned in a lawsuit in the late 1990s during Bill Clinton's presidency over the loss of more than 1 million White House emails that were not saved for FOIA, congressional or criminal investigations. The Clinton White House blamed a technical error for the loss of the records. But subsequent litigation by the Judicial Watch group found evidence that a White House official disabled the archiving function for White House emails. A federal judge sharply criticized the Clinton White House for what he called a "fiasco" and singled out Mills, who had been a deputy white house counsel for Bill Clinton for having "failed miserably" to resolve the problem or give the court accurate information.

In another embarrassment, Sandy Berger, President Clinton's national security adviser and a longtime confidant of both Bill and Hillary Clinton, was caught trying to secret classified information about terrorism out of the National Archives in his socks. He pled guilty and apologized.