

Against transparency

Government officials' email should be private, just like their phone calls.

Matthew Yglesias, Vox.com | Sep 6, 2016

“Can I give you a call?”

It’s the worst possible reply to an email, but one I receive all too often in the course of reporting. Phone calls are journalistically indispensable when you want to conduct an extended interview, but for a routine query or point of clarification, email is much, much better.



Photo by Joe Raedle/Getty Images

Besides which, like any self-respecting person born in the 1980s, I hate phone calls.

The issue is that administration officials and other executive branch aides don’t want to leave a record of the conversation that might come to light one day. Not necessarily because they have anything scandalous to say. After all, we live in a world where something as banal as [Doug Band, a top Clinton Foundation aide, asking Huma Abedin, a top State Department aide, for a special diplomatic passport](#) for a hostage rescue trip to North Korea and being told he can’t have one can be spun as a scandal by a determined team of reporters and editors.

If Band had made a phone call instead of sending an email, Hillary Clinton would have been spared the bad — and totally unjustifiably so — news cycle she suffered last week. Which is why prudent staffers want to do basically everything, no matter how innocent, over the phone.

The issue is that while common sense sees email and phone calls as close substitutes, federal transparency law views them very differently. The relevant laws were written decades ago, in an era when the dichotomy between written words (memos and letters) and spoken words (phone calls and meetings) was much starker than it is today. And because they are written down, emails are treated like formal memos rather than like informal conversations. They are archived, and if journalists or ideologically motivated activists want to get their hands on them, they can.¹

It’s impossible to write about this issue in today’s environment without thinking of Clinton’s use of a private email account while serving as secretary of state. But while the question of whether she appropriately followed the existing laws is obviously important, so is the question of whether the laws make sense. And the answer is: no. **Treating email as public by default rather than private like phone calls does not serve the public interest. Rather than public servants communicating with the best tool available for communication purposes, they’re communicating with an arbitrary legal distinction in mind.**²

¹ **aiREFORM footnote:** Not necessarily so. The FOIA laws, passed in 1966, did provide for 'FOIA Exemptions' that allow partial redactions and full redactions. Read about 'FOIA History' [here](#), or 'FOIA Process & Exemptions' [here](#).

² **aiREFORM footnote:** This looks at email in a backwards way: instead of seeing email as an incredibly efficient way to document 'the work in government' that thus enables easier transparency, it views email as yet another venue for which public officials need to be protected. Utter bullshit, frankly. And, in practice, as evidenced by hundreds of FAA documents obtained via FOIA, government employees are constantly mindful that the records they record (including memos summarizing phone conversations, audio tapes, and emails, etc.) may be subject to full FOIA disclosure.

Under current law, if Bill Clinton wants to ask his wife to do something wildly inappropriate as a favor to one of his Clinton Foundation donors, all he has to do is ask her in person. But disclosure laws sit as a constant threat to the adoption and use of efficient communications tools. Your smartphone isn't primarily for making phone calls, but the stuff you do on your "phone" — communicating with other human beings in your life — is the social and economic equivalent of a phone call. It ought to be legally treated that way too.

Government secrecy can be, and in some ways is, out of control. But a private conversation to facilitate a frank exchange of ideas is not the same as a secret bombing campaign in Cambodia. We need to let public officials talk to each other — and to their professional contacts outside the government — in ways that are both honest and technologically modern.

Email isn't mail

The idea that digital text communications are like memos — and should be disclosed as a kind of official government work product — is wrong, but it wasn't crazy. After all, the pioneers of the email protocol themselves did seem to see it that way. It's called "electronic mail," not "chitchatting with text and emojis."

And the formal properties of the protocol deliberately imitate the formalisms of an interoffice memo from the postwar decades. The distinction between who a message is "to" versus who is merely receiving a carbon copy (or the dread blind carbon copy) has the sender playing the role of executive dictating a memo to his secretary who will type it up, make the copies, and see to the distribution.

From a modern standpoint it's a bit silly, but you can't blame the early emailers for not anticipating how it would be incorporated into the modern vernacular. After all, they couldn't anticipate the hardware devices modern people would use to email with. A message dashed off on a phone while riding the bus or a quick thumbs up reply clearly aren't digital versions of an old-time longhand letter.

Most email is informal and conversational, and over time digital communication has moved beyond email to mediums that are even better suited to the conversation approach. Messaging platforms — whether Apple's iMessage, Facebook's WhatsApp, Google's forthcoming Allo — and chat services like the office communication juggernaut Slack take the informal logic of email as it's actually used and improve upon its functionality.

The idea of "group chat" also conveys, much more accurately than the idea of "electronic mail" ever did, the basic purpose of these services.

The eerie silence of the modern newsroom compared with the din portrayed in *All The President's Men* is a cliché inside our industry. Instead of loud typewriters, modern journalists bang away at relatively quiet laptop keyboards. But a big part of it is that the routine chatter of the workplace has been replaced by a silent cacophony of Slacks and DMs and Gchats — people communicating casually with words and images rather than with voices.

Input disclosure versus output disclosure

One view, of course, is that if email is the new phone call and texting is the new talking, this is simply good news for government transparency. Back in the day, it might have been desirable to record and transcribe every single phone call and every meeting in every government office, but

there was simply no way to make it happen. So sunshine activists mandated archiving and disclosure of what they could mandate — paper, basically — and let voices go unlogged as a concession to reality.

Digital storage is pretty cheap and easy, so maybe the next step in open government is ubiquitous surveillance of public servants paired with open access to the recordings.

As a journalist and an all-around curious person, I can't deny there's something appealing about this.

Historians, too, would surely love to know everything that President Obama and his top aides said to one another regarding budget negotiations with John Boehner rather than needing to rely on secondhand news accounts influenced by the inevitable demands of spin. By the same token, historians surely would wish that there were a complete and accurate record of what was said at the Constitutional Convention in 1787 that, instead, famously operated under a policy of anonymous discussions.

But we should be cautioned by James Madison's opinion that "no Constitution would ever have been adopted by the convention if the debates had been public."

His view, which seems sensible, is that public or recorded debates would have been simply exercises in position-taking rather than deliberation, with each delegate playing to his base back home rather than working toward a deal.

"Had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground," Madison wrote, "whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument."

The example comes to me by way of Cass Sunstein, who formerly held a position as a top regulatory czar in Obama's White House, and who [delivered a fascinating talk on the subject of government transparency](#)³ at a June 2016 Columbia symposium on the occasion of the anniversary of the Freedom of Information Act.

Sunstein asks us to distinguish between disclosure of the government's outputs and disclosure of the government's inputs. Output disclosure is something like the text of the Constitution or when the Obama administration had Medicare change decades of practice and begin publishing information about [what Medicare pays to hospitals and other health providers](#).

Input disclosure would be something like the transcript of the debates at the Constitutional Convention or a detailed record of the arguments inside the Obama administration over whether to release the Medicare data. Sunstein's argument is that it is a mistake to simply conflate the two ideas of disclosure under one broad heading of "transparency" when considerations around the two are very different.

Public officials need to have frank discussions

The fundamental problem with input disclosure is that in addition to serving as a deterrent to misconduct, it serves as a deterrent to frankness and honesty.

³ aiREFORM footnote: archived copy at this [link](#).

There are a lot of things that colleagues might have good reason to say to one another in private that would nonetheless be very damaging if they went viral on Facebook:

- Healthy brainstorming processes often involve tossing out bad or half-baked ideas in order to stimulate thought and elevate better ones.
- A realistic survey of options may require a blunt assessment of the strengths and weaknesses of different members of the team or of outside groups that would be insulting if publicized.
- Policy decisions need to be made with political sustainability in mind, but part of making a politically sustainable policy decision is you don't come out and say you made the decision with politics in mind.
- Someone may want to describe an actual or potential problem in vivid terms to spur action, without wanting to provoke public panic or hysteria through public discussion.
- If a previously embarked-upon course of action isn't working, you may want to quietly change course rather than publicly admit failure.

Journalists are, of course, interested in learning about all such matters. But it's precisely because such things are genuinely interesting that making disclosure inevitable is risky.

Ex post facto disclosure of discussions whose participants didn't realize they would be disclosed would be fascinating and useful. But after a round or two of disclosure, the atmosphere would change. Instead of peeking in on a real decision-making process, you would have every meeting dominated by the question "what will this look like on the home page of Politico?"

Rather than saying what they mean, participants will be saying what they want to be seen as saying. Actual decision-making will take on the flavor of a stage-managed press conference, where ideas are sanitized and no mistakes are confessed. Reality television doesn't capture reality precisely because it's television. The people on the show know they are on TV and they're playing a part. The theory says that sunshine is the best disinfectant, but people also need a dark room to sleep in at night if they're going to function properly.

When email is outlawed, only outlaws will email

Right now, of course, face-to-face meetings and phone calls operate as that dark room where people can deliberate. Which is to say that **instead of excessively harsh transparency, what we have in practice is routine, perfectly legal avoidance of transparency rules.**

Visits to the White House are logged by the Secret Service, and the logs are released to the public. So if someone on the White House staff wants to do a meeting and they don't want it on the logs, he might sit down at the Pete's Coffee on the other side of Pennsylvania Avenue instead. Instead of an email, you do a phone call.

For years, instead of an email from the official government account, you would sometimes get an email from the official's private Gmail (in July 2016, the DC Circuit ruled that [FOIA applies to official use of unofficial email](#), so people will presumably knock it off), but the more risk-averse federal personnel never did it in the first place.

All of which is to say that **in a world of imperfect transparency, the main effect of mandatory transparency is to push people into workarounds.** If you want to do something genuinely scandalous without leaving a record of it, you can almost certainly get away with it. If you want to be able to speak frankly in a non-scandalous manner that would nonetheless be problematic to

see show up splashed out of context on Drudge Report, you need to bear some of the inconvenience of shifting to a verbal communications medium.

As courts continue to scrutinize off-label use of personal communications tools by government officials, and modern digital communications tools continue to worm their way into federal use, the wedge between how normal people communicate and how federal officials communicate will grow.

When disclosure is appropriate, FOIA isn't enough

Even as current transparency measures do too much to force disclosure of public policy inputs, they are curiously inadequate for genuinely useful disclosure.

The FOIA process is grounded in a midcentury technological paradigm that made routine widespread information dissemination impractical.⁴ Information is disclosed on request to the requesting parties — which has turned it into a very slow, highly adversarial process that's primarily useful to people with an ax to grind. But the federal government is simply in possession of a lot of accurate information about what is going on in the United States — information that is broadly useful to have and that the government ought to be routinely publishing.

Of course, with certain topics — the unemployment rate, for example, or the weather forecast — this is longstanding practice. The Obama administration, as Sunstein explains, [has pushed further in this direction in useful ways](#):

Disclosure often helps agencies to achieve some of their most important goals. In environmental policy, one of the most well-known examples is the Environmental Protection Agency's Toxic Release Inventory, which was created largely as a bookkeeping measure, designed to ensure that the federal government would have information about releases of toxic chemicals. To the surprise of many, the TRI has been a successful regulatory approach, because companies did not want to be listed as one of the "dirty dozen" (the worst polluters) in their states.

More recently, the Occupational Safety and Health Administration has taken a similar approach: It posts, very visibly on osha.gov, information about recent deaths in American workplaces, with names of the companies where people died. To say the least, employers do not want their names to appear on that site.

But more could and should be done on this front.

Every agency should see routine publication of what it knows in useful formats as a core function, not a special occasion or something to be done reluctantly at the behest of investigative journalists.

[Erica Groshen](#), the commissioner of the Bureau of Labor Statistics, [points out](#) that in some cases the government isn't even in the habit of sharing information with other parts of the government. Her agency is charged with obtaining and publishing a wide range of statistical information about employment and wages in the United States. It does this largely by relying on surveys that

⁴ [aiREFORM footnote](#): FOIA was updated by Congress, to incorporate digital media such as emails, in 1996. So, while the 1966 version of FOIA was arguably "... grounded in a midcentury technological paradigm...", the version for the past 20-years is not grounded that way at all. The one constant these past 50-years, though, is that many government officials, both elected as well as agency employees, disdain transparency that could reveal and stop corruption or hold them professionally accountable.

ask employers how many people they employ, and individuals about their demographic status and pay.

But other branches of the federal government — the parts that either actually collect taxes or hand out benefits to people — have much more complete and accurate information about who works for whom and what they are paid. But even though the government collects this administrative data, statistical agencies are legally required to rely on less accurate surveys when informing the public. This is a boring, inside-baseball problem worlds removed from journalists' interest in gossipy snooping on official email, but [Groshen argues that it's substantively consequential](#):

Improving access to government administrative data so that statistical agencies could have access to more data to produce more and better official statistics would improve productivity in three ways: reducing burdens on respondents, improving the values of government statistics, and (likely the largest, but hardest to measure) improving the business, policy and personal decisions (allocation, investment, etc.) in the economy.

For fairly obvious reasons, the government can't just publish every single thing it knows about everyone and everything. But the disclosure process could be greatly simplified. Information should either be held back for national security or privacy reasons, or else it should be published routinely. There's no good case for the current massive third status of information that piles up on servers to be coughed up reluctantly in response to an adversarial process.

Effective government beats transparent government

Americans deserve a government that is effective, with agencies that do their jobs properly. Routine disclosure of what, exactly, those agencies are doing is part and parcel of ensuring effectiveness.

But so is allowing leaders and staff of government agencies to use modern and efficient communications tools. When anti-secrecy legislation was adopted in the 1960s,⁵ nobody was suggesting that public officials should never have meetings or talk things over in the hallway. Over time, technology has changed, and normal modern-day people conduct a lot of discussions that in the past would have been verbal using text-based digital communications tools.

Insisting on treating all uses of these tools as if they were the equivalent of an official directive is conceptually mistaken and practically disastrous. It discourages officials from collaborating in the most efficient and effective way, creates incentives for evasion of existing legal standards, blurs the lines between security concerns and compliance with record-keeping laws, and over time casts a pall of impropriety over the very banal desire to be able to talk things over in private.

The desire to know what people are saying — or texting, or emailing, or chatting, or whatever — to each other is irresistible and understandable. If the information is available for disclosure, it

⁵ [aiREFORM footnote](#): It is important to note that what Yglesias is writing here ignores three key points: (1) that his personal view, presented in this article, is pitiful and insignificant next to the careful deliberation by two entire congressional bodies, signed off by past Presidents, to give us the FOIA Laws; (2), that these FOIA Laws aim to achieve transparency objectives debated even in the early 1940s, and codified via the Administrative Procedures Act; and (3) that officials are amply compensated to perform public service and the 50-yr-old FOIA Laws reasonably mandate a high level of transparency while also protecting them from the disclosure of irrelevant private/personal information.

will be disclosed. If it is disclosed, it will be written about. If it is written about, the stories will be read.

But while the press and the public are unquestionably interested in this stuff, it is fundamentally not in the public interest to routinely know about them. Officials who know their dialogue will be fodder for hot takes and cable news segments will either avoid speaking honestly or else shift their conversations to non-disclosable media.

But there is nothing fundamentally wrong with the desire for private conversation — even among public officials. It's simply a reality of the modern world that much private conversation takes place through digitally transmitted text. Outside of the specific context of American politics, nobody thinks these messages should be treated socially or legally as the equivalent of official memos rather than phone calls or oral conversations. It's time to let common sense reign and let government personnel communicate with each other through the medium of their choosing with a presumption of privacy.

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