



July 27, 2023

Via Electronic Mail

The Hon. Christi A. Grimm, Inspector General
Office of Inspector General
U.S. Department of Health and Human Services
P.O. Box 23489
Washington, DC 20026
Christi.Grimm@oig.hhs.gov

Request for Investigation: Federal Records Act and Freedom of Information Act Violations

Dear Inspector General Grimm:

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. Accordingly, we write to request that the Office of the Inspector General open an investigation regarding recent disclosures containing troubling evidence of legal violations by Dr. David Morens, Senior Advisor to the Director of the National Institute of Allergy and Infectious Disease, and by Secretary Xavier Becerra.

Recently, the House Select Subcommittee on the Coronavirus Pandemic released documents suggesting that Dr. Morens willfully evaded federal records retention and government transparency laws by using a private email account for official business and destroying government records.¹ In one email, Dr. Morens explained that he “tr[ies] to always communicate on gmail because [his] NIH email is FOIA’d

¹ 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), available at <https://bit.ly/44tRsWS>.

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constantly.”² In the same email, he explains that his Gmail account was “hacked,” and he was 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.” Although 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, there is strong evidence that he willfully and intentionally destroyed federal records and evaded the Freedom of Information Act. Furthermore, the evidence suggests that Secretary Becerra, who as Department head was responsible for establishing safeguards against the removal or loss of federal records, failed to implement appropriate internal controls and disregarded legal duties of compliance with the Federal Records Act and the Freedom of Information Act, among others.

Your office is authorized to investigate suspected violations of the Federal Records Act by employees of the Department of Health and Human Services and its components.³ See e.g., *Landmark Legal Foundation v. E.P.A.*, 272 F. Supp. 2d 59, 63 (D.D.C. 2003).⁴ Under 5 U.S.C. § 404(d), if your office discovers evidence indicating a violation of Federal law, you must report that violation to the Attorney General. In this case, the evidence suggests violations of 44 U.S.C. § 3105, providing that the head of each Federal agency shall establish safeguards against the removal or loss of records, one of which shall include making it known to officials and employees of the agency (1) that records in the custody of the agency are not to be improperly alienated or destroyed, and (2) the penalties provided by law for the unlawful removal or destruction of records; 44 U.S.C. § 3106(a), providing that the Secretary “shall notify the Archivist of any actual, impending, or threatened” unlawful deletion, erasure, or other destruction of agency records, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery thereof; and 18 U.S.C. § 2071(b), providing that a person who willfully or unlawfully conceals or destroys a federal record is subject to fines, imprisonment, and forfeiture of his office.

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

² *Id.*

³ 5 U.S.C. § 402(b); 5 U.S.C. § 401(1).

⁴ AFL has also written to your office regarding the Centers for Disease Control’s policy of deleting emails in violation of the same records preservation laws. See Letter from Reed D. Rubinstein, Director of Investigations, America First Legal Foundation, to Christi Grimm, Inspector General, U.S. Dep’t of Health and Hum. Servs. (Mar. 29, 2023), (available at <https://bit.ly/3Ohd5EJ>).

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