

Testimony of Andrew McLaughlin
before the House Committee on Oversight and Government Reform
on September 10, 2013
at a hearing on "Preventing Violations of Federal Transparency Laws".

**Updating Federal Recordkeeping Practices
for the Era of Ubiquitous Digital Communications**

Chairman Issa, Ranking Member Cummings, and distinguished members of the Committee on Oversight and Government Reform:

The subject of today's hearing raises an enormously interesting and challenging set of policy issues around the need to update agency rules and practices for the collection and preservation of records in an age of ever-more-numerous, rapidly-evolving, and increasingly decentralized channels of digital communication. I appreciate the opportunity to offer my thoughts and recommendations.

By way of introduction, I am a senior executive at betaworks, a New York City-based builder of, and investor in, technology- and data-driven media companies. I am CEO of Digg and Instapaper, two betaworks companies that offer innovative news curation and reading products for web and mobile devices. Outside of work, I chair the board of Access Now, which defends the free speech and privacy interests of activists, journalists, and citizens in high-risk countries; and I serve on the boards of the Sunlight Foundation, which uses the power of the Internet to catalyze greater openness and transparency in government, and Public Knowledge, which advocates for an open Internet and the public's access to knowledge.

Previously, I have held academic positions at Harvard Law School's Berkman Center for Internet & Society, Stanford Law School's Center for Internet & Society, and Princeton University's Center for Information Technology Policy. In 2011, I served as start-up executive director of Civic Commons, a project of Code for America, and taught an international constitutional law class on freedom of expression at Stanford Law School. In the private sector, I have worked as a senior executive at Tumblr (2011-12), Google (2004-09), and the Internet Corporation for Assigned Names and Numbers (1999-2003). I have entered public service three times: In 2009-10, I served in the White House's Office of Science and Technology Policy as a Deputy Chief Technology Officer; in 1997-98, I was counsel to this very Committee; and in 1994-95, I clerked on the United States Court of Appeals for the Eighth Circuit.

I. The Challenge of Ubiquitous Digital Communications

Government recordkeeping now confronts an era in which employees have a vastly expanded, and expanding, menu of personal and social communication channels. Email is no longer the the overwhelmingly dominant means of online person-to-person communication. While email will surely persist in something resembling its current form for decades, it is becoming less centrally important every year -- particularly among the generations of Americans that will be joining federal agencies in the coming decade.

Let's examine what a typical, newly-minted, digitally-native, twenty-something Executive Branch employee in 2013 will be bringing to the job. She will likely have not only a personal email account, but a smartphone with text messaging and an arsenal of apps designed either specifically for messaging or capable of being used to receive direct, work-relevant communications. To name only some of the apps that are popular right now, she might have accounts on Facebook, Twitter, Skype, Tumblr, LinkedIn, WhatsApp, AOL Instant Messenger, Yahoo! Messenger, Line, Viber, Voxer, Kik, Glide, Tinchat, Handcent SMS, GroupMe, WeChat, Google+, Path, Dropbox, Google Drive, Moped, Tango, and ooVoo. And that's not even counting photo- and video-sharing services that support direct or indirect messaging: Instagram, Vine, Pinterest, Flickr, Snapchat, Vimeo, and YouTube, to name just some of the most prominent.

While the new employee may not use any of her personal accounts to send work-related communications, her friends, friends of friends, former classmates and co-workers, and, indeed, random members of the public will almost certainly use them to try to reach her in the context of her new job. Indeed, I learned this very directly -- in today's electronic world, once you become a federal employee people will inevitably seek to contact you on your known or discoverable personal accounts. Even if you are conscientious about forwarding work-related emails to your official account to preserve them as government records, you can easily miss a few. Moreover, for many of the new communication apps mentioned above, there is no easy way to forward work-related communications to an official system: federal agencies are lagging, not leading, adopters of new technologies, and so in most cases, the new service will not be approved for use and there will be no official agency or employee accounts on it, no matter how popular.

Thus, from the perspective of the Federal Records Act ("FRA"), this explosion in employee use of online and mobile person-to-person communication services presents a significant challenge. Given that federal employees are directed to avoid using official resources for personal matters, It would be unreasonable to bar federal employees from using personal communications accounts, even during work hours. And it is equally unreasonable to expect that all federal agencies and their employees must actively operate an official account on every new communications service that appears on the Internet or in the iPhone or Android app store. The challenge I address today, therefore, is how to steer into federal records systems, in more reliable, thorough, and timely ways, those work-related communications that federal agency employees do not initiate but receive on their personal accounts.

II. Improving Federal Employee Recordkeeping Policies and Practices

I first commend the Committee for the reforms and improvements set forth in H.R. 1233, The Presidential and Federal Records Act Amendments of 2013, which was reported to the full House on June 25 of this year. In addition to updating the definition of “records” and codifying a number of existing federal agency practices, H.R. 1233 includes two important and useful clarifications of a federal employee’s obligations whenever using a personal electronic messaging account in connection with official business: namely, that any records created on a non-official account (1) must be copied or forwarded directly to the employee’s official messaging account, and (2) must be forwarded within five days of first being created or sent. Current law and practice provide that such messages must be preserved just like any other federal records, but do not specify how or when they must be transferred onto federal systems.

However, this useful clarification of responsibilities does not supply adequate guidance to employees who receive messages or other records relating to public business on digital communication platforms other than email. For example, if a federal employee receives a work-related communication via a direct message on Twitter, an InMail message on LinkedIn, an instant message on Skype, a text message on WhatsApp, or a shared document in Google Drive, there may be no obvious way to forward it to an official account -- in no small measure because the employee will almost certainly not have an official account on that particular service. If the expectation is that the employee should take a screenshot and then use personal email to send it into her official email account, then I urge the Committee to consider amending the legislation to make that explicit, at least as a safe harbor for compliance.¹

A second idea for improvement of federal recordkeeping requirements is that federal agencies make it possible for individuals outside the federal government to reach the official email addresses and other official digital communications accounts of federal employees. For security, privacy, and anti-spam reasons, most federal agencies do not publish employee email addresses in plain text on the web. That, in turn, leads many people to try to reach employees on non-official accounts, which are typically much easier to locate. But there are many ways to make it easy to contact specific federal employees even without publishing their email addresses. For example, agencies could utilize contact forms, where inbound messages can be submitted through a web page and then automatically or manually routed to the employee’s official email account. This technique is widely used in online customer service operations, as well as by many newspapers and online publications that want their journalists and writers to be easily reachable, but not easily spam-able.

A third idea that may merit the Committee’s consideration is a requirement that federal employees add notes to their personal communications accounts specifically stating that official business should be directed to their official accounts. These notes would probably have to be

¹ Even that approach has a notable downside for the long-term archival utility of the preserved record, as screenshot image files are not easily searchable.

specifically crafted, platform-by-platform and service-by-service. In the case of email, such a note could be added to an automatic signature footer or auto-responder. For Facebook, Twitter, LinkedIn, Skype, or Tumblr, it could be added to a public-facing field in the individual's profile. For other services, it might be more difficult or even impossible to incorporate an effective signal. Agencies could be directed to develop regularly-updated guidance on the language to be added to employees' personal accounts on the most widely used digital communications platforms.

III. Digital Recordkeeping Challenges for Congress

Finally, though this hearing focuses on the Executive Branch, the subject matter is relevant to Congress.

To be sure, Members of Congress are not subject to any obligation to retain and preserve records, digital or otherwise, with the National Archives or any other institution. Even absent such a requirement, many Members choose to build and maintain official archives and then, at the conclusion of their service, transfer them to local academic or historical institutions, often in or near their districts. But as Members and their offices embrace and rely upon new digital services and tools for communicating with their constituents, they may find themselves increasingly unable to collect, retain, and preserve a complete historical record of their time and actions in office. Accordingly, the members of this Committee might want to consider whether Congress needs institutional technical capabilities and policies to assist Members who elect to archive their official communications on digital communication platforms, from both official and non-official accounts.

Thank you for your consideration of my thoughts and suggestions. I look forward to answering the Committee's questions and serving as a resource as the Committee's work continues beyond this hearing.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – “Truth in Testimony”
Required by House Rule XI, Clause 2(g)(5)

Name: Andrew McLaughlin

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2010. Include the source and amount of each grant or contract.

Consultant to Radio Free Asia, Global Internet Freedom Initiative, \$14,400 (2011)

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

None.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2010, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None.

I certify that the above information is true and correct.

Signature:



Date: 8 September, 2013

Andrew McLaughlin

Curriculum Vitae

EMPLOYMENT

betaworks, New York, NY.

Senior Vice President, October 2012 – present.

Entrepreneur-in-Residence, August – September 2012.

Digg, New York, NY.

Chief Executive Officer, February 2013 – present.

Instapaper, New York, NY.

Chief Executive Officer, April 2013 – present.

Tumblr, Inc., New York, NY and Richmond, VA.

Executive Vice President, November 2011 – July 2012.

Civic Commons, New York, NY and San Francisco, CA.

Start-up Executive Director, February – October 2011.

Stanford Law School, Palo Alto, CA.

Lecturer in Law and Visiting Fellow, Center for Internet & Society, April 2011 – June 2012.

White House Office of Science and Technology Policy, Washington, DC.

Deputy Chief Technology Officer of the United States, June 2009 – December 2010.

Obama-Biden Presidential Transition, Washington, DC.

Technology, Innovation, and Government Reform Team, November 2008 – January 2009.

Google Inc., Mountain View, CA.

Director of Global Public Policy, January 2004 – May 2009.

Harvard Law School, Berkman Center for Internet and Society, Cambridge, MA.

Senior Fellow, July 2002 – December 2004.

Associate Director and Fellow, August 1998 – June 1999.

Internet Corporation for Assigned Names and Numbers (ICANN), Marina del Rey, CA.

Vice President, Chief Policy Officer, and Chief Financial Officer, December 1998 – July 2002.

United States House of Representatives.

Counsel, Committee on Government Reform and Oversight, 1997 - 1998.

Jenner & Block, Washington, DC.

Associate, 1995-1997.

EDUCATION

Harvard Law School, J.D. *cum laude*, 1994.

Yale University, B.A. *summa cum laude*, 1991. History major.

Honors: Phi Beta Kappa, Distinction in History, Butler Scholarship.

CLERKSHIP

Judge Gerald Heaney, United States Court of Appeals for the Eighth Circuit, 1994-95.

RECENT FELLOWSHIPS AND AFFILIATIONS

New America Foundation, Washington and New York.
Future Tense Fellow, 2013 - present.

Mozilla Corp., Mountain View, CA.
Advisor, Internet Public Policy Module, 2012 - present.

Princeton University, Center for Information Technology Policy, Princeton, NJ.
Visiting Fellow, 2011 - 2012.

Stanford Law School, Center for Internet & Society, Palo Alto, CA.
Visiting Fellow, 2011 - 2012.

Harvard University, Berkman Center for Internet & Society, Cambridge, MA.
Senior Fellow, 1998-1999, and 2002-2004.

NON-PROFIT BOARDS

Access Now, New York, Brussels, Tunis.
Chair, Board of Directors, 2011-present.

Sunlight Foundation, Washington, DC.
Member of Board of Directors, 2011-present.

Public Knowledge, Washington, DC.
Member of Board of Directors, 2011-present.

Code for America, San Francisco, CA.
Member of Board of Directors, 2011-2013.

Bridges.org, Cape Town, South Africa, and Kampala, Uganda.
Member of Board of Directors, 2003-2009.

Collaboration on International ICT Policy for East and Southern Africa (CIPESA),
Kampala, Uganda.
Co-founder, 2002-2003.

TEACHING

Stanford Law School
Fall 2011: *Free Speech in a Digitally Interconnected World*.

Harvard Law School
Fall 2003: *Digital Democracy*.

United Nations Institute for Training and Research
August 2003: *Strategic Policymaking on Information and Communications Technologies*.

International Development Law Institute, Rome Italy
September 2002: *Internet Law and Governance*.

Harvard Law School, Internet Law Program
July 2002: *Interconnection in the Developing World*.

Harvard Law School, Internet Law Program
July 2001: *Internet Self-Governance*.

University of Massachusetts, Legal Studies Department
Visiting Assistant Professor, Spring 1999: *The Law of Cyberspace*.

Harvard Law School and MIT.
Teaching Assistant, Fall 1998: *Law and Ethics on the Electronic Frontier*, co-taught by Prof. Lawrence Lessig (Harvard Law School) and Prof. Hal Abelson (MIT).
Module: "Architectures of Democracy."

Harvard University, Department of Economics
Instructor, Spring 1994: *The Law and Economics of Discrimination*.