



July 27, 2023

Via Electronic Mail

The Hon. Colleen Shogan
Archivist of the United States
National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

Request for Referral Under 44 U.S.C. § 3106(b): Destruction of Records

Dear Dr. Shogan:

America First Legal Foundation (“AFL”) is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. AFL frequently files Freedom of Information Act requests and is therefore interested in ensuring that records are properly preserved. We write to request that the National Archives and Records Administration transmit a referral to the Department of Justice for the criminal investigation of Dr. David Morens, Senior Advisor to the Director of the National Institute of Allergy and Infectious Disease.¹ Under 44 U.S.C. § 3106(b), when records are unlawfully destroyed or removed from federal custody, you are charged with the duty to notify the Attorney General and seek his assistance in the preservation and recovery of the records. Under the Archives’ General Records Schedule, the emails of non-Capstone officials generally must be preserved for at least seven years, and in no case may agency emails be deleted in fewer than three years.²

The House Select Subcommittee on the Coronavirus Pandemic recently released documents showing that Dr. David Morens, Senior Advisor to the Director of the

¹ NARA has made criminal referrals to the Department of Justice in recent instances of alleged mishandling of federal records. *See* Letter from Debra Steidel Wall, Acting Archivist of the United States, to Rep. James Comer, Ranking Member, House Comm. on Oversight and Reform, and Rep. Jim Jordan, Ranking Member, House Comm. on the Jud. (Oct. 25, 2022), <https://bit.ly/3XSunev> (last visited July 24, 2023).

² NARA, *General Records Schedule 6.1* (Jan. 2023), <https://bit.ly/3FZHgvz>.

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National Institute of Allergy and Infectious Disease, deliberately chose to evade federal records retention and transparency laws by using a private email account for official business, and by engaging in a planned and systematic destruction of government records.³ He admitted that he “tr[ies] to always communicate on gmail because [his] NIH email is FOIA’d constantly.”⁴ In the same email, he said that his gmail account was “hacked” and that he had been forced to resume the use of his official account for sensitive matters, but he reassured his contacts that he would “delete anything [he doesn’t] want to see in the New York Times.”

Additional information remains to be made public disclosing whether and to what extent Dr. Morens’s supervisors were aware of and approved his illegal conduct. Regardless, the evidence is that federal records have been unlawfully removed, deleted, erased, or otherwise destroyed. Although this information has been in the public domain for many weeks, there is no evidence suggesting that the head of the relevant agency has initiated action through the Attorney General for the recovery of records. Therefore, we write to request that the National Archives and Records Administration transmit a referral to the Department of Justice under 44 U.S.C. § 3106(b).⁵

Thank you in advance for your attention to this matter. Please contact us if you have any questions.

Sincerely,

/s/ Reed D. Rubinstein

Reed D. Rubinstein

America First Legal Foundation

cc: National Archives and Records Administration, Records Management Oversight and Reporting Program (UnauthorizedDisposition@nara.gov)
Hon. Brad Wenstrup, Chairman, House Select Subcommittee on the Coronavirus Pandemic
Hon. Paul Ruiz, Ranking Member, House Select Subcommittee on the Coronavirus Pandemic
Hon. James Comer, Chairman, House Committee on Oversight and Accountability

³ Letter from Rep. Brad Wenstrup, Chairman, H. Select Subcomm. on the Coronavirus Pandemic, to Dr. David Morens, Senior Sci. Advisor, Nat’l Inst. of Allergy and Infectious Diseases at 2 (June 29, 2023), <https://bit.ly/44tRsWS> (last visited July 24, 2023).

⁴ *Id.*

⁵ The National Archives apparently has made criminal referrals to the Department of Justice in recent instances where there was alleged mishandling of federal records. *See* Letter from Debra Steidel Wall, Acting Archivist of the United States, to Rep. James Comer, Ranking Member, House Comm. on Oversight and Reform, and Rep. Jim Jordan, Ranking Member, House Comm. on the Jud. (Oct. 25, 2022), <https://bit.ly/3XSunev> (last visited July 24, 2023).

Hon. Jamie Raskin, Ranking Member, House Committee on Oversight and
Accountability