

ATTACHMENT B



FOIA Requests <foia@democracyforward.org>

FOIA Appeal

1 message

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Mon, Mar 12, 2018 at 5:16 PM

To: GSA FOIA <GSA.FOIA@gsa.gov>

Dear FOIA Officer,

Please see below and attached a FOIA appeal regarding GSA-2018-000574. Please note that the attached PDF includes hyperlinks for additional context.

If you have any questions, please respond to this email.

Thank You!



March 9, 2018

VIA Electronic Delivery

U.S. General Services Administration
FOIA Requester Service Center (H1F)
1800 F St. NW, Room 7308
Washington, DC 20405

Re: Freedom of Information Act Appeal (Case Number: GSA-2018-000574)

Dear General Services Administration:

This is an appeal under the Freedom of Information Act (FOIA) pursuant to 5 U.S.C. § 552(a)(6) and 41 C.F.R. 105-60.000, *et seq.*, of the determination that the General Services Administration (GSA) has no records responsive to the FOIA request submitted by Democracy Forward on January 5, 2018. (Case Number: GSA-2018-000574).

I. Background

Democracy Forward's FOIA request seeks "Any and all correspondence, including attachments, to or from 'ptt.gov' email addresses associated with Rick Dearborn, Mike Pence, Michael Flynn, Rudy Giuliani, Chris Christie, Jeff Sessions, Ben Carson, K.T. McFarland, Pam Bondi, Jared Kushner, Rebekah Mercer, Steven Mnuchin, Devin Nunes, Anthony Scaramucci, Peter Thiel, Reince Priebus, Steve Bannon, Donald Trump Jr., Eric Trump, Ivanka Trump, and Omarosa Manigault on any server controlled by the General Services Administration."

On February 8, 2018, GSA responded, stating that "After a careful review of our files, it has been

determined that GSA has no records of the information that you have requested.”

II. Basis for Appeal

We are submitting this appeal because GSA’s determination that it does not possess responsive records is improbable. Democracy Forward requested records with the email addresses associated with certain Trump transition team members. The statutory scheme regarding transition team email systems, public reporting, and the President’s own statements all support the conclusion that GSA has possession, custody, and control of such transition team emails. There can also be no question that these emails are “agency records” for the purpose of FOIA.

A. GSA Likely Possesses Transition Team Emails.

We believe that GSA possesses responsive records because: (1) this is consistent with the statutory scheme providing for transition team government email addresses and systems; (2) the existence of transition team emails on a GSA controlled email server has been publicly reported; (3) both the President and Congress have acknowledged that such emails are in GSA’s possession.

First, by statute, GSA provides email and hardware systems to the presidential transition teams. Trump-Pence Transition Team members signed memoranda of understanding (MOU) regarding these resources. These MOUs reveal the following facts: GSA provided the transition team with Government Furnished Equipment (GFE) for related work, including laptops and smartphones equipped with email and cloud-based services. GSA encouraged transition team members to use the GFE by providing technical support for the GFE, but only limited support for other hardware and software, and by warning of the cybersecurity risks in using non-governmental equipment. Transition team staff members signed and accepted IT Rules of Behavior to safeguard the assets as a precondition of receiving the GFE.

Second, the existence of the “@ptt.gov” transition team emails on a GSA controlled server has been reported by CNN and others. Specifically, the existence of the cache of transition emails using the domain “@ptt.gov” came to light publicly after the Special Counsel’s Office and FBI investigators reviewed a portion of those emails in the investigation into Russian interference with the 2016 Presidential election. According to CNN, since March 2017, the FBI and the Department of Justice have been working with GSA to review the emails, and DOJ has made specific requests for emails, laptops and cell phones associated with the transition team. Both the FBI and the Special Counsel’s Office sent preservation orders to GSA regarding transition team documents. The FBI also requested that GSA consult with Congress before disposing of any information or hardware associated with the transition team. Over the course of the Special Counsel’s Office review, GSA has reportedly produced thousands of transition team documents.

Finally, both the President and Congress have acknowledged the existence of transition team emails. When asked about them, President Trump said “I can’t imagine there’s anything on them” of interest to the Russia investigation. And a lawyer for President Trump’s transition team sent a letter to Congress seeking in part legislative changes that would prevent disclosure of future transition teams’ documents. In response, Congressman Elijah Cummings, ranking member of the House Committee on Oversight and Government Reform, said the 1963 Presidential Transition Act “simply does not support withholding transition team emails.”

B. Transition Team Emails in GSA’s Possession Are Agency Records Subject to the FOIA.

Assuming, as discussed above, that GSA has possession of the requested @ptt.gov transition team

emails, it must determine that they are agency records and release all responsive records to Democracy Forward. There is a strong presumption against withholding records within the possession of an agency. According to the Supreme Court, “The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not ‘agency records.’” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989).

The Supreme Court has articulated two primary requirements for a record to be an “agency record” under FOIA. First, an agency must “either create or obtain” the requested materials. *Tax Analysts*, 492 U.S. at 144. An agency need not have generated the record itself to meet this requirement. *Id.* Second, the agency must be in control of the requested materials at the time the FOIA request is made. *Id.* Whether an agency has sufficient control over a record for it to be an agency record turns on the “totality of the circumstances,” with special attention to four factors:

[1] the intent of the document’s creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency’s record system or files.

Judicial Watch, Inc. v. U.S. Secret Serv., 726 F.3d 208, 218–20 (D.C. Cir. 2013). These four factors compel the conclusion that transition team emails are agency records subject to the FOIA.

First, the transition team members knowingly relinquished control of the email records when using the “@ptt.gov” email domain and GFE hardware. It is clear from the email domain name that the transition email addresses are not personal; they belong to the government, ending with “.gov”. Further, according to GSA Deputy Counsel Lenny Loewentritt, a part of the “series of agreements that anyone had to agree to when using GSA materials during the transition, includ[es] that there could be monitoring and auditing of devices and that, “Therefore, no expectation of privacy can be assumed.”

On the second factor, GSA maintains the ability to use and dispose of the emails. Under the MOU signed by the transition team, GSA retains the authority to audit the content of the hardware, such as email, and dispose of records thereon after the conclusion of the transition. Based on CNN reporting, GSA exercised this authority and has retained documents, including for review by the Special Counsel’s Office.

Third, GSA has extensively read and relied on “@ptt.gov” emails. The definition of “agency record” is not limited to documents created by agency staff, as “agencies routinely avail themselves of studies, trade journal reports, and other materials produced outside the agencies both by private and governmental organizations.” *Tax Analysts*, 492 U.S. at 144. That an agency “has some ability to use and dispose of such emails because it controls the server that delivers the emails and presumably also owns and maintains the email software,” *Competitive Enter. Inst. v. NASA*, 989 F. Supp. 2d 74, 91 (D.D.C. 2013), weighs in favor of considering the emails “agency records,” especially where “emails relate to agency matters and were exchanged with agency employees so they were necessarily read and relied upon by agency personnel.” *Id.* At the request of the Special Counsel’s Office, GSA has reviewed and produced thousands of transition team documents from its server. To comply with that request, GSA necessarily would have read or relied upon the records to conduct the search. Additionally, from documents previously released by GSA, it is evident that GSA communicated with Trump transition team members via the transition members’ “@ptt.gov” addresses.

On the final factor, the emails have been integrated into GSA’s record system. They reside on a GSA server, which supports the conclusion that they are in the agency’s control. *See Consumer Fed’n of Am. v.*

Dep't of Agric., 455 F.3d 283, 290 (D.C. Cir. 2006) (noting that records residing on an agency's computer system "necessarily subject[ed] them to the control of that system's administrators"). As noted, GSA has reviewed and maintained a portion of the "@ptt.gov" emails for the Special Counsel's Office. Further, now-former FBI General Counsel James Baker and Special Counsel Robert Mueller sent preservation orders to the GSA and Baker also requested that GSA consult with Congress before disposing of *any* of information or hardware associated with the transition team.

Finally, there is no basis to conclude that these emails should somehow be construed as Executive Office of the President (EOP) records exempt from the FOIA. First, the transition team's work in Cabinet and other executive branch agencies, via "landing" or "beachhead" teams, for example, makes them more akin to agency political appointees, who are unquestionably subject to FOIA, then to White House staff who are excluded from the requirements of FOIA.

Moreover, even if one were to apply the standard for determining whether agencies within EOP are subject to FOIA, the requested records would meet this test. Agencies within EOP may be subject to FOIA, depending on: "'how close operationally the group is to the President,' 'whether it has a self-contained structure,' and 'the nature of its delegat[ed]' authority. *Citizens for Responsibility & Ethics in Washington v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009). The Trump-Pence Transition Team had a self-contained structure headed by an Executive Committee; and it exercised authority and performed functions in addition to advising President-elect Trump. Ben Carson, Newt Gingrich, Michael Flynn, Rudy Giuliani, and Sen. Jeff Sessions, among others, served on the Executive Committee; and day-to-day operational command belonged to Rick Dearborn. The transition team also designated "landing teams" responsible for evaluating each agency during the transition period. And aside from a handful of advisors, the transition team reportedly operated with significant independence from the President-elect and with little oversight.

III. Conclusion

GSA, in providing a no-records response, has failed to show that it complied with its duties under FOIA to conduct an adequate search and release all responsive records and reasonably segregable information contained in otherwise exempt records.

Please respond to this appeal in writing within 20 working days as required under 5 U.S.C. § 552(a)(6)(A)(ii). If you have any questions please contact me as soon as possible at foia@democracyforward.org or 202-448-9090.

We appreciate your assistance with this appeal and look forward to your prompt response.

Sincerely,

/s/

Robin Thurston

Democracy Forward Foundation



Final Appeal _ GSA Transition Emails.pdf

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