



June 27, 2023

Dr. Colleen Shogan  
Archivist of the United States  
700 Pennsylvania Avenue, N.W.  
Washington, DC 20408

Via email: [archivistoftheunitedstates@nara.gov](mailto:archivistoftheunitedstates@nara.gov)

Subject: Request for Initiation of Department of Justice Enforcement Action

Dear Dr. Shogan:

The Project On Government Oversight (POGO) respectfully requests that the National Archives and Records Administration (NARA) ask the U.S. Department of Justice (DOJ) to initiate an enforcement action to recover text messages that may have been unlawfully deleted by the U.S. Department of Homeland Security (DHS) Inspector General (IG) Joseph V. Cuffari, in potential violation of the Federal Records Act (FRA), and to investigate the circumstances behind their deletion as well as the failure to report the matter to the National Archives.

POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

On June 6, 2023, IG Cuffari testified before the House Committee on Oversight and Accountability's subcommittee on National Security, the Border, and Foreign Affairs. In response to questioning, IG Cuffari admitted that, although he uses his government phone "to conduct business," his "normal practice" is to delete text messages from the device.<sup>1</sup> According to IG Cuffari, he alone made the decision that none of those messages were federal records.<sup>2</sup>

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<sup>1</sup> *Help Wanted: Law Enforcement Staffing Challenges at the Border: Hearing before the National Security, the Border, and Foreign Affairs Subcommittee*, 118th Cong. (June 6, 2023), <https://oversight.house.gov/hearing/help-wanted-law-enforcement-staffing-challenges-at-the-border/>; See also Letter from Ranking Member Bennie G. Thompson, House Committee on Homeland Security, Ranking Member Glenn F. Ivey, Subcommittee on Oversight, Investigations, and Accountability, to Inspector General Joseph V. Cuffari, June 8, 2023, [https://democrats-homeland.house.gov/imo/media/doc/letter\\_calling\\_on\\_ig\\_cuffari\\_to\\_resign.pdf](https://democrats-homeland.house.gov/imo/media/doc/letter_calling_on_ig_cuffari_to_resign.pdf); Maria Sacchetti & Carol D. Leonnig, "Democratic lawmakers seek Homeland Security watchdog's resignation," *Washington Post*, June 8, 2023, <https://www.washingtonpost.com/nation/2023/06/08/homeland-security-cuffari-text-messages/>.

<sup>2</sup> *Help Wanted: Law Enforcement Staffing Challenges at the Border: Hearing before the National Security, the Border, and Foreign Affairs Subcommittee* [see note 1].

While this was the first public revelation of IG Cuffari’s mass deletion of his text messages, staff in the Office of Inspector General learned of his actions earlier, when searching for documents responsive to a FOIA request brought by POGO. That request sought, in part, text messages from IG Cuffari to learn more about his role in suppressing evidence his staff had assembled on sexual harassment and misconduct at DHS.<sup>3</sup> An email sent on December 22, 2022, by a DHS Office of Inspector General employee confirms IG Cuffari’s mass deletion of text messages without following “the relevant policy for capturing such messages.”<sup>4</sup>

When Cuffari’s mass deletion of text messages first came to light within the IG office, staff developed a plan to investigate the matter and recommended reporting the deletion to NARA.<sup>5</sup> The Office of Inspector General, however, failed to carry out that plan — or to report the document deletion to NARA, as the FRA and implementing regulations require.<sup>6</sup>

IG Cuffari’s actions conflict directly with a DHS policy dating back to 2014 that places on all DHS employees the obligation to ensure they preserve any texts on their government phones that may be federal records.<sup>7</sup> Two months after staff discovered Cuffari had deleted texts from his phone, the DHS IG’s Office of the Chief Information Officer warned all staff in an email, “Do not use SMS/MMS electronic messaging to conduct federal government business/activities.”<sup>8</sup> The email further states that if such electronic messages are inadvertently created or received they “must be captured.”<sup>9</sup> Notwithstanding this guidance, IG Cuffari admitted to Congress that he continues to delete text messages on an ongoing basis.

Congress enacted the FRA in part to ensure “adequate and proper documentation of the policies and transactions of the Federal Government.”<sup>10</sup> Toward that end, the FRA imposes on agencies the obligation to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions” of each

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<sup>3</sup> Letter from Ranking Member Thompson, House Committee on Homeland Security, Ranking Member Ivey, Subcommittee on Oversight, Investigations, and Accountability, to Inspector General Joseph V. Cuffari [see note 1].

<sup>4</sup> Nick Schwellenbach, “DHS Watchdog Regularly Purges Texts on Gov’t Phone Despite Ongoing Investigation,” Project On Government Oversight, June 6, 2023, <https://www.pogo.org/investigation/2023/06/dhs-watchdog-regularly-purges-texts-on-govt-phone-despite-ongoing-investigation>; Letter from Ranking Member Jamie Raskin, Committee on Oversight and Accountability; Ranking Member Robert Garcia, Subcommittee on National Security, the Border, and Foreign Affairs; Ranking Member Gerry E. Connolly, Subcommittee on Cybersecurity, Information, Technology, and Government Innovation; and Ranking Member Kweisi Mfume, Subcommittee on Government Operations and the Federal Workforce, to Dr. Colleen Shogan, Archivist of the United States, June 12, 2023, <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2023-06-12.JBR%20et%20al.%20to%20Shogan-NARA%20re%20Cuffari.pdf>.

<sup>5</sup> Schwellenbach, “DHS Watchdog Regularly Purges Texts on Gov’t Phone” [see note 4].

<sup>6</sup> Schwellenbach, “DHS Watchdog Regularly Purges Texts on Gov’t Phone” [see note 4]; 44 U.S.C. § 3106 (2023), <https://www.law.cornell.edu/uscode/text/44/3106>; 36 C.F.R. § 1230.14 (2023), <https://www.ecfr.gov/current/title-36/chapter-XII/subchapter-B/part-1230/section-1230.14>.

<sup>7</sup> Department of Homeland Security, “DHS Management Directive 141-01,” August 11, 2014, [https://www.dhs.gov/sites/default/files/publications/mgmt/information-and-technology-management/mgmt-dir\\_141-01-records-and-information-management\\_revision-01.pdf](https://www.dhs.gov/sites/default/files/publications/mgmt/information-and-technology-management/mgmt-dir_141-01-records-and-information-management_revision-01.pdf).

<sup>8</sup> Schwellenbach, “DHS Watchdog Regularly Purges Texts on Gov’t Phone” [see note 4].

<sup>9</sup> Schwellenbach, “DHS Watchdog Regularly Purges Texts on Gov’t Phone” [see note 4].

<sup>10</sup> 44 U.S.C. § 2901(1) (2023), <https://www.law.cornell.edu/uscode/text/44/2901>.

agency.<sup>11</sup> Further, the FRA “strictly limits the circumstances under which records can be removed from federal custody or destroyed.”<sup>12</sup>

The fact that IG Cuffari willfully deleted his own texts from his government phone is alone sufficient basis for the Archivist to ask the Justice Department to examine whether any criminal destruction of federal records occurred under 18 U.S.C. § 2071.<sup>13</sup> IG Cuffari’s unilateral actions in this case are quite different from other cases where agency records were destroyed due to accidents or systematic weaknesses, situations that do not suggest any intentional criminal effort. IG Cuffari’s records were not deleted as part of a device reset carried out by Information Technology staff, nor were they physical records lost in a flood or fire.<sup>14</sup> While IG Cuffari has claimed that the texts he deleted are not federal records, a substantial range of records, including correspondence, has to be preserved as federal records either permanently or temporarily. That range is especially broad when it comes to his records. For instance, “correspondence signed by the Inspector General” must be permanently retained as federal records.<sup>15</sup>

Federal sources have told POGO that IG Cuffari very likely deleted federal records that were required to be preserved under the provisions of the FRA. The context in which these reported deletions occurred could not be more serious. The destroyed text messages may bear directly on IG Cuffari’s role in suppressing evidence his office gathered of sexual misconduct and harassment among agency ranks, and they could be related to a congressional inquiry and an ongoing executive branch investigation.<sup>16</sup>

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<sup>11</sup> 44 U.S.C. § 3101 (2023), <https://www.law.cornell.edu/uscode/text/44/3101>.

<sup>12</sup> *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 953 (D.C.C.. 2016), <https://casetext.com/case/judicial-watch-inc-v-kerry-3>, citing 44 U.S.C. § 3105(1).

<sup>13</sup> U.S. Department of Justice, Criminal Resource Manual, “Section 1663: Protection of Government Property — Protection of Public Records and Documents,” <https://www.justice.gov/archives/jm/criminal-resource-manual-1663-protection-government-property-protection-public-records-and>.

<sup>14</sup> Text messages on the government phones of Chad Wolf and Ken Cuccinelli, high-level appointees at DHS during the Trump administration, and of the Secret Service were deleted as part of routine agency IT efforts. Carol D. Leonnig and Maria Sacchetti, “Jan. 6 texts missing for Trump Homeland Security’s Wolf and Cuccinelli,” *Washington Post*, July 28, 2022, <https://www.washingtonpost.com/nation/2022/07/28/homeland-security-texts-jan6/>; If IG Cuffari corresponded with Mr. Wolf or Mr. Cuccinelli over text, it is conceivable those messages are lost if they were not backed up. Mr. Wolf has told POGO that he would meet with IG Cuffari on a quarterly basis when he was at DHS, and an internal record obtained by POGO mentions a planned meeting between the two to discuss a request asking the IG to investigate whether Mr. Wolf legally was in charge of DHS. Adam Zagorin and Nick Schwellenbach, “Did Whistleblower Reprisal Help Set the Stage for a January 6 Intelligence Failure?” Project On Government Oversight, July 1, 2021, <https://www.pogo.org/investigation/2021/07/did-whistleblower-reprisal-help-set-the-stage-for-a-january-6-intelligence-failure>.

<sup>15</sup> U.S. Department of Homeland Security, Headquarters Records Schedules, Office of Inspector General, April 30, 2009, [https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/departments-of-homeland-security/rg-0563/n1-563-09-010\\_sf115.pdf](https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/departments-of-homeland-security/rg-0563/n1-563-09-010_sf115.pdf).

<sup>16</sup> Lisa Rein, “Probe widens into Homeland Security watchdog’s role in missing Secret Service Jan. 6 texts,” *Washington Post*, April 6, 2023, <https://www.washingtonpost.com/politics/2023/04/06/homeland-security-watchdog-secret-service-texts/>; Letter from Ranking Member Carolyn B. Maloney of the House Committee on Oversight and Reform and Ranking Member Bennie G. Thompson of the House Committee on Homeland Security to DHS Inspector General Joseph V. Cuffari, May 10, 2022, <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2022-05-10.CBM%20Thompson%20to%20Cuffari-DHS%20IG%20re%20Reports.pdf>.

IG Cuffari’s conduct is part of a larger pattern of delay and obfuscation by the agency’s top watchdog, charged with preventing and detecting fraud and abuse in DHS programs and operations. Under these circumstances, it is critical that you refer this matter to the Department of Justice for a full inquiry using the panoply of investigative resources at the Attorney General’s disposal.

There are other reasons Justice Department involvement is warranted. The letter of the law strongly suggests that Congress wanted an independent investigation whenever top agency officials appear to have concealed allegedly unlawful actions regarding federal records or are directly involved in allegedly unlawful actions. The law makes clear when agencies must notify the Archivist about deleted federal records, and when the Archivist should request the assistance of the Attorney General in efforts to recover them. The FRA imposes on each agency head the obligation to “notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency.”<sup>17</sup> If an agency head fails to initiate the recovery of records “within a reasonable period of time after being notified” of unlawful actions regarding records, or if the head of the agency “is participating in, or believed to be participating in any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.”<sup>18</sup> The DC Circuit has identified this provision as a key component of the “FRA’s enforcement scheme.”<sup>19</sup> An IG is not normally considered an agency head, but is treated as one in numerous respects and has greater independence than the head of a typical agency component.<sup>20</sup> Due to the fact that IG Cuffari participated in the deletion of the records, functionally acts as an agency head, and did not report his deletions to the National Archives in a reasonable amount of time, the Archivist should request the assistance of the Attorney General and report that request to Congress.

We are aware of the June 15, 2023, letter to DHS’s Chief Information Officer in which NARA Chief Records Officer Laurence Brewer requested that DHS provide NARA a report documenting IG Cuffari’s practices with respect to his management of electronic messages.<sup>21</sup> In that letter, NARA also requested that if DHS does determine federal records were deleted

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<sup>17</sup> 44 U.S.C. § 3106(a) [see note 6].

<sup>18</sup> 44 U.S.C § 3106(b) [see note 6].

<sup>19</sup> *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1279 (D.C.C. 1993), <https://casetext.com/case/armstrong-v-executive-office-of-president-2>.

<sup>20</sup> “The agreements allow OSC to treat an Inspector General as the head of their agency for purposes of 1213 referrals.” Office of Special Counsel, “New Framework Clarifies Referral Policies for IG Whistleblower Disclosures,” November 3, 2020, <https://osc.gov/News/Pages/21-03-Framework-Clarifies-Referral-Policies-for-IG-Whistleblower-Disclosures.aspx>; 5 U.S.C. App. § 6(e)(1)(A) (2023) (specifies that an office of Inspector General is a “separate agency” and the Inspector General shall operate as “an agency head” for certain personnel matters), <https://www.law.cornell.edu/uscode/text/5a/compiledact-95-452/section-6>; “...*United States Nuclear Regulatory Commission v. Federal Labor Relations Authority*, 25 F.3d 229, 235 (4th Cir. 1994), reviewed the legislative history of the ‘general supervision’ language and described the agency head’s supervisory authority over the IG as ‘nominal’; “...Congress provided the IG with broad administrative authorities.” Council of Inspectors General on Integrity and Efficiency, “The Inspectors General,” July 14, 2014, [https://www.ignet.gov/sites/default/files/files/IG\\_Authorities\\_Paper\\_-\\_Final\\_6-11-14.pdf](https://www.ignet.gov/sites/default/files/files/IG_Authorities_Paper_-_Final_6-11-14.pdf).

<sup>21</sup> Letter from Laurence Brewer, Chief Records Officer for the US Government at the National Archive to Eric Hysen, Chief Information Officer of the Department of Homeland Security, June 15, 2023, <https://www.archives.gov/files/records-mgmt/resources/ud-2023-0052-dhs-open-letter.pdf>.

without proper disposition authority, the report include a complete description of the affected records.<sup>22</sup>

While this is an important first step, it does not come close to fulfilling NARA's duty under the FRA to initiate an enforcement action through the Attorney General.

Moreover, NARA's request is no substitute for a DOJ inquiry, with the full panoply of investigative resources that the Attorney General possesses. NARA's request also places DHS in the problematic position of investigating its own inspector general, whose independence is protected by the Inspector General Act.<sup>23</sup> A DOJ inquiry of the DHS IG does not create such a problem.<sup>24</sup>

Accordingly, we ask that you immediately request that the Attorney General initiate an enforcement action to recover the potentially unlawfully deleted text messages, as well as to investigate the circumstances behind their deletion by IG Cuffari and his failure to report the matter to the National Archives, despite his staff's recommendation he do so.

Sincerely,



Danielle Brian  
Executive Director

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<sup>22</sup> Letter from Laurence Brewer, to Eric Hysen [see note 21].

<sup>23</sup> Inspector General Act of 1978, Pub. Law No. 95-452 (2021), <https://www.law.cornell.edu/uscode/text/5a/compiledact-95-452>. When the CIA sought to investigate its inspector general in 2007, former CIA IG Fredrick P. Hitz said it was “a terrible idea.” Hitz also said, “Under the statute, the inspector general has the right to investigate the director. How can you do that and have the director turn around and investigate the I.G.?” Mark Mazzetti and Scott Shane, “Watchdog of C.I.A. Is Subject of C.I.A. Inquiry,” *New York Times*, October 11, 2007, <https://www.nytimes.com/2007/10/11/washington/12intel.html>.

<sup>24</sup> A DHS referral of NARA's letter to DHS IG also avoids such a problem. But, aside from being inconsistent with NARA's statutory enforcement scheme, it would place the responsibility for an investigation of the DHS Inspector General with his own office. The DHS IG Office of Counsel would necessarily be central to such an investigation. As POGO reported in March, however, the 2022 Federal Employee Viewpoints Survey shows that less than half of the staff in that office believe they “can disclose a suspected violation of any law, rule or regulation without fear of reprisal.” This is important because these attorneys are among the staff best positioned to disclose suspected legal violations by senior IG leaders. (See Nick Schwellenbach, “Whistleblower Reprisal Feared in Key Parts of DHS Watchdog,” Project On Government Oversight, March 8, 2023, <https://www.pogo.org/analysis/2023/03/whistleblower-reprisal-feared-in-key-parts-of-dhs-watchdog>.) An independent investigation by DOJ — staffed by individuals who cannot be retaliated against by IG Cuffari or by his senior leadership — is far more likely to yield results that are not skewed by fear.