

October 28, 2020

Jared Kushner  
Senior Advisor to the President  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

Re: Records Preservation Notice

Dear Mr. Kushner:

Citizens for Responsibility and Ethics in Washington (“CREW”) writes to ensure that you are on notice of your obligation to maintain and preserve records in accordance with the Presidential Records Act (“PRA”), and to remind you that the willful destruction or concealment of such records is a federal crime punishable by fines and imprisonment. As the White House prepares for a transition, regardless of the outcome of the upcoming election, it is critical that you adhere closely to these records-preservation requirements.

It is widely reported that you have routinely used non-official messaging applications, including WhatsApp and Signal, to communicate about official White House business. Your own attorney, Abbe Lowell, has confirmed as much to members of Congress, and, alarmingly, was unable to say whether you have discussed classified information using such non-official, unsecured messaging systems.<sup>1</sup> Press reports have likewise recounted your ongoing use of “WhatsApp to communicate with foreign leaders and conduct government business,” which has drawn concern from cybersecurity experts.<sup>2</sup> More recently, you reportedly used WhatsApp to communicate with your shadow coronavirus task force, a group of mostly “untested volunteers drawn from consulting firms and investment banks like McKinsey and Goldman Sachs” that operates outside of federal transparency laws.<sup>3</sup> And just this month, reports emerged that you maintain an “open line” of communication with Facebook CEO Mark Zuckerberg to discuss policy matters—again, through WhatsApp.<sup>4</sup>

Presidential records stored in your WhatsApp and other non-official accounts are not yours; they belong to the public. Indeed, the PRA “establish[es] the public ownership of records created by . . . presidents and their staffs in the course of discharging their official duties.”<sup>5</sup> The statute broadly defines “Presidential records” to include “documentary materials, or any reasonably

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<sup>1</sup> See Letter from Rep. Elijah E. Cummings to Pat A. Cipollone, at 6, Mar. 21, 2019,

<https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-03-21.EEC%20to%20Cipollone-WH.pdf>.

<sup>2</sup> See, e.g., Kevin Collier, Jared Kushner’s use of WhatsApp raises concerns among cybersecurity experts, *CNN*, Mar. 23, 2019, <https://www.cnn.com/2019/03/23/politics/kushner-whatsapp-concerns/index.html>.

<sup>3</sup> Katherine Eban, “That’s Their Problem”: How Jared Kushner Let the Markets Decide America’s COVID-19 Fate, *Vanity Fair*, Sept. 17, 2020, <https://www.vanityfair.com/news/2020/09/jared-kushner-let-the-markets-decide-covid-19-fate>.

<sup>4</sup> Deepa Seetharaman and Emily Glazer, How Mark Zuckerberg Learned Politics, *Wall Street Journal*, Oct. 16, 2020, <https://www.wsj.com/articles/how-mark-zuckerberg-learned-politics-11602853200>.

<sup>5</sup> *CREW v. Trump*, 924 F.3d 602, 603 (D.C. Cir. 2019) (quoting H.R. Rep. No. 95-1487, 95th Cong. at 2 (1978)).

segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."<sup>6</sup> Such records "can be in any media, including textual, audiovisual, and electronic."<sup>7</sup>

The PRA explicitly restricts White House employees' use of "non-official electronic message account[s]," such as WhatsApp, to create or send Presidential records.<sup>8</sup> Specifically, the statute prohibits covered White House employees from "creat[ing] or send[ing] a Presidential . . . record . . . using a non-official electronic message account unless" the employee either "copies an official electronic messaging account . . . in the original creation or transmission of the Presidential record," or "forwards a complete copy of the Presidential . . . record to an official electronic messaging account . . . not later than 20 days after the original creation or transmission of the Presidential . . . record."<sup>9</sup> The statute broadly defines "electronic messaging account" to mean "any account that sends electronic messages."<sup>10</sup>

Since joining the White House, you have received extensive guidance on your records-preservation obligations. In February 2017, the White House Counsel issued a memorandum to "remind all [White House] personnel of their obligation to preserve and maintain [P]residential records, as required by the Presidential Records Act."<sup>11</sup> The memo confirms that Presidential records include "electronic communications that are created or received in the course of conducting activities related to the performance of the President's duties," even when "sent from or received on non-official accounts."<sup>12</sup> It adds that "[P]residential records are the property of the United States. You may not dispose of [P]residential records. . . . The willful destruction or concealment of federal records is a federal crime punishable by fines and imprisonment."<sup>13</sup> Similarly, the memo makes clear that "[a]ny employee who intentionally fails to" ensure preservation of Presidential records from non-official accounts in accordance with the PRA "may be subject to administrative or even criminal penalties."<sup>14</sup>

The White House Counsel's memo flatly forbids the use of non-official messaging accounts for official business without prior authorization, stating as follows:

***You should not use instant messaging systems, social networks, or other internet-based means of electronic communication to conduct official business without the approval of the Office of the White House Counsel. If you ever generate or receive***

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<sup>6</sup> 44 U.S.C. § 2201(2).

<sup>7</sup> NARA, Guidance on Presidential Records, <https://www.archives.gov/files/presidential-records-guidance.pdf>.

<sup>8</sup> 44 U.S.C. § 2209.

<sup>9</sup> *Id.* § 2209(a).

<sup>10</sup> *Id.* § 2209(c)(3).

<sup>11</sup> White House Memorandum, Presidential Records Act Obligations, Feb. 22, 2017, [https://www.archives.gov/files/foia/Memo%20to%20WH%20Staff%20Re%20Presidential%20Records%20Act%20\(Trump,%202002-22-17\)\\_redacted%20\(1\).pdf](https://www.archives.gov/files/foia/Memo%20to%20WH%20Staff%20Re%20Presidential%20Records%20Act%20(Trump,%202002-22-17)_redacted%20(1).pdf).

<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.*

presidential records on such platforms, you must preserve them by sending them to your [Executive Office of the President (“EOP”)] email account via a screenshot or other means. After preserving the communications, you must delete them from the non-EOP platform.<sup>15</sup>

In September 2017, the White House Counsel reportedly sent another memo “sternly remind[ing]” White House staff “about proper use of communications and record-keeping responsibilities under the law,” stating that the “[u]se of personal email, text messages, instant messages, social networks, messaging apps (such as Snapchat, Confide, Slack or others) or other internet-based means of communication to conduct official business is not permitted.”<sup>16</sup> The memo added that “‘all work-related communications’ must be done on official government email accounts—and any official communications received on a private email account must be forwarded to the work account.”<sup>17</sup> “The willful destruction or concealment of federal records is a federal crime,” the memo reiterated.<sup>18</sup>

The criminal statute referenced in the White House Counsel’s February and September 2017 memoranda is 18 U.S.C. § 2071. It provides that “[w]hoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited . . . in any public office . . . shall be fined under this title or imprisoned not more than three years, or both.”<sup>19</sup> The “essential element of the offense is the specific intent to destroy [government records] as records of a public office; or, in other words, to obliterate or conceal them as evidence of that which constitutes their value as public records, or to destroy or impair their legal effect or usefulness as a record of our governmental affairs.”<sup>20</sup> The “statutory requirement of willfulness is satisfied if the accused acted intentionally, with knowledge that he was breaching the statute.”<sup>21</sup> White House officials have been prosecuted under Section 2071.<sup>22</sup>

Despite the White House’s apparent prohibition on the use of non-official messaging accounts to conduct official business, your counsel informed members of Congress in December 2018 that you “continue[] to use . . . WhatsApp to communicate as part of [your] official duties in the White House.”<sup>23</sup> He explained that you purportedly preserve Presidential records from your

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<sup>15</sup> *Id.* at 3 (emphasis in original).

<sup>16</sup> Josh Dawsey and Bryan Bender, National Archives warned Trump White House to preserve documents, *Politico*, Oct. 17, 2017, <https://www.politico.com/story/2017/10/17/national-archives-trump-documents-preserve-243888>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 18 U.S.C. § 2071(a).

<sup>20</sup> *United States v. Hinselberger*, 991 F. Supp. 2d 108, 124 (D.D.C. 2014) (quoting *United States v. Rosner*, 352 F. Supp. 915, 919 (S.D.N.Y. 1972)).

<sup>21</sup> *United States v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972); accord *United States v. North*, 920 F.2d 940, 949-50 (D.C. Cir. 1990).

<sup>22</sup> See, e.g., *United States v. North*, 708 F. Supp. 364, 368-69 & n.3 (D.D.C. 1988); *United States v. Poindexter*, 725 F. Supp. 13, 19-20 & n.7 (D.D.C. 1989).

<sup>23</sup> Letter from Rep. Elijah E. Cummings to Pat A. Cipollone, at 6, Mar. 21, 2019.

WhatsApp account by taking “screenshots of these communications and forward[ing] them to [your] official White House email account or to the National Security Council.”<sup>24</sup>

We have little confidence that your “screenshot” approach to records preservation complies with the law. A screenshot would not necessarily capture all aspects of a Presidential record stored in a WhatsApp message, such as underlying metadata. We also question whether you could have systematically screenshotted each and every Presidential record from your WhatsApp account since your counsel spoke to members of Congress in December 2018 (or even before that time). In fact, it may not even be possible to do so since WhatsApp has implemented security updates that appear to “stop people [from] screenshooting their private conversations.”<sup>25</sup>

Given the ample guidance you have received regarding your obligation to properly preserve Presidential records stored in non-official accounts (including your WhatsApp account) and the consequences of failing to do so,<sup>26</sup> any destruction or concealment of those records carries a serious risk of criminal penalties. This letter serves as yet another reminder of your statutory obligations, lest there be any doubt about your knowledge of what the law requires and prohibits.

Sincerely,



Noah Bookbinder  
Executive Director



Nikhel Sus  
Senior Counsel

cc: Pat Cipollone  
White House Counsel

David Ferriero  
Archivist of the United States

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<sup>24</sup> *Id.*

<sup>25</sup> Andrew Griffin, [WhatsApp Update to Stop Users Taking Screenshots of Private Chats](https://www.independent.co.uk/life-style/gadgets-and-tech/news/whatsapp-screenshot-chat-private-update-ios-android-feature-a8882116.html), *The Independent*, Apr. 23, 2019, <https://www.independent.co.uk/life-style/gadgets-and-tech/news/whatsapp-screenshot-chat-private-update-ios-android-feature-a8882116.html>.

<sup>26</sup> See, e.g., White House Memorandum, Presidential Records Act Obligations, Feb. 22, 2017; Senate Homeland Security and Governmental Affairs Committee Memorandum, Briefing from White House Counsel on Private Email Use, Oct. 27, 2017, <https://www.hsgac.senate.gov/imo/media/doc/Staff%20Memo%20on%20White%20House%20Counsel%20Briefing%20on%20PRA.pdf>; Letter from Rep. Elijah E. Cummings to Pat A. Cipollone, Mar. 21, 2019.