



Via Certified Mail

April 23, 2019

The Honorable Robert Wilkie
Secretary of Veterans Affairs
U.S. Department of Veterans Affairs
810 Vermont Ave. NW
Washington, DC 20420

Re: Request for Action Under the Federal Records Act to Recover Former Secretary Shulkin's Work Emails Maintained on a Personal Email System

Dear Secretary Wilkie:

Recent reporting indicates that, when he served as Secretary of Veterans Affairs, David Shulkin created and used a private, non-governmental email address to engage in what he called "secure" communications about government business with a group of outside advisors.¹ Under the Federal Records Act, the Department of Veterans Affairs must take steps to recover and preserve those communications. We ask that you confirm that the Department has done so by June 24, 2019.

Factual Background

The role of Ike Perlmutter, Bruce Moskowitz, and Marc Sherman in advising the VA has been well documented, including by an August 2018 exposé in *Pro Publica*.² That initial reporting described the so-called Mar-a-Lago Crowd's ties to President Trump through the private Mar-a-Lago Club, and their privileged access and influence at the VA. Documents on which that reporting relied confirm that the Crowd used their own, private email addresses to conduct their business with the VA.³ Since that time, it has come to light that Secretary Shulkin *also* used private, non-governmental email to communicate with the Crowd, including an address

¹ Ben Kesling, *House Democrats to Probe How Trump's Associates Influenced the VA*, Wall St. J., Feb. 8, 2019, <https://www.wsj.com/articles/house-democrats-to-probe-how-trumps-associates-influenced-the-va-11549634520>.

² See Isaac Arnsdorf, *The Shadow Rulers of the VA*, Pro Publica, Aug. 7, 2018, <https://www.propublica.org/article/ike-perlmutter-bruce-moskowitz-marc-sherman-shadow-rulers-of-the-va>.

³ See, e.g., *The Mar-a-Lago Crowd Documents*, ProPublica, at DS-Moskowitz 1 Att 2-3_Redacted 3, <https://www.propublica.org/datastore/dataset/the-mar-a-lago-crowd-documents>.

that he specifically established for that purpose.⁴ As the *Wall Street Journal* reported on February 8, 2019, Secretary Shulkin informed the Mar-a-Lago Crowd and other VA officials in an email that he had “set up a new email address just for our secure communication on issues in the future.”⁵ On occasions thereafter, the Crowd “communicated with then-VA Secretary Dr. David Shulkin through the use of private email accounts.”⁶

This reporting raises new concerns about what the public record already demonstrated: that the Mar-a-Lago Crowd repeatedly advised VA officials, including Secretary Shulkin, regarding official VA business.⁷ The Mar-a-Lago Crowd discussed and advised VA officials on, among other things, personnel and staffing issues; veteran suicide prevention programming; development of a mobile platform by which veterans could access medical services and records; development of a national medical device registry; the VA’s multi-billion dollar, no-bid contract with the Cerner Corporation to revamp its digital medical records system; and the privatization of certain essential health services currently provided to veterans directly by the VA.⁸ The limited picture into the relationship between Secretary Shulkin and the Crowd that is currently publicly available confirms that Secretary Shulkin communicated primarily, if not exclusively, with the Crowd about VA business, including from a private email address.⁹ Accordingly, communications between Secretary Shulkin and the Crowd not already in the public domain most likely also pertain to work-related matters.

As explained below, because they concern the VA’s affairs, Secretary Shulkin’s communications with the Mar-a-Lago Crowd fall within the ambit of the Federal Records Act. Accordingly, all communications between Secretary Shulkin and the Mar-a-Lago Crowd must be preserved regardless of whether they occurred on governmental or non-governmental email systems.

The VA’s Obligations Under the Federal Records Act

The Federal Records Act (the “FRA”), 44 U.S.C. §§ 3101 *et seq.*, requires executive agencies to make and preserve federal records. Under the Act, “records” that must be preserved

⁴ Kesling, *supra* note 1 (reporting that the Mar-a-Lago Crowd “communicated with then-VA Secretary Dr. David Shulkin through the use of private email accounts, an arrangement set up by Dr. Shulkin”); *see, e.g.*, U.S. Dep’t of Veterans Affairs, FOIA Service, Senior Leadership Emails/Travel, DSTBCSto62218Redacted at 0591, <https://www.oprm.va.gov/docs/foia/DSTBCSto62218Redacted.PDF> (containing partially redacted emails being sent from and received by a David Shulkin aol.com email address).

⁵ Kesling, *supra* note 1.

⁶ *Id.*

⁷ *See* Arnsdorf, *supra* note 2; *see also* First Am. Compl. at 20-36, *Vote Vets Action Fund v. U.S. Dep’t Veterans Affairs*, No. 18-cv-1925 at 20-36 (D.D.C. Dec. 6, 2018), ECF No. 10 (collecting examples of issues on which the Mar-a-Lago Crowd advised VA officials, including Secretary Shulkin). Democracy Forward Foundation represents Vote Vets Action Fund in that action.

⁸ *See* Arnsdorf, *supra* note 2.

⁹ *See* Senior Leadership Emails/Travel, *supra* note 4, DSTBCSto62218Redacted at 0591 (using a private email address to discuss a partnership with Apple for purposes of developing various healthcare information technology applications for the Department).

“include[] all recorded information . . . made or received by a Federal agency . . . 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 United States Government.”¹⁰ Once federal records have been created, the FRA “strictly limits the circumstances under which [they] can be removed from federal custody or destroyed.”¹¹

Applying these principles in the circumstances present here, courts have repeatedly held that “[w]ork-related emails” that have been “created and received . . . on . . . personal email account[s]” by federal employees “constitute federal records, which by law should remain in the custody of the federal government.”¹² Under the FRA, “[w]hen the head of a federal agency ‘knows or has reason to believe’ that [such emails] ‘have been unlawfully removed’ from agency custody”—for example, by being maintained on a personal, non-governmental email system—the agency head “has a duty to ‘initiate action through the Attorney General for the recovery of [the emails].’”¹³ “If the agency head fails to do so ‘within a reasonable period of time,’ the Archivist must do the same.”¹⁴

Secretary Shulkin’s communications with the Mar-a-Lago Crowd are federal records under the FRA. They were “made or received by [the VA] . . . in connection with the transaction of public business and . . . appropriate for preservation by [the VA] . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government.”¹⁵ Specifically, they comprise and document the advice that the Mar-a-Lago Crowd has provided to the VA on topics ranging from the privatization of VA services to agency initiatives to prevent veteran suicide. Yet while some portion of these communications transpired over the VA’s email system, Secretary Shulkin created and used a personal email account for other communications with the Mar-a-Lago Crowd, apparently to shield them from

¹⁰ 44 U.S.C. § 3301(a)(1)(A).

¹¹ *Jud. Watch, Inc. v. Kerry*, 844 F.3d 952, 953 (D.C. Cir. 2016) (citing 44 U.S.C. § 3105(1)); *see* 44 U.S.C. § 3105. Except in certain emergency situations not relevant here, the FRA requires that certain steps be followed before federal records can be lawfully disposed. *See* 44 U.S.C. §§ 3301-3314 (setting forth the steps for lawfully disposing of records in various circumstances). These procedural steps are meant to achieve a methodical and orderly disposition of federal records. *See id.*

¹² *Cause of Action Inst. v. Tillerson*, 285 F. Supp. 3d 201, 203 (D.D.C. 2018) (citing 44 U.S.C. § 3301); *see, e.g., Cause of Action Inst. v. Pompeo*, 319 F. Supp. 3d 230, 232 (D.D.C. 2018) (“Under the Federal Records Act and accompanying regulations, work-related emails that Secretary Powell exchanged on a personal email account constitute federal records.” (citations omitted)). VA guidance states that “[n]on-official, electronic messaging accounts will not be used to conduct official VA business transactions,” but addresses steps VA employees must take when such usage occurs to ensure the records’ preservation. U.S. Dep’t Veterans Affairs, VA Directive 6300: Records and Information Management at 14 (September 21, 2018), https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=8113; *see also* U.S. National Archives and Records Administration, Guidance on Managing Electronic Messages, Bulletin 2015-02 (July 29, 2015), <https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html>.

¹³ *Cause of Action Inst. v. Pompeo*, 319 F. Supp. 3d at 232 (citing 44 U.S.C. § 3106(a)).

¹⁴ *Id.* (citing 44 U.S.C. § 3106(b)).

¹⁵ 44 U.S.C. § 3301(a)(1)(A).

view.¹⁶ Those communications may have been made entirely outside the VA's email system and therefore may have been unlawfully removed from governmental custody.

Accordingly, in order to fulfill its obligations under the FRA, the VA must:

- (i) notify the Archivist of the United States of any and all instances where federal records created or received by Secretary Shulkin were removed from governmental custody, *see* 44 U.S.C. § 3106(a);
- (ii) retrieve from Secretary Shulkin's custody any and all federal records stored on private accounts and ensure their proper preservation under the FRA, including, as necessary, by referring the potential unlawful alienation of federal records by Secretary Shulkin to the Attorney General for the purpose of initiating an enforcement action, *see id.*; and
- (iii) review the VA's records management policy, identify any shortcomings, and make any necessary revisions, *see id.* §§ 3101, 3102(1).

We respectfully request that the VA respond to this letter in writing by June 24, 2019, to confirm that it has undertaken these steps. To the extent the VA fails to take these steps, we respectfully request that the Archivist fulfill his statutory obligation to request that the Attorney General initiate an enforcement action to recover the records and seek other appropriate redress. *See id.* § 3106(b).

Sincerely,

/s/ Anne Harkavy

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¹⁶ *See supra* notes 3, 5. As with emails between Secretary Shulkin and the Mar-a-Lago Crowd, the Department's obligations under the FRA apply with equal force to communications made by alternative methods, such as SMS text applications, Blackberry Messenger, What's App, iMessage, and social media direct messaging.