

April 25, 2019

By Facsimile: 202-219-3856

Mary L. Kendall
Deputy Inspector General
U.S. Department of the Interior
Office of Inspector General
1849 C Street, N.W.
Washington, DC 20240

Re: Request for Investigation of Recordkeeping Practices of Secretary David Bernhardt

Dear Ms. Kendall:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Office of Inspector General open an investigation into the recordkeeping practices of Department of the Interior Secretary David Bernhardt and his staff. As reported in multiple press accounts over the past several months and confirmed in the recent congressional testimony of Interior Deputy Chief FOIA Officer Rachel Spector, Secretary Bernhardt and his staff have taken affirmative steps to prevent the preservation of information regarding his daily schedule and appointments in contravention of the Federal Records Act (“FRA”).

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 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 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).

The reported actions of Secretary Bernhardt and his staff appear to conflict directly with their obligations under the FRA. First, Secretary Bernhardt has admitted that “he had ‘not personally maintained a calendar for years’ and had ‘no intention of suddenly doing so now.’”¹ Stated differently, Secretary Bernhardt has affirmatively refused to create and maintain accurate and complete calendars – records that would document his actions and therefore fall within the scope of the FRA’s record creation requirements – and instead has insisted on following the no-records approach he had while in the private sector. His refusal to create records fully

¹ Jacob Holzman, [Bernhardt’s office acknowledges meetings left off schedule](http://www.rollcall.com/news/bernhardts-office-acknowledges-meetings-left-off-schedule), *Roll Call*, Apr. 16, 2019, available at www.rollcall.com/news/bernhardts-office-acknowledges-meetings-left-off-schedule.

documenting his meetings and daily schedules conflicts directly with his duty under the FRA to “make and preserve records” documenting his actions as Secretary of the Interior.

This failure is all the more significant given that the undocumented information includes meetings Secretary Bernhardt, a former oil and gas lobbyist, had with industry lobbyists.² According to the chair of the House Natural Resources Committee, “more than 100 hours of official government time on Bernhardt’s schedule did not include descriptions of his meetings or list the non-Interior attendees.”³ One review of agency visitor logs revealed that the likely attendees at a “Meeting to Discuss Energy Issues” included the then-CEO of the American Petroleum Institute, an entity that includes some of Secretary Bernhardt’s former clients.⁴

Even more troubling, the exclusion of Secretary Bernhardt’s controversial meetings with industry representatives reportedly is intentional.⁵ Rather than spell out the details of Secretary Bernhardt’s schedule, his staff “intentionally left controversial meetings with representatives of fossil fuel, timber and water interests off his public calendar, citing ‘internal protocol’ governing his schedules.”⁶

Finally, while Secretary Bernhardt maintained a “personal itinerary,” it was done using a Google document that was “regularly overwritten” as his staff updated his schedule.⁷ This process resulted in the destruction of agency records without authorization from the National Archives and Records Administration (“NARA”) that the FRA requires. *See* 44 U.S.C. §§ 3301-3314. And if this repeated document destruction occurred while Freedom of Information Act requests for the Secretary’s calendars were pending before the agency, the harm to the public would be further magnified.

Secretary Bernhardt’s apparently unlawful recordkeeping practices date back to his tenure as Deputy Secretary when details of his meetings for 133 work days were discovered to be missing.⁸ An analysis of the missing days revealed that for 15 days, then-Deputy Secretary Bernhardt “was working on a controversial plan for maximizing water deliveries from the ecologically sensitive Bay-Delta water hub to California farmers[.]”⁹ The plan implicated an agriculture group for which Bernhardt had lobbied for five years.¹⁰

² *See, e.g.*, Curt Devine and Drew Griffin, [Congress wants to see acting Interior secretary’s calendar – he says he doesn’t keep one](https://www.cnn.com/2019/03/08/politics/david-bernhardt-calendar-democrats/index.html), *CNN*, Mar. 8, 2019, available at <https://www.cnn.com/2019/03/08/politics/david-bernhardt-calendar-democrats/index.html>.

³ *Id.*

⁴ *Id.*

⁵ Holzman, *Roll Call*, Apr. 16, 2019.

⁶ *Id.*

⁷ *Id.*

⁸ Ben LeFebvre and Annie Snider, [National Archives joins investigation into Interior chief’s missing calendars](https://www.politico.com/story/2019/04/13/interior-bernhardt-national-archives-1273472), *Politico*, Apr. 13, 2019, available at <https://www.politico.com/story/2019/04/13/interior-bernhardt-national-archives-1273472>.

⁹ *Id.*

¹⁰ *Id.*

In response to a letter from House Oversight Chair Elijah E. Cummings, NARA has initiated an inquiry of Secretary Bernhardt's unauthorized disposition of his calendar records.¹¹ Further, a records management inspection of the Interior Department that NARA completed in January 2017 identified "records management implementation challenges across the Department" and "identified corrective actions to address these challenges."¹²

While these are laudable steps that should address the mechanics of Secretary Bernhardt's recordkeeping failures, they do not address the underlying issue of whether the Secretary purposely evaded the statutory requirements of the FRA – an action that would warrant steps beyond simply requiring Secretary Bernhardt and his staff to maintain more complete calendars going forward. Your office already has confirmed publicly it is investigating allegations of ethics violations Secretary Bernhardt purportedly committed.¹³ Given the possible links between those ethics violations and Secretary Bernhardt's recordkeeping violations, which appear designed in part to shield from public view and congressional scrutiny his contacts with industry lobbyists, we respectfully ask that you include in that pending investigation a review of Secretary Bernhardt's actions with respect to his calendars and daily schedules and the extent to which they depart from the requirements of the FRA.

Adequate documentation, particularly by top agency officials, is one of the two main pillars of the FRA. Secretary Bernhardt's failure to create and maintain full documentation of his meetings and actions undermines the goals of the FRA and deprives the public of access to the most basic record of the agency. Public confidence in the Interior Department and Secretary Bernhardt can be restored only with a full and impartial investigation by your office.

Sincerely,



Noah Bookbinder
Executive Director

cc: Archivist of the United States David S. Ferriero

¹¹ The April 1, 2019 letter from Laurence Brewer, NARA's Chief Records Officer, to Chairman Cummings confirming the inquiry is available at <https://www.politico.com/f/?id=0000016a-13d7-da8e-adfa-3bd757bd0001>.

¹² *Id.*

¹³ See, e.g., Ben LeFebvre, [Interior's watchdog opens investigations into Bernhardt](https://www.politico.com/story/2019/04/15/interior-secretary-bernhardt-investigation-1357527), *Politico*, Apr. 15, 2019, available at <https://www.politico.com/story/2019/04/15/interior-secretary-bernhardt-investigation-1357527>.