



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

July 18, 2022

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

The Honorable Christopher Wray
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Re: Request for Investigation of the Secret Service for Violating Federal Law by Destroying Records

Dear Attorney General Garland and Director Wray:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Department of Justice (“DOJ” or the “Department”) investigate whether individuals at the United States Secret Service violated federal criminal law by willfully destroying text messages from January 5 and 6, 2021 after receiving a request for the records from the Department of Homeland Security’s (“DHS”) Office of Inspector General.

As recently reported, on July 13, 2022 Inspector General Joseph V. Cuffari sent a letter to the leaders of the House and Senate Homeland Security committees advising that “many U.S. Secret Service (USSS) text messages, from January 5 and 6, 2021 were erased,” which the Secret Service claimed was “part of a device-replacement program.”¹ Those erasures, however, occurred *after* OIG requested copies of the texts,² and had requested that the Secret Service preserve its data.³ The Inspector General further stated that efforts by his office to investigate the January 6 attack on the Capitol were being hindered by the Secret

¹ Letter from Inspector General Joseph V. Cuffari to Sens. Gary C. Peters and Rob Portman and Reps. Bennie g. Thompson and John Katko, July 13, 2022 (“Cuffari Letter”), <https://twitter.com/NicoleSganga/status/1547699110915895299/photo/1>; Maria Sacchetti and Carol D. Leonnig, Secret Service erased texts from Jan. 5 and 6, 2021, official says, *Washington Post*, July 14, 2022, <https://www.washingtonpost.com/national-security/2022/07/14/secret-service-texts-erased/>. See also Ken Klippenstein, Secret Service Deleted Jan. 6 Text Messages After Oversight Officials Requested Them, *The Intercept*, July 14, 2022, <https://theintercept.com/2022/07/14/jan-6-texts-deleted-secret-service/>; Luke Broadwater, Secret Service Text Messages Around Jan. 6 Were Erased, Inspector General Says, *New York Times*, July 14, 2022, <https://www.nytimes.com/2022/07/14/us/politics/secret-service-text-messages-jan-6.html>.

² Cuffari Letter.

³ Broadwater, *New York Times*, July 14, 2022.

Service.⁴ According to the letter, this is part of a larger pattern by DHS to resist inquiries from his office, that includes repeated refusals to provide documents until review by an attorney.⁵

After news reports emerged about the letter, the Secret Service released a statement claiming “the insinuation that the Secret Service maliciously deleted text messages following a request is false.”⁶ The statement further maintained that the Secret Service has been “fully cooperating” with the DHS OIG “in every respect – whether it be interviews, documents, emails, or texts.”⁷ Inspector General Cuffari’s letter calls those claims into question. According to public reports, in a briefing on Friday, the Inspector General informed members of the Select Committee to Investigate the January 6th Attack on the United States Capitol (“Select Committee”) that the Secret Service’s account about how employees’ text messages from the day before and the day of the Capitol attack were erased has shifted several times.⁸ The Inspector General reportedly told the Select Committee that at one point, the explanation from the Secret Service for the lost text messages was because of software upgrades but that at another point, the explanation was due to device replacements.⁹

Testimony provided to the Select Committee has revealed that members of the Secret Service may have critical evidence relevant to the Committee’s investigation of the January 6th insurrection. Former White House aide Cassidy Hutchinson testified she was told that President Trump “lunged’ at his lead Secret Service agent” after being told “it was too dangerous for him to go” to the Capitol where he had directed the assembled and armed mob to go after his speech on the ellipse.¹⁰ The Committee also has received evidence that then-Vice President Mike Pence refused to get in a car with the Secret Service after rioters entered the Capitol, reportedly fearing they would take him “to a secure location where he would have been unable to certify the presidential election results[.]”¹¹ Despite the importance of Secret Service records and testimony in the Committee’s investigation, the Inspector General’s letter to Congress suggests that “key evidence in the form of the Secret Service’s electronic communications may never see the light of day.”¹²

The Federal Records Act

The FRA, 44 U.S.C. § 2101, *et seq.*; § 3010, *et seq.*; and § 3301, *et seq.*, imposes on agency heads the obligations to both “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential

⁴ Cuffari Letter; Sacchetti & Leonnig, *Washington Post*, July 14, 2022.

⁵ Cuffari Letter;; Sacchetti & Leonnig, *Washington Post*, July 14, 2022.

⁶ Statement of Anthony Guglielmi, Chief of Communications for the United States Secret Service on Accusations of Deleted Text Messages From DHS Inspector General, July 14, 2022, <https://www.secretservice.gov/newsroom/releases/2022/07/statement-anthony-guglielmi-chief-communications-united-states-secret>.

⁷ *Id.*

⁸ Hugo Lowell, Secret Service’s January 6 text messages story has shifted several times, panel is told, *The Guardian*, July 15, 2022, <https://www.theguardian.com/us-news/2022/jul/16/secret-service-deleted-text-messages-january-6>.

⁹ *Id.*

¹⁰ Broadwater, *New York Times*, July 14, 2022.

¹¹ Klippenstein, *The Intercept*, July 14, 2022.

¹² *Id.*

transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101. Further, under the FRA each agency head must maintain an active records management program that provides for effective controls over the creation and use of federal records. 44 U.S.C. § 3102. These requirements help to fulfill one of the key congressional goals of the FRA: ensuring "[a]ccurate and complete documentation of the policies and transactions of the Federal Government[.]" 44 U.S.C. § 2902(1).

In 2014 Congress amended the FRA to add a new definition for electronic messages. Under that definition "[t]he term 'electronic messages' means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals." 44 U.S.C. § 2911. Applying this definition there can be no question that the Secret Service was required to preserve text messages from January 5 and 6, 2021 as federal records.

Potential Criminal Law Violations

At least two provisions of the Criminal Code could bear on the Secret Service employees' reported destruction of federal records.

18 U.S.C. § 2071

First, a provision of the Criminal Code, 18 U.S.C. § 2071(a), makes it unlawful to intentionally "conceal[], remove[], mutilate[], obliterate[], or destroy[], or attempt[] to do so . . . any record, proceeding, map, book, paper, document, or other thing, filed or deposited . . . in any public office[.]" Section 2071(b) further prohibits the custodian of any record from concealing, removing, mutilating, obliterating, falsifying, or destroying it. A violation of either provision is punishable by a fine or imprisonment of not more than three years, or both.

As explained in the Department's Criminal Resources Manual, "[t]he acts proscribed by this section are defined broadly."¹³ Section 2071(a) prohibits "three types of conduct" involving public records, including "concealment, removal, mutilation, obliteration or destruction of records[.]"¹⁴ The offense is "a specific intent crime," which "means that the defendant must act intentionally with knowledge that he is violating the law and, according to at least one case, must "know that the documents involved are public records."¹⁵ The "statutory requirement of willfulness is satisfied if the accused acted intentionally, with knowledge that he was breaching the statute."¹⁶ The "essential element" of a section 2071 offense is "the specific intent to destroy them [papers or documents] as records of a public office; or, in other words, to obliterate or conceal them as the evidence of that which

¹³ U.S. Dep't of Justice, Criminal Resources Manual, CRM 1663. Protection of Government Property—Protection of Public Records And Documents, <https://www.justice.gov/archives/jm/criminal-resource-manual-1663-protection-government-property-protect-on-public-records-and>.

¹⁴ *Id.*

¹⁵ *Id.*, citing *United States v. De Groat*, 30 F. 764, 765 (E.D. Mich. 1887).

¹⁶ *United States v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972) (citation and quotation omitted); accord *United States v. North*, 708 F. Supp. 364, 368-69 & n.3 (D.D.C. 1988).

constitutes their value as public records, or to destroy or impair their legal effect or usefulness as a record of our governmental affairs.”¹⁷

There is sparse legislative history to this and its predecessor statute. Courts applying this statute have described its purpose variously as “prevent[ing] any conduct which deprives the Government of the use of its documents, be it by concealment, destruction, or removal,”¹⁸ and “to preserve the public records and papers intact from all kinds of spoliation, mutilation, or destruction.”¹⁹ Section 2071 has been “customarily employed where Government records have been mutilated or destroyed,” and in such cases the “essence of the offense charged” was “the rendering of information unavailable to the Government.”²⁰ Given this broad construction and the statute’s underlying purpose, courts applying section 2071(a) have not attributed any special meaning to the statute’s “filed or deposited” requirement, finding it met where the documents in question were part of the “records of a public office.”²¹

Relying on the statute’s “obvious purpose” of prohibiting “the impairment of sensitive government documents by those officials who have access to and control over them,” at least one court has construed section 2071(b) as applying not only to “custodians of records in the technical sense” but also those “officials who have access to and control over” the records.²²

Based on the currently known facts it appears that employees within the Secret Service may have violated 18 U.S.C. § 2071 by destroying text messages from January 5 and 6, 2021, after they were requested by DHS’ Inspector General. The records unquestionably were “records of a public office,” and their destruction deprived the government of crucial evidence in an investigation into one of the most significant events in our history: an attack on the U.S. Capitol in an unlawful attempt by President Trump to overturn the results of an election. The critical role these documents play warrants a thorough investigation to ascertain whether their destruction was willful and in violation of 18 U.S.C. § 2071.

18 U.S.C. § 1361

Second, 18 U.S.C. § 1361 provides that anyone who “willfully injures or commits any depredation against any property of the United States” whose value exceeds \$1,000 shall be punished by a fine and/or imprisonment for not more than 10 years and for property that does not exceed \$1,000 a fine and/or imprisonment for not more than one year. Department guidance clarifies that this statute reaches the destruction of a public record or document.²³

If, as the currently known facts suggest, employees within the Secret Service willfully destroyed text messages from a critical period on January 5 and 6 after receiving a request

¹⁷ *United States v. De Groat*, 30 F. at 765.

¹⁸ *United States v. Rosner*, 352 F. Supp. 915, 919 (S.D.N.Y. 1972).

¹⁹ *McInerney v. United States*, 143 F. 729, 730 (1st Cir. 1906) (describing the purpose in part as “to make it an offense to steal or destroy . . . any paper, document, or record filed or deposited in any of the public offices of the federal government; the purpose being to preserve them as evidence relating to things which concern the public and the government”).

²⁰ *United States v. Rosner*, 352 F. Supp. at 920-21.

²¹ *United States v. De Groat*, 30 F. at 765.

²² *United States v. Poindexter*, 725 F. Supp. 13, 20 (D.D.C. 1989).

²³ U.S. Dep’t of Justice, Criminal Resources Manual, CRM 1663.

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for those records from the DHS Inspector General, that destruction would violate 18 U.S.C. § 1361.

DOJ guidance notes the need to prove a loss of at least \$100 to establish a felony conviction,²⁴ and the statute provides that damage exceeding \$1,000 is punishable by a fine and imprisonment for not more than 10 years. Those prerequisites may be met here given the value of records pertaining to the January 6 insurrection and the likelihood that the missing text messages would supply critical and still unknown information about the Secret Service's role in that event.

Conclusion

Our nation is at a crossroad as we struggle to comprehend the violent insurrection that occurred on January 6, 2021, and its meaning for our continued democracy. A full and public airing of the facts is critical to hold those responsible accountable. Full accountability may not be possible, however, when critical evidence is destroyed. Accordingly, we request that you launch an immediate and full investigation into whether Secret Service employees willfully destroyed federal records in violation of federal criminal laws.

Sincerely,



Donald K. Sherman
Senior Vice President and Chief Counsel
Citizens for Responsibility and Ethics in
Washington

²⁴ U.S. Dep't of Justice, Criminal Resources Manual, CRM 1663.