

ONE HUNDRED SIXTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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March 7, 2019

The Honorable Ajit V. Pai
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Pai:

Pursuant to Rules X and XI of the U.S. House of Representatives, we write to request information about the Federal Communications Commission's (FCC) policies with respect to the retention and disposition of electronic communications, including email, text messages, chat and instant messages, and social media messages. Specifically, we have a number of questions as to whether the FCC is in compliance with the Federal Records Act (FRA), regulations, and guidance, including the Office of Management and Budget (OMB)/National Archives and Records Administration (NARA) 2012 Directive.

Transparency, openness, and honesty are all bedrock principles of a functioning government responsive to its people. These principles are also at the heart of several major federal laws, including the Freedom of Information Act (FOIA), the Administrative Procedures Act, and FRA, among others. The Committee seeks to ensure the agencies under its jurisdiction uphold these principles. Since NARA has yet to approve the FCC's approach to records management, we are concerned that the FCC may not be managing its electronic records in accordance with federal law and guidance, potentially thwarting the public from an understanding of the FCC's decision-making process and how it conducts its business.

FRA governs the recorded information created or received by agencies in the course of their official business. Under FRA, a record is information, regardless of form or characteristics, "made or received by a Federal agency under Federal law or in connection with the transaction of public business," including those stored in digital or electronic form.¹ One stated goal of FRA is to ensure an "accurate and complete documentation of the policies and transactions of the

¹ 44 U.S.C. § 3301.

Federal Government.”² Accordingly, it requires the “head” of each Federal agency to make and preserve records containing “adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency.”³

Congress and the Executive Branch have in recent years updated laws and policies to reflect the fact that in the 21st century, federal agencies conduct their business almost exclusively using electronic communications and systems. In August 2012, OMB and NARA jointly issued a “digital government” Directive, which ordered federal agencies to manage all of their email records in an electronic format by December 31, 2016.⁴ The Directive defined electronic management as maintaining emails in an accessible electronic format and ensuring that e-mails remain discoverable, retrievable, and useable.⁵ The Directive also required agencies to manage all of their permanent records in an electronic format easily transferable to NARA by December 31, 2019.⁶

In 2014, Congress amended FRA to also address federal agencies’ use of electronic communications and systems, including concerns that agencies may not be adequately preserving their electronic records. The legislation amended FRA’s definition of “record” to explicitly include “information created, manipulated, communicated, or stored in digital or electronic form.”⁷ It also required NARA to promulgate rules requiring the transfer of agency records to the Archives “in digital or electronic form to the greatest extent possible,”⁸ and it prohibited agency employees from creating or sending records using non-official electronic messaging accounts.⁹

NARA proposed an automated system, called Capstone, to assist agencies in meeting the requirements of FRA and the OMB/NARA Directive.”¹⁰ According to NARA, Capstone

² 44 U.S.C. § 2902(1).

³ 44 U.S.C. § 3101

⁴ Executive Office of the President, Office of Management and Budget and National Archives and Records Administration, *Managing Government Records Directive*, M-12-18 (Aug. 24, 2012) (OMB/NARA Directive).

⁵ *Id.*

⁶ *Id.*

⁷ The Presidential and Federal Records Act Amendments of 2014, § 5, 128 Stat. 2003, 2009 (2014) (codified at 44 U.S.C. § 3301).

⁸ *Id.* at § 9 (codified at 44 U.S.C. § 2904).

⁹ *Id.* at § 10 (codified at 44 U.S.C. § 2911). This provision defines an “electronic message” as “...electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.” If messages are created or sent on private accounts, they must be forwarded to official accounts within 20 days.

¹⁰ National Archives and Records Administration, *Guidance on a New Approach to Managing Email Records*, Bulletin 2013-02 (Aug. 29, 2013) (Capstone Guidance). *See also*

simplifies the records management process, optimizes access to records responsive to FOIA requests, and reduces the risk of unauthorized destruction of email records.¹¹

More than five years after NARA announced the creation of Capstone, most executive and independent agencies have had their applications approved or have otherwise demonstrated to NARA how they are in compliance with the OMB/NARA Directive. The FCC has not. Though the FCC apparently planned to implement Capstone, we understand that its application to NARA was withdrawn in June 2017, shortly after you were appointed Chairman.¹² More recently the FCC submitted a new application, but outstanding issues continue to prevent its approval.

The American public should have confidence that the FCC is properly capturing and archiving its own communications. Accordingly, please answer the following:

1. What is the status of the FCC's application to NARA to maintain electronic records using Capstone? Why was the application withdrawn in June of 2017? What were the differences between the original application filed in December 2016 and the current application? To your understanding, what issue or issues are preventing the FCC's application from being approved?
2. Provide a timeline of events regarding the FCC's application to NARA to implement the Capstone approach, beginning with the FCC's initial application in December 2016 to present, including the submission of the initial application, the withdrawal or withdrawal(s) of application(s) and the subsequent submission of a new application(s). Include the dates corresponding with all interactions between the FCC and NARA regarding the applications and all FCC internal meetings, conversations, guidance, and legal interpretations discussing the FCC's Capstone application. Provide all documents related to the events described in the timeline.
3. Provide all communications between the FCC and NARA regarding the FCC's application to implement Capstone.

National Archives and Records Administration, *Criteria for Managing Email Records in Compliance with the Managing Government Records Directive (M-12-18)*, Memorandum (Apr. 6, 2016), www.archives.gov/files/records-mgmt/email-management/2016-email-mgmt-success-criteria.pdf. Though Capstone is not mandatory, agencies must be approved by NARA to use the Capstone approach for their email record management. If agencies choose not to use Capstone, they must still demonstrate to NARA compliance with Federal records laws and guidance. 44 U.S.C. § 2904(c)(7).

¹¹ Capstone Guidance.

¹² Federal Communications Commission, FCC Directive, Electronic Mail Records Retention, FCC INST 1115.1 (Jan. 2017).

4. Provide all communications relating to the FCC's implementation of Capstone between and or among the Office of General Counsel, the Office of the Chairman, and the Office of the Managing Director, from January 2017 to the present.
5. Provide all documents containing legal analysis by staff in the Office of the General Counsel regarding the implementation of Capstone. Provide all documents containing legal analysis by staff in the Office of the General Counsel regarding compliance with the record retention, access, archiving, and disclosure provisions of FRA, the OMB Directive, NARA's 2015 guidance on electronic messages, and FOIA.
6. Is the FCC currently in compliance with FRA, the OMB Directive, NARA's 2015 guidance on electronic messages, and FOIA? Describe all steps taken by the FCC to comply with FRA, the OMB Directive, NARA's 2015 guidance on electronic messages, and FOIA. Provide a copy of the agency's policies with respect to managing these communications and describe in detail how the agency has captured and stored all electronic communications, including email, text messages, chat and instant messages, and social media messages that discuss agency business—whether made or received on agency-owned or personal accounts and devices.¹³
7. With respect to the electronic communications described in Inquiry 6, are such communications in an easily searchable format for purposes of responding to (1) FOIA requests, (2) Congressional requests, and (3) litigation demands? Has the FCC searched all electronic communications retained pursuant to FRA in response to FOIA requests made between January 2017 and the date of this letter? If not, why not? Have any of these records been responsive to FOIA requests received by the FCC since January 2017, and if so, have the records been provided to the requestor? If not, why not?
8. Has the FCC assessed the resources that will be required to implement the Capstone approach? Please provide all written analysis and all budget requests the agency has made to Congress reflecting the need for additional resources for this effort.
9. If there are any outstanding requests from NARA to the FCC for an amended application or additional information to supplement the FCC's Capstone application, what is the timeline for the FCC's response to such request(s)?

In responding to this and all requests from the Committee, do not limit your search to document and communications maintained in the accounts and files of individual FCC personnel. Your search should include all documents and communications maintained or stored

¹³ See NARA, Guidance on Managing Electronic Messages, Bulletin 2015-02 (July 29, 2015).

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anywhere in the FCC's information systems. As part of your response please include a description of the method and process you followed to conduct the search, including the terms, date ranges, and other parameters you used to collect responsive information and a list of all the FCC information systems you searched.

In addition to FCC information systems, your search should include any other information systems of applications that may contain information related to this request, including personal phone records, non-government e-mail accounts, SMS-based text messages, direct communications sent or received through social media applications, or other electronic communications services. As part of your response, please provide a list of the FCC personnel whose non-FCC accounts were searched.

Please provide a written response to these questions by April 4, 2019. Thank you for your attention to this important matter. If you have any questions, please contact Gerald Leverich of the Committee Staff at (202) 225-2927.

Sincerely,


Frank Pallone, Jr.
Chairman


Mike Doyle
Chairman
Subcommittee on Communications
and Technology