

Fact check: Clinton e-mails and the privacy 'privilege'

Eugene Kiely, FactCheck.org 2:01 p.m. EDT March 12, 2015



(Photo: Don Emmert, AFP/Getty Images)

Hillary Clinton says neither the federal government nor an independent third party has the right to review e-mails she sent as secretary of State if she deems them personal. "Government officials are granted the privacy of their personal, non-work related emails, including personal emails on .gov accounts," her office says.

That's inaccurate. State Department guidelines say there is "no expectation of privacy" for personal e-mails sent by government employees on a department e-mail system.

"No one creating records on an official government network has an individual 'privacy right' to demand that their e-mails or e-records should be shielded beyond the reach of public access requests under FOI [Freedom of Information] laws, state or federal," Jason R. Baron, (<http://www.drinkerbiddle.com/people/attorneys/baron-jason-r>) a lawyer at Drinker Biddle and a former director of litigation (<http://www.archives.gov/press/press-releases/2011/nr11-181.html>) at the National Archives, told us in an e-mail.



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Clinton, a likely presidential candidate in 2016, has been embroiled in an e-mail controversy since March 2, when *The New York Times* reported (<http://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html?ref=topics>) that she exclusively used a private e-mail account at clintonemail.com to conduct government business. At a press conference on March 10 (<http://time.com/3739541/transcript-hillary-clinton-email-press-conference/>), Clinton said she sent and received more than 60,000 e-mails during her time in office. At the State Department's request, Clinton turned over about half of them to the government in December. The rest were deleted because they were personal, she said.

Asked whether she would agree to allow an "independent third party to come in and examine your e-mails," Clinton replied that she should be treated no differently than federal employees who have a government e-mail account and a personal e-mail account. They can decide when they send an e-mail whether to use the government or private account.

"So, even if you have a work-related device with a work-related .gov account, you choose what goes on that," she told reporters.

That's true, of course, but the situation she describes is not entirely analogous, since Clinton had no government account. She made the choice to use only a personal e-mail account set up on a personal server.

Moreover, Clinton's office went too far when answering the same question in a Q&A it released on the day of the press conference (<http://www.factcheck.org/UploadedFiles/2015/03/HRC-staff-QA-pdf.pdf>). The Q&A detailed the Clinton team's review process and answered some common questions that have been raised since the *Times* story first appeared.

One of the questions in the Q&A: "Do you think a third party should be allowed to review what was turned over to the Department, as well as the remainder that was not?" Clinton's office answered, in part: "Government officials are granted the privacy of their personal, non-work related emails, including personal emails on .gov accounts. Secretary Clinton exercised her privilege to ensure the continued privacy of her personal, non-work

related emails."

That characterization of the rules governing government e-mail systems is not accurate.

State Department policy — spelled out in the [Foreign Affairs Manual](http://www.state.gov/documents/organization/85696.pdf) (<http://www.state.gov/documents/organization/85696.pdf>) under "Points to Remember About E-mail" — says there is "no expectation of privacy." Specifically, 5 FAM 443.5 says, in part: "Department E-mail systems are for official use only by authorized personnel" and "The information in the systems is Departmental, not personal. No expectation of privacy or confidentiality applies."

Clinton is correct that the department policy allows employees to delete e-mails that are not work-related. The 5 FAM 443.5 rule also says, "Messages that are not records may be deleted when no longer needed."

But Baron — who served 13 years as director of litigation (<https://www.linkedin.com/in/jasonrbaron>) at the [National Archives](http://www.archives.gov/publications/general-info-leaflets/1-about-archives.html) (<http://www.archives.gov/publications/general-info-leaflets/1-about-archives.html>), which is responsible for maintaining government records — said in an interview that Clinton's use of a private server gave her exclusive control, thus preventing the department from having full access to e-mails she sent and received while a federal employee. Government employees have no right to privacy on government computers and even personal e-mails are subject to review and perhaps release at the department's discretion.

"Setting up a private server to conduct public business inappropriately shifts control of what is accessible to the end user alone rather than allowing the institution to decide threshold questions," he told us.

We sent e-mails to Clinton's office and to the State Department asking about the privacy claim but received no response.

At her press conference, Clinton said the State Department "already had the vast majority" of her e-mails because she made it a habit to e-mail government officials on their government e-mail accounts "so those e-mails would be automatically saved in the State Department system to meet record-keeping requirements." Her office said it turned over 30,490 printed copies of e-mails to the State Department and about 90% of those e-mails were already in the State Department's possession. It also said that 31,830 were private e-mails, and those were not turned over and were destroyed.

Baron also questioned the thoroughness of Clinton's review process to determine which e-mails to preserve and which to delete. The Q&A issued by her office described a four-step process. There was a search for e-mails sent to and received from government accounts, and a search for keywords such as "Benghazi" and "Libya." There was also a search of first and last names of more than 100 government officials, and e-mails were sorted and reviewed by both sender and recipient to account for any mistakes made in the name search.

Baron said all the e-mails should have been reviewed by hand to avoid missing some work-related e-mails. The State Department did not set a deadline, he said, and a team of people could have reviewed all 60,000 e-mails in a week or two.

"There are legitimate questions being asked if Ms. Clinton's staff did an adequate job of deciding what constituted a personal record, before emails were deleted," he told us. "But she opted for control through a private server, something no other average public sector employee would ever contemplate."

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