

Public Is Entitled to Openness From Government Officials

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The Freedom of Information Act¹ was inspired by James Madison's vision that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."² The Senate Judiciary Committee quoted these words in its report clarifying the purposes of FOIA, which concluded with forceful words of its own, as true today as when they were written 50 years ago: "A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty."³

New York's Freedom of Information Law embodies these same principles, stating that "[t]he people's right to know the process of governmental decision-making ... is basic to our society," and "should not be thwarted by shrouding it with the cloak of secrecy or confidentiality."⁴

The revelation that former Secretary of State Hillary Clinton created her own email system is but the most recent example of conduct that thwarts open government. Former Mayor Michael Bloomberg used his mbloomberg@bloomberg.net email address to conduct official business and one of his top deputies was still sending official correspondence to him at that address late into Bloomberg's third term.⁵ During the presidency of George W. Bush, more than 20 White House staffers, including Deputy Chief of Staff Karl Rove, conducted official business through Republican Party or campaign email accounts, and millions of other emails on White House servers were not properly preserved.⁶

In 2013, the House Committee on Science, Space and Technology found that officials within the Department of Commerce were using personal and alias email for official business, and the department claimed they had no way to stop it.⁷ Gov. Andrew Cuomo, whose staff has also conducted official business through a private messaging system,⁸ recently implemented a policy of purging any email over 90 days old.⁹

When the CIA tried to implement a similar policy in 2014, U.S. Senators Patrick Leahy and John Cornyn complained to the National Archives that "[i]n an era when critically important government activities and decisions are conducted via email, a plan to delete the majority of emails at any agency should raise great concern."¹⁰

Secretary Clinton purportedly "opted for convenience to use [her] personal e-mail account" for official State Department business "because [she] thought it would be easier to carry just one device."¹¹ Personal "convenience" hardly justifies Clinton's surprising decision, in light of the undeniably important public interests at stake. By conducting government business through personal email hosted on a private server, Clinton effectively thwarted public access to her official communications during her entire term (during which time the State Department received more than 70,000 FOIA requests)¹² and at least complicated the government's efforts to archive the correspondence of the nation's top diplomat.

Whether secrecy was her intent, and whether her conduct was illegal, her actions contradict the principles of open government and transparency espoused by President Barack Obama (who touted "accountability" through "transparency" and a "profound national commitment" to "open government");¹³ the Department of Justice under Attorney General Eric Holder (which described freedom of information as a "structural necessity in a real democracy");¹⁴ and Clinton herself.

On March 16, 2009, Freedom of Information Day, Clinton declared that "[t]he State Department will be at the forefront of making [openness in government] a reality," which would require "[p]reserving the record of our deliberations, decisions, and actions."¹⁵ By that time, Clinton was apparently already playing by a different rulebook. And the true record of the "deliberations, decisions, and actions" that shaped American foreign policy during her tenure will never be fully known or objectively evaluated—further frustrating informed, democratic decision-making in the future.

Another hypocritical aspect here, which extends far beyond Clinton, is that while top officials have been cavalier about their own recordkeeping responsibilities, lower-level officials and private citizens are pilloried for similar conduct. During Clinton's term, the State Department's Inspector General issued a scathing report against U.S. Ambassador to Kenya, J. Scott Gration, for, among other things, "willfully disregard[ing] Department regulations on the use of commercial email for official government business."¹⁶ Months later, FINRA fined five firms a total of \$1.2 million dollars for failing to preserve email.¹⁷ In this same period, the government spent untold sums prosecuting a fisherman under the recordkeeping provisions of Sarbanes Oxley for casting overboard a bucket of undersized fish—until the U.S. Supreme Court finally put an end to the nonsense.¹⁸ When a fisherman is criminally prosecuted under the SOX recordkeeping requirements for discarding fish while a sitting secretary of state exempts herself from federal recordkeeping system by creating her own private email domain sitting on her own private server, then the executive branch is writing a "prologue to a farce or a tragedy or perhaps both."

Worse than hypocritical, it is dangerous precedent for a sitting secretary of state to skirt federal records laws. If government officials are allowed to conduct official business "off the radar," there are two obvious negative consequences. First, the government's own internal watch dogs—who must

be vigilant against fraud, corruption, espionage, etc.—must operate partially blind. And second, the retrospective analyses conducted by the executive and legislative branches into various national crises lose a key source of evidence. After all, Clinton's email misconduct only came to light because the House Select Committee on Benghazi, which is examining the circumstances surrounding the deadly terrorist attack on the U.S. Embassy in Libya, served a subpoena on the State Department and a few of the documents happened to reference Clinton's private email address.¹⁹

Clinton was videotaped in 2000 saying "I don't do email," and explaining: "As much as I have been investigated and all of that, ... why would I ever want to do email? Can you imagine?"²⁰ It is possible to "imagine" the reasons Clinton might want to avoid email, but those reasons all involve avoiding warranted or unwarranted scrutiny. Whatever the motivation, it is not consistent with public trust, as transparency is supposed to be a job requirement.

But it is hard to imagine a cabinet-level officer touting openness while at the same time keeping her official, public records on a private server. The government is making increasingly high demands upon corporate integrity and internal compliance functions. Surely the public is entitled to demand the same level of integrity and internal compliance from the government.

Endnotes:

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