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30 March 2017

The Honorable Claire McCaskill, Ranking Member  
The Honorable Tom Carper  
Committee on Homeland Security and Governmental Affairs  
United States Senate  
Washington, DC 20510-6250

Dear Senators McCaskill and Carper:

I write in response to your letter of March 7, 2017, regarding concerns over compliance by President Trump's Administration with the Presidential Records Act (PRA) and the Federal Records Act (FRA). Specifically, you asked NARA to respond to five questions. Please see our responses, below:

**Question 1:** Has any staff from the White House or offices within the Executive Office of the President consulted NARA since January 20, 2017 regarding compliance with the Presidential Records Act or the Federal Records Act? If so, has NARA provided any guidance to the White House or the Executive Office of the President? Please provide a copy of any written guidance.

**Answer:** Yes, attorneys with the Office of the Counsel to the President have consulted with NARA officials on a regular basis regarding compliance with the PRA. NARA has provided them with the following written guidance, which is attached to this letter:

- Agenda for February 2, 2017, Briefing on the Presidential Records Act
- Background on the Presidential Records Act
- NARA's Guidance on Presidential Records (2016)
- The Presidential Records Act, 44 U.S.C. Chapter 22
- Proposed Amendments to NARA's Regulation on Presidential Records, 36 C.F.R. Part 1270 (December 28, 2016)

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- Notification Procedures
- Approved Requests for Waiver of Incumbent Presidential Privilege Review
- Approved Requests for Disposal of Incumbent Presidential Records
- NSC Special Access Request Waivers

**Question 2:** Has NARA provided, or been asked to provide, guidance to any federal agency regarding methods to ensure that President Trump's communications made through this [sic] personal smartphone are preserved? If so, please provide a copy of any written guidance and a list of any agencies that have requested such guidance.

**Answer:** No, NARA has not provided or been asked to provide guidance to any “federal agency” regarding methods to ensure that President Trump’s communications made through his personal smartphone are preserved. To the extent that your question was intended to apply to the White House Office or other offices that manage Presidential records, see response to question 1.

**Question 3:** NARA considers President Trump's tweets as presidential records that need to be preserved for historic purposes. Has NARA made a determination of whether the Trump Administration must also preserve altered or deleted tweets? If so, please provide this determination. If not, please indicate when NARA anticipates making such a determination.

**Answer:** No, under the PRA, records management authority is vested in the President, and NARA does not make “determinations” with respect to whether something is or is not a Presidential record. Rather, NARA provides advice and guidance concerning the PRA upon the request of the White House. The January 23, 2017, AP article cited in your question references the reporter’s conversation with a NARA spokesperson to the effect that “presidential tweets, like all electronic communications ‘created or received’ by the president or his staff, are considered presidential records.” NARA has advised the White House that it should capture and preserve all tweets that the President posts in the course of his official duties, including those that are subsequently deleted, as Presidential records, and NARA has been informed by White House officials that they are, in fact, doing so.

**Question 4:** Is NARA aware of any federal agencies or offices within the Executive Office of the President using smartphone apps including, but not limited to, Confide for work related communications? Has NARA provided any guidance to federal agencies or offices within the Executive Office of the President on the use of smartphone apps that do not preserve work-related communications? Please provide a copy of any written guidance.

**Answer:** NARA is aware of press reports suggesting that employees within the Executive Office of the President may be using smartphone apps including, but not limited to, Confide for work related communications. However, NARA has been advised by White House officials that their internal PRA guidance to all employees expressly forbids the use of such apps. Pursuant to our authority under the FRA, NARA issued a memo on March 15, 2017, to all Senior Agency Officials for Records Management that addresses, among other things, “Electronic Messaging

and Encrypted Messages,” and issued earlier guidance on January 27, 2017, on “Records Management of Social Media and Electronic Records,” which is attached:

- Archivist’s Memo to Senior Agency Officials for Records Management on Records Management Priorities for 2017 (March 15, 2017)
- NARA Records Express Blog on Records Management of Social Media and Electronic Records (January 27, 2017)

**Question 5:** Is NARA aware of any government official at federal agencies or offices within the Executive Office of the President who have been instructed to avoid using email as a method of work-related communication for fear of press leaks? Has NARA provided any guidance to any federal agencies or offices within the Executive Office of the President on whether, and under what circumstances, it is appropriate to instruct covered officials to avoid using email for work-related communications, or on how to preserve the content of telephonic or in-person work-related communications? Please provide a copy of any written guidance.

**Answer:** NARA is not aware of any government officials within the Executive Office of the President who have been instructed to avoid using email as a method of work-related communication for fear of press leaks, nor has NARA provided any written guidance specific to the Executive Office of the President regarding the issues raised in this question.

We hope that these responses are helpful to you.

Sincerely,



DAVID S. FERRIERO  
Archivist of the United States

cc: The Honorable Ron Johnson, Chairman

Enc.

## Attachments in Response to Question 1

- Agenda for February 2, 2017, Briefing on the Presidential Records Act
- Background on the Presidential Records Act
- NARA's Guidance on Presidential Records (2016)
- The Presidential Records Act, 44 U.S.C. Chapter 22
- Proposed Amendments to NARA's Regulation on Presidential Records, 36 C.F.R. Part 1270 (December 28, 2016)
- Notification Procedures
- Approved Requests for Waiver of Incumbent Presidential Privilege Review
- Approved Requests for Disposal of Incumbent Presidential Records
- NSC Special Access Request Waivers

## Briefing on the Presidential Records Act (PRA)

February 2, 2017

### NARA Attendees

Gary M. Stern, General Counsel of the National Archives and Records Administration (NARA)  
(301) 837-3026 [garym.stern@nara.gov](mailto:garym.stern@nara.gov)

John Laster, Director of NARA's Presidential Materials Division  
(202) 357-5144 [john.laster@nara.gov](mailto:john.laster@nara.gov)

### Incumbent PRA Issues and Assistance

#### Records Management

*Incumbent President/Counsel solely responsible for managing Presidential records; NARA's role is purely advisory, with the exception of the disposal of incumbent Presidential records.*

- Major focus on Presidential electronic records and new media used by the White House Office that creates Presidential records
  - 2014 Amendments to the PRA – 20 Day Rule for Electronic Messages
- Institutional knowledge on past White House practices and issues
  - Establish Ongoing Archiving System
- Determining records status of commissions
- NARA's more formal role over federal records within the EOP: OMB, OSTP, USTR, CEQ, and ONDCP
  - Need new disposition schedules for FRA email

#### Disposal of Presidential/Vice Presidential records

*In consultation with the Archivist, the incumbent President can seek to dispose of records that do not sufficiently document the constitutional, statutory, official, or ceremonial duties of the incumbent President*

- Requirements for disposal of incumbent Presidential records
- Implementation of disposal agreements, including for "bulk mail" in all formats and certain categories of electronic records

#### Courtesy Storage and Transfer of Incumbent Presidential Records

*NARA provides courtesy storage for Presidential and Vice Presidential records and gifts and artifacts intended to be placed in the future Obama Presidential Library*

- 24/7, one-hour turn-around time for all recalls of records and gifts
- Coordinates courtesy storage with White House Office of Records Management, National Security Council's Records Management staff, the White House Communications Agency, and the White House Gift Office.
- 2014 Amendment re President having exclusive control – 44 U.S.C. 2203(f)

#### NARA Detailees

*NARA funds the Presidential Diarist, who is on detail from the Presidential Materials Division. The agency also provides two members of the National Security Staff's Access Management staff.*

## **Issues and Assistance involving PRA records in NARA's legal custody\***

### **Public Release of Presidential records**

*Per the PRA, the incumbent President has an opportunity to conduct a privilege review of all Presidential records prior to release.*

- Normally 60 working days, plus one 30 day extension
  - Initial six months for new Administration
- Potential notification waivers

### **Access to records not yet publicly available (Special Access Requests)**

*Under the PRA, the incumbent President, Congress, and the Courts can request access to Presidential records*

- Special access requests by incumbent President or other Executive Branch agency must be cleared by White House Counsel before NARA can respond
  - The White House Counsel's Office has authorized the NSC and the President's Intelligence Advisory Board to request records directly from NARA
- Congressional and Judicial special access requests for former PRA records
- Notice goes to a living former President and to White House Counsel and AG/OLC
- Right of the former Presidents to access their papers

And asking the incumbent to waive their privilege review of the stuff that Bush and Obama did – pre Reagan NSC, most of Reagan, Bush 41, and Bush VP

### **Other issues**

**Assertion of PRA Restrictions and Designation of PRA Representatives**

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\* NARA's PRA regulations, at 36 C.F.R. Part 1270, are in the process of being updated in light of the 2014 amendments. The notice of proposed rulemaking was published on December 28, 2017; no comments were received, so it is ready for final publication.

**BACKGROUND ON THE PRESIDENTIAL RECORD ACT**  
*Implementation by the Incumbent President and the National Archives and Records  
Administration (NARA)*

**The Presidential Records Act (PRA) and the incumbent President**

- The Presidential Records Act of 1978, as amended (PRA) permanently changed the tradition of handling Presidential papers, while at the same time incorporating checks and balances for the records of the highest official in the government. As its first order of business, the PRA changed the legal ownership of official Presidential papers from private to public; but it did so prospectively, so that the PRA only applies to the records of Presidents and Vice Presidents who take office starting on January 20, 1981. For this reason, the Presidential historical materials at NARA's Presidential libraries are now governed by three distinct legal instruments: donors' deeds of gift for Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Ford, and Carter; the Presidential Recordings and Materials Preservation Act for Nixon; and the PRA for Reagan, George H.W. Bush, Clinton, George W. Bush, Obama and all subsequent Presidents.
- The PRA defines presidential records as all records generated or received by the president or his staff "in the course of conducting activities which relate to or have an effect upon the carrying out of constitutional, statutory or other official or ceremonial duties of the President." These records are transferred to the Archivist of the United States at the end of the Presidential administration to be placed in a Presidential library run by NARA. In addition, Vice Presidential records are treated in the same manner as Presidential records (except that the Archivist may deposit these records in an approved non-federal facility).
- The PRA places the responsibility for the custody and management of incumbent Presidential records with the President, but only allows for the disposal of incumbent Presidential records after obtaining the written views of the Archivist of the United States.
- An incumbent President also has the authority to invoke six restrictions to public access of his records for a period of 12 years following the end of his administration.
- Finally, the PRA grants an incumbent President the authority to request access to Presidential records of former administrations that are needed for the conduct of on-going business of the incumbent. It also, as codified in section 2208 of the PRA and NARA's regulations, provides an opportunity for the incumbent and former Presidents to conduct a privilege review prior to public release of Presidential records. Additionally, NARA's regulations establish the procedures for the incumbent and former Presidents to review material before it is provided to Congress or the Courts.

## **The Presidential Records Act (PRA) and the National Archives**

- Legal and physical custody of Presidential records transfers to NARA at the end of each Presidential administration and the records are placed in a presidential library run by NARA.
- Once Presidential records are in the legal custody of NARA, trained archivists begin the decades-long process of reviewing these tens of millions of pages of records to determine which ones can be made available to the public. In addition to the six Presidential restrictions a President can choose to invoke, Presidential records are also subject to closure under eight of the nine FOIA exemptions. (The PRA mandates that the FOIA (b)(5) exemption, which allows for the withholding of deliberative and other privileged records, shall not apply to Presidential records.)
  - Four PRA restrictions mirror the FOIA exemptions for classified information, other statutory exemptions, trade secrets, and personal privacy. As such, these PRA restrictions withhold no more information than would be withheld under the identical FOIA exemption.
  - Two PRA restrictions are unique. One of these restrictions applies to information containing “confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers.” This is known as the “confidential advice” or “P5” restriction (and is similar to the FOIA (b)(5) exemption). A second Presidential restriction is for information “relating to appointments to Federal office,” and is known as the “appointments” or “P2” restriction.
- Five years after the end of the presidency, Presidential records are subject to public disclosure through the Freedom of Information Act (FOIA) or through affirmative openings by NARA. NARA can choose to propose to open discrete groups of records before five years, and has done so to make records available for the opening of a Presidential library.
- The PRA mandates that NARA cannot disclose any Presidential record without first providing notice to both the former and incumbent Presidents, through their designated representatives, so that they have the opportunity to review the records in order to decide whether to assert a constitutionally based privilege.





# GUIDANCE ON PRESIDENTIAL RECORDS

from the National Archives and Records Administration



**Front cover image: Pete Souza, Official White House Photo**

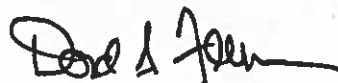
# Letter from the Archivist

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The National Archives and Records Administration (NARA) has long had a special relationship with the incoming Presidential Administration, including providing archival and records management guidance and support to the White House upon request. This relationship continues throughout the Administration, until the Presidential records are transferred into the National Archives for permanent preservation in our President Library system.

As a member of the President's White House staff, you will be creating Presidential records governed by the Presidential Records Act of 1978. The PRA places a number of recordkeeping requirements and responsibilities on the President and his staff for maintaining, preserving, and disposing of Presidential records. The information in this guidance will help you to carry out your day-to-day responsibilities, as well as to correctly fulfill obligations mandated by the PRA and to ensure that posterity has a full documentation of your Presidential Administration. This guidance also illustrates how NARA can assist the President and the White House staff in a variety of ways to fully document this Presidential Administration's unique history.

I would like to welcome you on behalf of NARA as you begin a new Presidential Administration. We hope this guidance serves as a starting point for a long and productive relationship between the National Archives and the White House, and we look forward to working with you.



DAVID S. FERRIERO  
Archivist of the United States

# How the Presidential Records Act Affects the President, Vice President, and White House Staff During the Administration

## Overview

The Presidential Records Act (PRA) of 1978, as amended, 44 U.S.C. §§ 2201-2209, governs the official records of Presidents and Vice Presidents created on or received after January 20, 1981. The PRA changed the legal ownership of the official records of the President from private to public.

The PRA established a new statutory structure under which Presidents must manage their records.

### *The Presidential Records Act:*

- Defines and states public ownership of the records;
- Places the responsibility for the custody and management of incumbent Presidential records with the President;
- Allows the incumbent President to dispose of records that no longer have administrative, historical, informational, or evidentiary value, once he has obtained the written views of the Archivist of the United States on the proposed disposal;
- Requires that the President and his staff take all practical steps to file personal records separately from Presidential records;
- Establishes a process for public access to and restriction of Presidential records. Specifically, the PRA allows for public access to Presidential records, including through the Freedom of Information Act (FOIA), beginning five years after the end of the Administration, but allows the President to invoke as many as six specific restrictions to public access for up to twelve

years. The PRA also establishes procedures for Congress, courts, and subsequent Administrations to obtain “special” access to records that remain closed to the public. (A chart describing these access provisions and restrictions is attached.) The procedures for privilege review by the incumbent and former Presidents are established by the PRA, Executive order 13489 and NARA’s regulations;

- Requires that Vice Presidential records are to be treated in the same way as Presidential records.

### *Presidential records are defined as:*

“documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.” [44 U.S.C. § 2201(2)].

These records can be in any media, including textual, audiovisual, and electronic.

### *Personal records are defined as:*

“documentary materials or any reasonably segregable portion thereof, of a purely private or nonpublic character, which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President” and which include “diaries, journals, or other personal

notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business," "private political associations" and "materials relating exclusively to the President's own election to the office of the Presidency" [44 U.S.C. § 2201(3)].

Personal records remain the personal property of the President or the record creator.

Records created by the President-elect and his transition team are also considered personal records. To the extent that these records are received and used after the inauguration by the incoming Presidential Administration, they may become Presidential or Federal records. Former Presidents have traditionally donated these personal transition records to the National Archives and Records Administration for deposit in their Presidential Library.

### **Who creates Presidential records?**

The PRA applies to records created by components of the Executive Office of the President (EOP) that solely advise and assist the President. These components are not covered by the Federal Records Act. Even within the EOP, some components generate Federal records, while others generate Presidential records. Among the components of the Executive Office of the President that create Presidential records are:

- The White House Office
- The Office of the Vice President
- The Office of Policy Development
- The Council of Economic Advisors
- The National Security Council
- The President's Foreign Intelligence Advisory Board

- The President's Intelligence Oversight Board
- The National Economic Council
- The Office of Administration

Other EOP components generate Federal records that are governed by the Federal Records Act.

Among the EOP offices that generate Federal records are:

- The Office of Management and Budget
- The Office of the United States Trade Representative
- The Council on Environmental Quality
- The Office of Science and Technology Policy
- The Office of National Drug Control Policy

NARA also works with those offices that create Federal records to ensure their proper maintenance and preservation. More information on managing Federal records can be found at NARA's web site [www.archives.gov/records-mgmt](http://www.archives.gov/records-mgmt).

### **Records management requirements**

The Presidential Records Act gives records management authority for incumbent Presidential records to the President, and states that personal records should be kept separate upon their creation or receipt from the Presidential record files [44 U.S.C. § 2203(b)]. The Office of the White House Counsel generally provides PRA policy guidance. Although NARA has limited records management authority over incumbent Presidential records, NARA routinely provides records management guidance based on its institutional knowledge and expertise to the incumbent Administration upon request.

White House staff responsible for maintaining file systems must be trained to keep personal records separate from Presidential records at the point of creation. Once items have been mixed, it becomes

difficult to determine record status. Since the President has the discretion to determine what is personal material, this determination should be made during the incumbent's term of office rather than after the records are transferred to NARA.

#### **Disposal authority**

The PRA states that the incumbent President must obtain the views in writing of the Archivist before disposing of any Presidential records. This authority is routinely used to dispose of the extremely large volumes of public mail that the President and Vice President receive on a daily basis. Under certain circumstances, the Archivist must inform Congress of the proposed disposal. In these cases, the President must wait at least sixty legislative days before disposing of them. After the President's term, the Archivist has authority to dispose of Presidential records, following a public notice and comment period [44 U.S.C. 2203(c)-(f)].

#### **Notice and review before opening or accessing records of former Presidents**

NARA notifies the White House Counsel's Office

of requests for records of former Presidents (1) that are not currently opened to the public or are being requested under one of the categories of exceptions to restrictions provided by the Presidential Records Act ("special access requests") and (2) that are being proposed for opening to the public. NARA also notifies the representatives of the former President and Vice President who created these records.

The notification procedures for public release are found at 44 U.S.C. § 2208 and described in NARA's implementing regulations (36 CFR Part 1270). Notification procedures for special access requests are outlined in Executive Order 13489 and in 36 CFR Part 1270. The purpose of the notification is to give Counsel, on behalf of the incumbent President, the right to assert applicable constitutionally based privileges to prohibit access to or release of Presidential or Vice Presidential records. Although these records were created by a prior President, the incumbent President may believe that it is appropriate to assert Executive Privilege to bar the release of these records.

## **How the National Archives and Records Administration Implements the PRA**

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#### **NARA reviews disposal requests of the incumbent President**

The Archivist must provide his views in writing before the President and Vice President may dispose of any incumbent Presidential records. Because Presidential records document the highest level of activities in the Government, the PRA establishes a presumption that such records will

be preserved permanently for eventual public access. As Presidential records increase in volume across all media and formats, however, certain types of administrative or high-volume records may be appropriate for disposal.

Under the PRA, the Archivist may state that he does not intend to take any action under subsec-

tion (e) of section 2203 [requesting the advice of Congress] or he must "request the advice of [the appropriate House and Senate Committees]... whenever he considers that (1) these particular records may be of special interest to the Congress; or (2) consultation with the Congress regarding the disposal of these particular records is in the public interest." Neither "special interest" nor "public interest" is further defined. There is no public notice or judicial review of an incumbent disposal request by the President.

Presidents Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama, and their Vice Presidents, have used this authority to dispose of incoming bulk mail. Bulk mail is defined as certain categories of routine and high-volume public mail including anonymous correspondence, correspondence with incomplete addresses, mail from prolific writers, and public opinion mail. Bulk mail also includes enclosures in public mail, such as brochures and clippings, when there is no historical importance to the materials. The bulk mail disposal program has been instituted with the assistance of NARA's Presidential Materials Division. Staff sample the mail on a routine basis, and retain a small selected sample for permanent preservation. This program has resulted in the disposal of a large amount of Presidential records that have very little value.

With the tremendous increase in the use of electronic systems to create records, NARA worked collaboratively with the George W. Bush and Obama Administrations to also authorize the disposal of bulk electronic records and certain low-level administrative files. NARA believes that additional disposal authority may be appropriate in other circumstances, including when records may exist in more than one media, or when there

are electronic copies of records that are maintained in either an electronic or paper record-keeping system.

#### **NARA takes legal custody of records at the end of the President's term**

On January 20th at the end of the President's final term, the Presidential records of the Administration are automatically transferred to the legal custody of the Archivist of the United States and the National Archives and Records Administration. The records are eventually housed in a Presidential Library maintained by NARA. The National Archives and Records Administration preserves, reviews, arranges, describes, and makes available these records in its role as legal custodian.

#### **NARA notifies current and former Presidents of both requests for and proposed disclosure of records of former Presidents**

NARA is responsible for providing notice to the incumbent and former Presidents before any outside access to the former President's records can be provided. NARA also provides a copy of the notice to the Office of Legal Counsel in the Department of Justice. The procedures for privilege review by the incumbent and former Presidents are established by 44 U.S.C. § 2208, Executive order 13489 and NARA's regulations.

#### **NARA disposes of Presidential records after the end of the Administration**

44 U.S.C. 2203(f)(3) authorizes the Archivist of the United States to dispose of those records which he has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value, following publication of a notice of the proposed disposal in the *Federal Register*. This action is subject to judicial review.



## **■ Critical Steps for the Incoming President and Administration**

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### **Provide a briefing for White House staff members on their responsibilities under the PRA**

At the start of a new Administration, NARA recommends that White House Counsel provide the President's staff with guidance on the Presidential Records Act and its applicability to everyday work. Previous Presidential Administrations have provided this type of guidance and it has proved to be very helpful. NARA is able to assist with the drafting of this guidance and can assist with any briefings as well. Such briefings should include a summary of PRA requirements, an outline of the types of records covered by the Act, a listing of units in the EOP covered by the Act, instructions for maintaining Presidential records, and guidance for departing staff members.

### **Designate the President's and Vice President's personal representatives in case of death or disability**

44 U.S.C. § 2204 (d) states that "upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist." Unless the President designates a representative, any authority with regard to the President's or former President's records would be exercised by the Archivist of the United States in the event of the President's death or disability. This also applies to the Vice President. Former Presidents and Vice Presidents have usually des-

ignated their representatives within the first year of their Administrations. NARA recommends that the President and Vice President designate their representative or representatives as early as possible at the beginning of the Administration. The representatives can play a valuable role in interacting with NARA on a variety of records issues during the Administration. After the end of the Administration, these representatives serve as liaisons with NARA in reviewing access requests and public openings. (A sample letter designating representatives is attached.)

### **Consider whether to apply the PRA restrictive categories**

It is important that the President consider and decide whether to apply the six restrictive categories of the Presidential Records Act early in the Administration, because this action must be taken before the end of the Administration. ("Prior to the conclusion of a President's term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record" [44 U.S.C. § 2204(a)]. The Vice President must also apply these restrictions before the conclusion of the term of office. These restrictions expire twelve years after the President leaves office. NARA recommends that the President and Vice President consider the Presidential restrictions and decide whether they need to invoke these additional restrictions in addition to the eight applicable FOIA exemptions (the PRA specifically exempts Presidential records from FOIA exemption (b)(5)).



If the decision is made to apply these restrictions, we recommend that the President and Vice President invoke them as soon as possible at the beginning of the Administration to avoid any confusion at the close of the Administration. (A sample letter applying these restrictions is attached.) NARA can work with the President and Vice President to ease these restrictions later in the term or after they leave office.

**Designate a White House Counsel attorney to serve as contact with NARA on all PRA issues, including access requests to NARA for Presidential records of former Presidents**

Because the Administration faces an ongoing array of PRA issues, it is essential for NARA to have a primary point of contact in the White House Counsel's Office as soon as possible. This is particularly important for responding to special access requests that NARA receives from Congress and the Courts for the Presidential records of former Presidents. The Clinton, George W. Bush, and Obama Administrations have followed this approach to good effect. NARA can provide training and guidance to such counsel on all requirements of the PRA.

**Involve NARA at design stage of electronic records systems to ensure that records management and transition issues are addressed**

The vast and growing use of electronic systems to create and manage Presidential records requires special attention. Because so many of the most important policy records may exist only in electronic form, it is imperative that these records be identified, maintained, and protected from loss or change. Most of these systems will have to be transferred to NARA at the end of the Administration so that the records can be preserved

and accessed. Accordingly, it is essential that records management requirements are designed directly into such systems from the very beginning, particularly when using proprietary systems, which can include capabilities to archive in place in coordination with NARA. This will help avoid complicated and expensive problems that can occur in transferring these records into NARA's archival systems at the end of a Presidential Administration.

NARA has significant expertise in the development and management of electronic records systems and strongly encourages the White House to include NARA in the development and maintenance of these systems. NARA looks forward to continuing to work closely with the White House, including the White House Office of Records Management and the Office of Administration, in developing ways to recognize, preserve, and manage electronic records at the earliest point in the new Administration.

**Establish separate files for personal records**

Personal documents and files should be identified by the records creator and filed separately from those containing Presidential records. Clearly defined filing systems will ensure that questions concerning record status do not arise.

**Send forward a request for the disposal of routine, high-volume Presidential records, such as bulk mail (including bulk email)**

NARA strongly encourages the new Administration to send forward a request to establish authority for the routine disposal of certain high-volume Presidential records, such as those that meet the definition of bulk mail in both textual and electronic formats.

## **How the National Archives and Records Administration Assists the White House**

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NARA has had a special relationship with Presidents and their staffs since the agency's establishment in 1934. NARA provides a variety of archival and records management assistance to the President, First Lady, Vice President and their staffs. This special relationship has included the following services:

### **Providing, at White House request, archival and records management guidance on Presidential records and the requirements of the Presidential Records Act, personal papers and gifts**

NARA has long played an important role in providing archival and records management guidance to the White House staff upon request. This role has increased dramatically since the passage of the Presidential Records Act. In the Carter, Reagan, and George H.W. Bush Presidential Administrations, NARA had an office in the White House, or a NARA White House liaison based in the White House. This archival function is now performed by NARA's Presidential Materials Division in coordination with other offices in NARA.

In recent Administrations, guidance and requests dealing with Presidential records that have legal implications have been coordinated through the White House Counsel's Office. For requests from White House Counsel's Office, NARA's General Counsel and Presidential Materials Division work jointly with the White House Counsel staff on these requests.

### **Providing courtesy storage for incumbent**

**Presidential and Vice Presidential records and gifts**  
The records, gifts, and historical materials of the President and Vice President are held on courtesy storage by NARA. These records are in the physical custody of NARA, while the White House maintains legal custody. The Presidential Materials Division provides reference service and, upon request, quickly returns these records back to the White House. These records, gifts, and historical materials are made available only to the incumbent Administration as requested for reference. Unless designated as open, boxes of textual records in courtesy storage remain sealed while in NARA custody. No archival processing takes place, and no one but designated Administration personnel can see the material. In 2014, the PRA was amended to make clear that when NARA provides courtesy storage to records, including in digital and electronic form, the President remains exclusively responsible for custody, control, and access to such Presidential records [44 U.S.C. § 2203(f)].

### **Providing guidance and approving schedules for Executive Office of the President staff who create Federal records**

Several of the units of the EOP are considered to be Federal agencies, which create Federal records. NARA's Chief Records Officer and General Counsel work in cooperation with the Office of Administration and with records officers and program staff in these units to provide records management guidance, training for staff, targeted assistance with particularly difficult recordkeeping problems or issues, and the review of records retention schedules.

**Assisting in planning for and later managing the Presidential Library**

Throughout the Presidential Administration, NARA provides guidance on planning for the Presidential Library and the selection of the Library site. The point of contact on any Library issues is the Director of the Office of Presidential Libraries. Traditionally, as the Administration draws to a close, NARA identifies appropriate space to temporarily house materials until the permanent Library is built.

**Planning and executing the move of Presidential materials at the end of the Administration to a location close to where the President will build the Presidential Library**

NARA is responsible for the planning and moving of all Presidential records and gifts, and any personal papers that are planned for donation to the government. NARA ensures physical and intellectual control over the records during their move from the White House complex to a NARA facility. On January 20th, NARA assumes legal custody of the Presidential records and gifts. NARA staffs and operates the temporary facility and later the Library.

**Maintaining the Presidential Diary by providing the Presidential Diarist**

The Presidential Diary, similar in nature to a daily log, is a chronological record of the President's movements, phone calls, trips, briefings, meetings, and activities. The Diarist compiles information from a wide array of Presidential records, manages the paper record and a computer database system, and assists the incumbent Administration with information requests regarding the official schedule of the President. Traditionally, the Diarist is based in the Office of Scheduling and Advance and works with Oval

Office Operations. This organizational structure assists the Diarist in receiving the most complete scheduling information. As a NARA employee, the Diarist position is non-political in nature and the work is non-interpretive. The Diarist's objectivity and non-partisanship is an important factor in maintaining consistency, completeness, and accuracy of the record.

**Editing and publishing the Daily Compilation of Presidential Documents and the Public Papers of the Presidents**

NARA's Office of the Federal Register produces the Daily Compilation of Presidential Documents, a non-political, publicly available, daily journal of the public actions and words of the President, for use by Administration officials, Members of Congress, journalists, and others interested in the contemporary Presidency. The publication contains the public messages, statements, and remarks of the President. Operating under the auspices of the Staff Secretary, the Federal Register editors work with the Staff Secretary and the Office of the Press Secretary to collect the full range of the President's public documents, and then edit and publish the materials, verifying spoken materials against audio tapes provided by the White House Communications Agency and written material against signed originals from the Executive Clerk. The Public Papers of the Presidents, which are based on the Daily Compilation of Presidential Documents, serve as the major historical documentary source on the public record of the President. Volumes are currently published approximately twice a year, and each volume covers approximately a six-month period.

The Daily Compilation is an online only publication. The Public Papers of the Presidents is available both in print and online.

## Attachments: Presidential Records Act of 1978, 44 U.S.C. 2201-2209

### How Do Its Access Provisions Work? How Does It Intersect With FOIA?

Incumbent President	President Leaves Office	Years 1 to 5	Years 5 to 12	After 12 Years
<p>Specifies up to 6 restriction categories</p> <p>Specifies duration of restrictions, up to 12 years after term (s) end</p> <p>During incumbency, no right of public access</p> <p>President to segregate Presidential from personal records</p> <p>Same provisions for Vice Presidential records</p>	<p>Presidential records transfer to legal custody of the Archivist of the U.S.</p> <p>Archivist responsible for custody, control, preservation and access</p> <p>Archivist has "affirmative duty" to make records available to public "as rapidly and completely as possible"</p>	<p>Presidential records, even unrestricted, are exempt from FOIA access until earlier of:</p> <ul style="list-style-type: none"> <li>· 5 years after Archivist takes custody or</li> <li>· Archivist completes processing</li> </ul> <p>Only access is "special access": Congress, judicial process, or incumbent President ("current business")</p>	<p>Access through FOIA</p> <p>Both PRA restrictions and FOIA exemptions apply</p> <p>Archivist determines PRA restrictions in consultation w/ former President</p> <p>No judicial review of PRA restrictions</p> <p>All disclosures: prior notice to current and former President</p>	<p>Access through FOIA</p> <p>Only FOIA exemptions apply</p> <p>But FOIA Ex. (b)5 is "not available" to withhold Presidential records</p> <p>All other provisions of FOIA apply</p> <p>All disclosures: prior notice to current and former President</p>

**PRA restriction categories [44 U.S.C. § 2204(a)]:**

1. National security information properly classified under Executive Order [FOIA Ex. 1]
2. Information relating to appointments to Federal Office
3. Exempted from disclosure by statute [FOIA Ex. 3]
4. Trade secrets and confidential business information [FOIA Ex. 4]
5. Confidential communications requesting or submitting advice, between the President and his advisors or between such advisors
6. Information which if disclosed would cause a clearly unwarranted invasion of personal privacy [FOIA Ex. 6]

**SAMPLE LETTER ASSERTING PRA RESTRICTIONS**

January 21, 2017

Dear Mr. Ferriero:

Pursuant to the provisions of the Presidential Records Act of 1978, 44 USC 2204(a), I specify [can specify all six Presidential restriction categories for a maximum of twelve (12) years] for which the Act permits me to apply to the official records of my tenure as President of the United States.

Under the conditions set forth in section 2204(d) of the Act, as well as 36 C.F.R. 1270.20 implementing the Act, I hereby designate XXX and XXX as my representatives with authority to exercise all discretion or authority granted to me under the Act upon my death or disability.

Sincerely,

**PRESIDENT OF THE UNITED STATES**

The Honorable David S. Ferriero

Archivist of the United States

Washington, DC 20408

**SAMPLE LETTER DESIGNATING PRA REPRESENTATIVE**

January 21, 2017

Dear Mr. Ferriero:

Under the conditions set forth in Section 2204(d) of the Presidential Records Act of 1978, as well as Section 1270.20 of the regulations implementing that Act (36 C.F.R. 1270.20), I hereby designate the following individuals to be my representatives with authority with respect to all my Presidential records:

[Specified individual or individuals]

Sincerely,

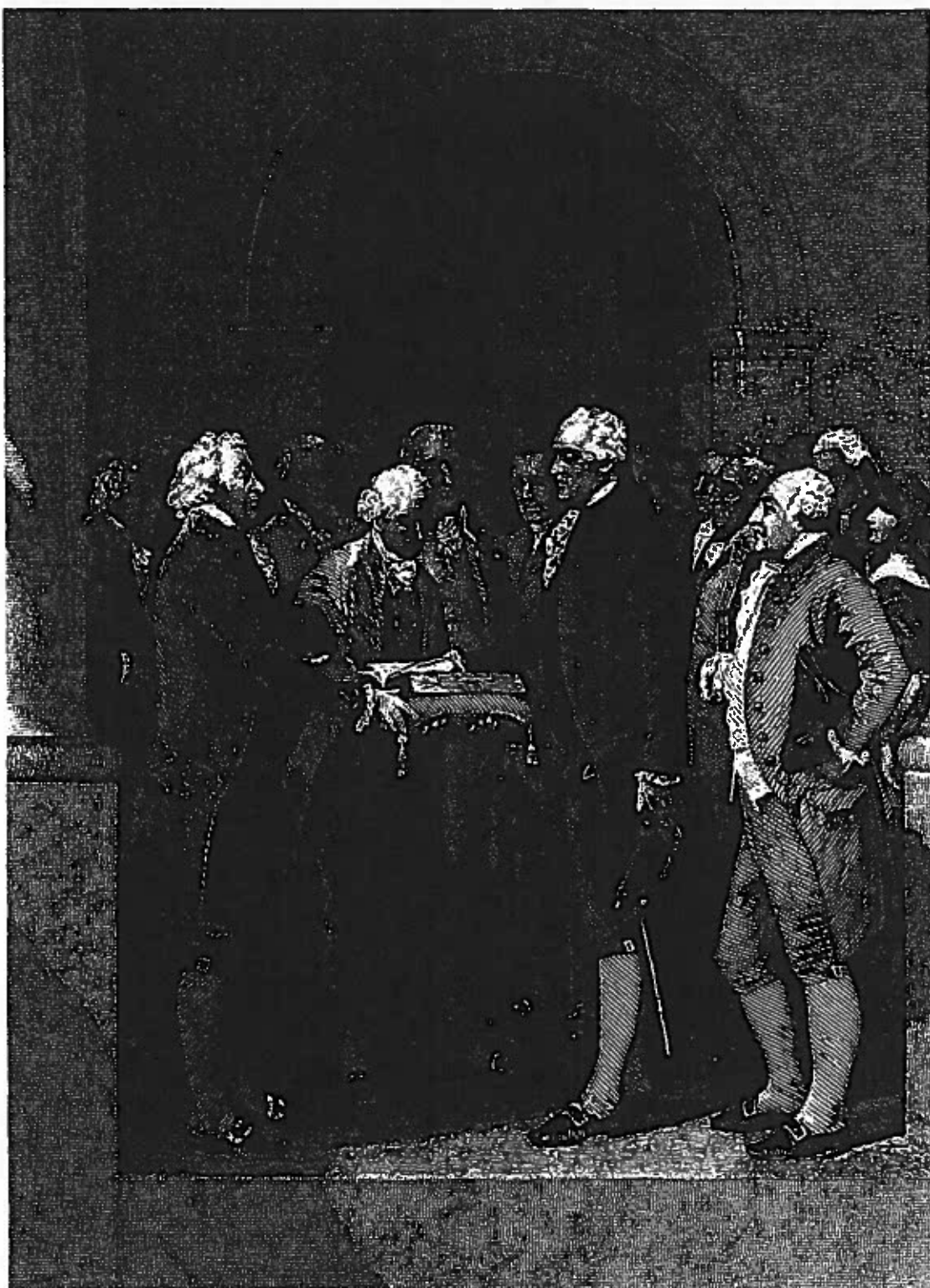
**PRESIDENT OF THE UNITED STATES**

The Honorable David S. Ferriero

Archivist of the United States

Washington, DC 20408







[www.archives.gov](http://www.archives.gov)





# Presidential Records (44 U.S.C. Chapter 22)

*(44 U.S.C. Chapter 22)*

§ 2201. Definitions

§ 2202. Ownership of Presidential records

§ 2203. Management and custody of Presidential records

§ 2204. Restrictions on access to Presidential records

§ 2205. Exceptions to restricted access

§ 2206. Regulations

§ 2207. Vice-Presidential records

§ Note. Rule of Construction

§ 2208. Claims of constitutionally based privilege against disclosure

§ 2209. Disclosure requirement for official business conducted using non-official electronic messaging accounts

## **§ 2201. Definitions**

As used in this chapter--

(1) The term "documentary material" means all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio and visual records, or other electronic or mechanical recordings, whether in analog, digital, or any other form.

(2) The term "Presidential records" means documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term--

(A) includes any documentary materials relating to the political activities of the President or members of the President's staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) of title 5, United States Code; (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

(3) The term "personal records" means all documentary materials, or any reasonably segregable portion thereof, of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term includes--

(A) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;

(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

(C) materials relating exclusively to the President's own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

(4) The term "Archivist" means the Archivist of the United States.

(5) The term "former President", when used with respect to Presidential records, means the former President during whose term or terms of office such Presidential records were created.

### **§ 2202. Ownership of Presidential records**

The United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.

### **§ 2203. Management and custody of Presidential records**

(a) Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records pursuant to the requirements of this section and other provisions of law.

(b) Documentary materials produced or received by the President, the President's staff, or units or individuals in the Executive Office of the President the function of which is to advise or assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

(c) During the President's term of office, the President may dispose of those Presidential records of such President that no longer have administrative, historical, informational, or evidentiary value if--

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that the Archivist does not intend to take any action under subsection (e) of this section.

(d) In the event the Archivist notifies the President under subsection (c) that the Archivist does intend to take action under subsection (e), the President may dispose of such Presidential records if copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

(e) The Archivist shall request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Oversight and the Committee on Government Operations of the House of Representatives with respect to any proposed disposal of Presidential records whenever the Archivist considers that--

(1) these particular records may be of special interest to the Congress; or

(2) consultation with the Congress regarding the disposal of these particular records is in the public interest.

(f) During a President's term of office, the Archivist may maintain and preserve Presidential records on behalf of the President, including records in digital or electronic form. The President shall remain exclusively responsible for custody, control and access to such Presidential records. The Archivist may not disclose any such records, except under direction of the President, until the conclusion of a President's term of office, if a President serves consecutive terms upon the conclusion of the last term, or such other period provided for under section 2204 of this title.

(g)(1) Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential

records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this chapter.

(2) The Archivist shall deposit all such Presidential records in a Presidential archival depository or another archival facility operated by the United States. The Archivist is authorized to designate, after consultation with the former President, a director at each depository or facility, who shall be responsible for the care and preservation of such records.

(3) The Archivist is authorized to dispose of such Presidential records which the Archivist has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States Code.

#### **§ 2204. Restrictions on access to Presidential records**

(a) Prior to the conclusion of a President's term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record, within one or more of the following categories:

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) in fact properly classified pursuant to such Executive order;

(2) relating to appointments to Federal office;

(3) specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code), provided that such statute

(A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or

(B) establishes particular criteria for withholding or refers to particular types of material to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) confidential communications requesting or submitting advice, between the President and the President's advisers, or between such advisers; or

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(b)(1) Any Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of--

(A)(i) the date on which the former President waives the restriction on disclosure of such record, or

(ii) the expiration of the duration specified under subsection (a) for the category of information on the basis of which access to such record has been restricted; or

(B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in the public domain through publication by the former President, or the President's agents.

(2) Any such record which does not contain information within a category restricted by the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall be exempt from the provisions of subsection (c) until the earlier of--

(A) the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(d)(1) [sic: should reference 2203(g)(1)]; or

(B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof.

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in his discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or the Archivist's designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

(c)(1) Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of

withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. Access to such records shall be granted on nondiscriminatory terms.

(2) Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.

(d) Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter, except section 2208, shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist.

(e) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

(f) The Archivist shall not make available any original Presidential records to any individual claiming access to any Presidential record as a designated representative under section 2205(3) of this title if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.

#### **§ 2205. Exceptions to restricted access**

Notwithstanding any restrictions on access imposed pursuant to sections 2204 and 2208--

(1) the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to Presidential records in the custody of the Archivist;

(2) subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available--

(A) pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(B) to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not otherwise available; and

(C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available; and

(3) the Presidential records of a former President shall be available to such former President or the former President's designated representative.

#### **§ 2206. Regulations**

The Archivist shall promulgate in accordance with section 553 of title 5, United States Code, regulations necessary to carry out the provisions of this chapter. Such regulations shall include-

- (1) provisions for advance public notice and description of any Presidential records scheduled for disposal pursuant to section 2203(f)(3);
- (2) provisions for providing notice to the former President when materials to which access would otherwise be restricted pursuant to section 2204(a) are to be made available in accordance with section 2205(2);
- (3) provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have; and
- (4) provisions for establishing procedures for consultation between the Archivist and appropriate Federal agencies regarding materials which may be subject to section 552(b)(7) of title 5, United States Code.

#### **§ 2207. Vice-Presidential records**

Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records. The duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of the President under this chapter, except Section 2208, with respect to Presidential records. The authority of the Archivist with respect to Vice-Presidential records shall be the same as the authority of the Archivist under this chapter with respect to Presidential records, except that the Archivist may, when the Archivist determines that it is in the public interest, enter into an agreement for the deposit of Vice-Presidential records in a non-Federal archival depository. Nothing in this chapter shall be construed to authorize the establishment of separate archival depositories for such Vice-Presidential records.

#### **§ Note. Rule of Construction**

Nothing in the amendment made by paragraph (2)(C) [amending section 2207] shall be construed to—

- (A) affect the requirement of section 2207 of title 44, United States Code, that Vice Presidential records shall be subject to chapter 22 of that title in the same manner as Presidential records; or
- (B) affect any claim of constitutionally based privilege by a President or former President with respect to a Vice Presidential record.

#### **§ 2208. Claims of constitutionally based privilege against disclosure**

(a)(1) When the Archivist determines under this chapter to make available to the public any Presidential record that has not previously been made available to the public, the Archivist shall—

(A) promptly provide notice of such determination to—

- (i) the former President during whose term of office the record was created; and
- (ii) the incumbent President; and

(B) make the notice available to the public.

(2) The notice under paragraph (1)—

(A) shall be in writing; and

(B) shall include such information as may be prescribed in regulations issued by the Archivist.

(3)(A) Upon the expiration of the 60-day period (excepting Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist provides notice under paragraph (1) (A), the Archivist shall make available to the public the Presidential record covered by the notice, except any record (or reasonably segregable part of a record) with respect to which the Archivist receives from a former President or the incumbent President notification of a claim of constitutionally based privilege against disclosure under subsection (b).

(B) A former President or the incumbent President may extend the period under subparagraph (A) once for not more than 30 additional days (excepting Saturdays, Sundays, and legal public holidays) by filing with the Archivist a statement that such an extension is necessary to allow an adequate review of the record.

(C) Notwithstanding subparagraphs (A) and (B), if the 60-day period under subparagraph (A), or any extension of that period under subparagraph (B), would otherwise expire during the 6-month period after the incumbent President first takes office, then that 60-day period or extension, respectively, shall expire at the end of that 6-month period.

(b)(1) For purposes of this section, the decision to assert any claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) must be made personally by a former President or the incumbent President, as applicable.

(2) A former President or the incumbent President shall notify the Archivist, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate of a privilege claim under paragraph (1) on the same day that the claim is asserted under such paragraph.



(c)(1) If a claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) is asserted under subsection (b) by a former President, the Archivist shall consult with the incumbent President, as soon as practicable during the period specified in paragraph (2)(A), to determine whether the incumbent President will uphold the claim asserted by the former President.

(2)(A) Not later than the end of the 30-day period beginning on the date of which the Archivist receives notification from a former President on the assertion of a claim of constitutionally based privilege against disclosure, the Archivist shall provide notice to the former President and the public of the decision of the incumbent President under paragraph (1) regarding the claim.

(B) If the incumbent President upholds the claim of privilege asserted by the former President, the Archivist shall not make the Presidential record (or reasonably segregable part of a record) subject to the claim publicly available unless.

(i) the incumbent President withdraws the decision upholding the claim of privilege asserted by the former President; or

(ii) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(C) If the incumbent President determines not to uphold the claim of privilege asserted by the former President, or fails to make the determination under paragraph (1) before the end of the period specified in subparagraph (A), the Archivist shall release the Presidential record subject to the claim at the end of the 90-day period beginning on the date on which the Archivist received notification of the claim, unless otherwise directed by a court order in an action initiated by the former President under section 2204(e) of this title or by a court order in another action in any Federal court.

(d) The Archivist shall not make publicly available a Presidential record (or reasonably segregable part of a record) that is subject to a privilege claim asserted by the incumbent President unless—

(1) the incumbent President withdraws the privilege claim; or

(2) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(e) The Archivist shall adjust any otherwise applicable time period under this section as necessary to comply with the return date of any congressional subpoena, judicial subpoena, or judicial process.

### **§ 2209. Disclosure requirements for official business conducted using non-official electronic messaging accounts**

(a) In General- The President, the Vice President, or a covered employee may not create or send a Presidential or Vice Presidential record using a non-official electronic message account unless the President, Vice President, or covered employee--

(1) copies an official electronic messaging account of the President, Vice President, or covered employee in the original creation or transmission of the Presidential record or Vice Presidential record; or

(2) forwards a complete copy of the Presidential or Vice Presidential record to an official electronic messaging account of the President, Vice President, or covered employee not later than 20 days after the original creation or transmission of the Presidential or Vice Presidential record.

(b) Adverse Actions- The intentional violation of subsection (a) by a covered employee (including any rules, regulations, or other implementing guidelines), as determined by the appropriate supervisor, shall be a basis for disciplinary action in accordance with subchapter I, II, or V of chapter 75 of title 5, as the case may be.

(c) Definitions.—In this section:

(1) COVERED EMPLOYEE- The term 'covered employee' means--

(A) the immediate staff of the President;

(B) the immediate staff of the Vice President;

(C) a unit or individual of the Executive Office of the President whose function is to advise and assist the President; and

(D) a unit or individual of the Office of the Vice President whose function is to advise and assist the Vice President.

(2) ELECTRONIC MESSAGES.—The term 'electronic messages' means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.

(3) ELECTRONIC MESSAGING ACCOUNT.—The term 'electronic messaging account' means any account that sends electronic messages.

**The U.S. National Archives and Records Administration**

1-86-NARA-NARA or 1-866-272-6272

determination of the amount of the United States property treated as held by a controlled foreign corporation (CFC) through a partnership.

**DATES:** Written or electronic comments and request for a public hearing are still being accepted and must be received by February 1, 2017.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-114734-16), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-114734-16), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-114734-16).

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Rose E. Jenkins, (202) 317-6934; concerning submissions of comments or request for a public hearing, Regina Johnson, (202) 317-6901 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

The notice of proposed rulemaking (REG-114734-16) that is the subject of this document is under sections 954 and 956 of the Internal Revenue Code.

**Need for Correction**

As published, the notice of proposed rulemaking (REG-114734-16) contains errors that may prove to be misleading and are in need of clarification.

**Correction of Publication**

Accordingly, the notice of proposed rulemaking, (REG-114734-16), that was the subject of FR Doc. 2016-26424, is corrected as follows:

- 1. On page 76543, first column, in the preamble, the sixth line from the top of the page, the language, "property that does not have a principal" is corrected to read "property that is respected for Federal income tax purposes under section 704(b) and the regulations thereunder and does not have a principal".
- § 1.956-4 [Corrected]
- 2. On page 76543, third column, third line from the bottom of paragraph (b)(2)(ii), the language "allocation does not have a principal" is corrected to read "allocation will be respected for Federal income tax purposes under section 704(b) and the regulations

thereunder and does not have a principal".

Martin V. Franks,  
Chief, Publications and Regulations Branch,  
Legal Processing Division, Associate Chief  
Counsel, (Procedure and Administration).  
[FR Doc. 2016-31358 Filed 12-27-16; 8:45 am]  
BILLING CODE 4830-01-P

**NATIONAL ARCHIVES AND RECORDS ADMINISTRATION**

**36 CFR Part 1270**

[FDMS No. NARA-16-0005; NARA-2017-011]

RIN 3095-AB87

**Presidential Records**

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to revise this regulation to reflect changes instituted by the Presidential and Federal Records Acts Amendments of 2014 (2014 Amendments). These Amendments in part added new requirements to the Presidential Records Act (PRA), which went into effect in 2014 and remain in effect, even without this proposed regulatory revision. The proposed changes make clear that, when we maintain electronic Presidential records on behalf of the President before the President's term of office expires, the President retains exclusive control over the records. In addition, the proposed changes establish procedures that we will follow to notify an incumbent President and former President when we propose to disclose Presidential records to the public, Congress, the courts, or the incumbent President under the provisions of the PRA allowing for access to Presidential records otherwise subject to restrictions. We began the regulatory revision process in response to the 2014 Amendments and issue this updated regulation to reduce confusion about access to Presidential records in light of these recent changes in the law.

**DATES:** Submit comments by January 27, 2017.

**ADDRESSES:** You may submit comments, identified by RIN 3095-AB87, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* [Regulation\\_comments@nara.gov](mailto:Regulation_comments@nara.gov). Include RIN 3095-AB87 in the subject line of the message.
- *Mail* (for paper, disk, or CD-ROM submissions). Include RIN 3095-AB87

on the submission): Regulations Comments Desk (External Policy Program, Strategy and Performance Division (SP)); Suite 4100; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740-6001

- *Hand delivery or courier:* Deliver comments to the front desk at the address above.

*Instructions:* You must include on all submissions the Regulatory Information Number (RIN) for this rulemaking (RIN 3095-AB87) and NARA's name. We may publish any comments we receive without changes, including any personal information you provide.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Keravuori, by email at [regulation\\_comments@nara.gov](mailto:regulation_comments@nara.gov), or by telephone at 301-837-3151.

**SUPPLEMENTARY INFORMATION:**

**Background**

We are revising our regulations governing Presidential and Vice Presidential records to incorporate changes made by the Amendments and Federal Records Act Amendments of 2014, ("2014 Amendments," Pub. L. 113-187, 128 Stat. 1017).

The 2014 Amendments made several changes to the Presidential Records Act (44 U.S.C. 2201-2209). The most substantial change was codifying the procedures by which we notify former and incumbent Presidents so that they may consider whether to restrict public access to Presidential records of former Presidents that are in our legal custody. This privilege review process was previously controlled by an Executive Order, subject to change by any sitting administration. Because Congress codified the privilege review process for public disclosures in the 2014 Amendments, we are revising the regulation to set out processes for giving notice in such cases, and for former or incumbent Presidents to consider whether to assert a constitutionally based privilege.

The 2014 Amendments did not codify the provisions of the Executive Order allowing for notification to the former and incumbent President when Congress, the courts, or the incumbent President (instead of the public) makes the request for records subject to access restrictions. To ensure that the former and incumbent Presidents are given notice and an opportunity to consider whether to assert a constitutionally based privilege in those circumstances as well, we are revising our regulation to set out procedures we follow prior to disclosing records under the PRA's exceptions to restricted access, which

are similar to the procedures we follow when we propose to make disclosures to the public.

The 2014 Amendments also authorized an incumbent President to transfer physical custody of their permanent electronic Presidential records to NARA, while leaving legal custody with the President, and some other more minor changes. We are therefore also revising the regulation to reflect these changes (the regulatory changes are identified in more detail below).

We are also making a small revision to the regulation to be consistent with 2016 amendments to the Freedom of Information Act, and are revising the wording and organization of the regulation to make it easier to follow, in compliance with provisions of the Plain Writing Act of 2010.

#### Substantive Changes in the Regulation

##### Subpart A

§ 1270.1, Scope: Removed "Nothing in these regulations is intended to govern procedures for assertion of, or response to, any constitutionally based privilege which may be available to an incumbent or former President." The 2014 Amendments at 44 U.S.C. 2208 now include the President's authority to assert a constitutionally based privilege and those provisions have been added to this regulation.

§ 1270.2, Application: Removed "These regulations apply to all Presidential records created during a term of office of the President beginning on or after January 20, 1981." This is already included elsewhere in the regulation and thus was redundant.

Changed from stating that all provisions in the regulation apply to the Vice President and Vice Presidential records, to stating that all provisions except §§ 1270.46 and 1270.48 apply to the Vice President as to the President, because those sections have now been revised due to the 2014 Amendments at 44 U.S.C. 2208 to cover only Presidential authorities.

§ 1270.4, Definitions: Removed "documentary material, personal records, President, Presidential archival depository, Vice Presidential records, filed" definitions because they are terms not used in the regulation any longer or the definitions were identical to the statute and not needed.

##### Subpart B

Changed the title of the subpart from "Handling Presidential records upon death or disability" to "Custody and control of Presidential records" and revised the subpart to add a provision

on "Presidential records in the Archivist's physical custody" (§ 1270.20), because the President may request that the Archivist maintain physical custody of Presidential records (now, under the 2014 Amendments at 44 U.S.C. 2203(f), also including electronic records) during the President's term of office. However, the President remains responsible for control and access to these records until the end of the President's term of office.

##### Subpart C

§ 1270.32, Disposal of Presidential records in the Archivist's custody: Revised to require a preliminary notice of proposed disposal with a 45-day public comment period, in addition to the final notice published 60 days prior to the disposal, as established in the 2014 Amendments at 44 U.S.C. 2203(g)(3).

##### Subpart D

Added § 1270.38 to clarify when public access to Presidential records may occur based on requirements in 44 U.S.C. 2204, to make it easier for readers to understand the context in which the subsequent sections on restricting access occur.

§ 1270.42(b), Appealing restricted access: Expanded the time in which a person denied access due to a Presidential restriction may file an appeal, from 35 days after receiving NARA's denial letter to 90 days, to be consistent with the 2016 Amendments to the Freedom of Information Act, at 5 U.S.C. 552(a)(6)(i)(III)(aa).

§ 1270.44, Exceptions to restricted access: Under the 2014 Amendments at 44 U.S.C. 2204(f), added a provision at (a)(4) that the Archivist will not release original Presidential records to a President's designated representative who has been convicted of a crime that involves misuse or misappropriation of NARA records.

Added provisions at (d) through (g) allowing for notification of a request for records to the former and incumbent President so that they may consider whether to assert a constitutionally based privilege. These provisions are similar to new section 1270.48, which, in accord with the 2014 Amendments at 44 U.S.C. 2208, covers releasing records to the public and claiming privilege against disclosure.

§ 1270.46, Notice of intent to disclose Presidential records to the public: In accord with the 2014 Amendments at 44 U.S.C. 2208(2)(B), added detail in subsection (b) about what will be included in the notice to the public (such as the NARA case number and the end date of the 60-day working period

set out in § 1270.48 for the President to assert a constitutional privilege).

§ 1270.48, Releasing records to the public and claiming privilege against disclosure: Revised to include procedures, now codified in the 2014 Amendments, by which Presidents may restrict public access to Presidential records of former Presidents that are in NARA's legal custody through a constitutionally based privilege against disclosure. This new section parallels new provisions in 44 U.S.C. 2208, including a 60-day notice period in which a President may assert a constitutionally based claim of privilege against disclosure.

The regulation has also been revised throughout with non-substantive edits and reorganization to incorporate Plain Writing Act practices and make it clearer and easier to read.

#### Regulatory Analysis

##### Review Under Executive Orders 12866 and 13563

Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (September 30, 1993), and Executive Order 13563, Improving Regulation and Regulatory Review, 76 FR 23821 (January 18, 2011), direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). This proposed rule is "significant" under section 3(f) of Executive Order 12866. It involves revisions to existing regulations to bring them in line with statutory changes, and affects only individuals or Government entities and access to Presidential or Vice Presidential records. The Office of Management and Budget (OMB) has reviewed this proposed regulation.

##### Review Under the Regulatory Flexibility Act (5 U.S.C. 601, et seq.)

Although this proposed rule is not subject to the Regulatory Flexibility Act, see 5 U.S.C. 553(a)(2), 601(2), NARA has considered whether this rule, if promulgated, would have a significant economic impact on a substantial number of small entities (5 U.S.C. 603). NARA certifies, after review and analysis, that this rule will not have a significant adverse economic impact on a substantial number of small entities because it affects only individuals or Government entities and access to Presidential or Vice Presidential records.

*Review Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.)*

This proposed rule does not contain any information collection requirements subject to the Paperwork Reduction Act.

*Review Under Executive Order 13132, Federalism, 64 FR 43255 (August 4, 1999)*

Review under Executive Order 13132 requires that agencies review regulations for Federalism effects on the institutional interest of states and local governments, and, if the effects are sufficiently substantial, prepare a Federal assessment to assist senior policy makers. This proposed rule will not have any direct effects on State and local governments within the meaning of the Executive Order. Therefore, the proposed regulation requires no Federalism assessment.

**List of Subjects in 36 CFR Part 1270**

Archives and records, Government in the Sunshine Act, Open government, Presidential records.

For the reasons stated in the preamble, NARA proposes to revise 36 CFR part 1270 to read as follows:

**PART 1270—PRESIDENTIAL RECORDS**

**Subpart A—General Provisions**

**Sec.**

- 1270.1 Scope of part.
- 1270.2 Application.
- 1270.4 Definitions.

**Subpart B—Custody and Control of Presidential Records**

- 1270.20 Presidential records in the physical custody of the Archivist.
- 1270.22 Designating a representative to act for a President.
- 1270.24 When the Archivist may act for a President.

**Subpart C—Disposing of Presidential Records**

- 1270.30 Disposing of Presidential records by an incumbent President.
- 1270.32 Disposing of Presidential records in the Archivist's custody.

**Subpart D—Accessing Presidential Records**

- 1270.38 Public access to Presidential records.
- 1270.40 Restricting access to Presidential records.
- 1270.42 Appealing restricted access.
- 1270.44 Exceptions to restricted access.
- 1270.46 Notice of intent to disclose Presidential records to the public.
- 1270.48 Releasing records to the public and claiming privilege against disclosure.
- 1270.50 Consulting with law enforcement agencies.

Authority: 44 U.S.C. 2201–2209.

**Subpart A—General Provisions**

**§ 1270.1 Scope of part.**

This part implements the provisions of the Presidential Records Act of 1978, as amended, 44 U.S.C. 2201–2209, and establishes requirements for preserving, protecting, disposing of, and providing access to all Presidential and Vice-Presidential records created during a Presidential or Vice Presidential term of office beginning on or after January 20, 1981.

**§ 1270.2 Application.**

This part, except §§ 1270.46 and 1270.48, applies to Vice-Presidential records in the same manner as to Presidential records. The Vice President's duties and responsibilities, with respect to Vice-Presidential records, are the same as the President's duties and responsibilities with respect to Presidential records, except those in §§ 1270.46 and 1270.48. The Archivist's authority with respect to Vice-Presidential records is the same as the Archivist's authority with respect to Presidential records, except that the Archivist may enter into an agreement with a non-Federal archival repository to deposit Vice-Presidential records, if the Archivist determines it to be in the public interest.

**§ 1270.4 Definitions.**

For the purposes of this part—  
**Agency** has the meaning given by 5 U.S.C. 551(1)(A)–(D) and 552(f).  
**Archivist** means the Archivist of the United States or staff of the National Archives and Records Administration acting on behalf of the Archivist.  
**Presidential records** has the meaning given by 44 U.S.C. 2201(2).

**Subpart B—Custody and Control of Presidential Records**

**§ 1270.20 Presidential records in the physical custody of the Archivist.**

During a President's term of office, the President may request that the Archivist maintain physical custody of Presidential records, including digital or electronic records. However, the President remains exclusively responsible for control and access to their records until their term of office concludes. During the President's terms of office, the Archivist does not disclose any of these records, except under the President's direction, until the President's term of office concludes. If a President serves consecutive terms, the Archivist does not disclose records without the President's direction until the end of the last term, or the end of another period if specified in 44 U.S.C. 2204 and subpart E of this part.

**§ 1270.22 Designating a representative to act for a President.**

(a) Title 44 U.S.C. chapter 22 grants the President certain discretion and authority over Presidential records. An incumbent or former President may designate one or more representatives to exercise this discretion and authority, including in the event of the President's death or disability.

(b) The designation under paragraph (a) of this section is effective only if the Archivist receives written notice of it, including the names of the representatives, before the President dies or is disabled.

**§ 1270.24 When the Archivist may act for a President.**

If a President specifies restrictions on access to Presidential records under 44 U.S.C. 2204(a), but has not made a designation under § 1270.22 at the time of their death or disability, the Archivist exercises the President's discretion or authority under 44 U.S.C. 2204, except as limited by 44 U.S.C. 2208 and § 1270.48.

**Subpart C—Disposing of Presidential Records**

**§ 1270.30 Disposing of Presidential records by an incumbent President.**

An incumbent President may dispose of any Presidential records of their administration that, in the President's opinion, lack administrative, historical, informational, or evidentiary value, if the President obtains the Archivist's written views about the proposed disposal and either—

(a) Those views state that the Archivist does not intend to request Congress's advice on the matter because the Archivist either does not consider the records proposed for disposal to be of special interest to Congress or does not consider it to be in the public interest to consult with Congress about the proposed disposal; or

(b)(1) Those views state that the Archivist considers either that the records proposed for disposal may be of special interest to Congress or that consulting with Congress about the proposed disposal is in the public interest; and

(2) The President submits copies of the proposed disposal schedule to the Senate and the House of Representatives at least 60 calendar days of continuous congressional session before the proposed disposal date. For the purpose of this section, a continuous congressional session breaks only when Congress adjourns *sine die* (with no date set to resume). If either House of Congress adjourns with a date set to

resume, and breaks for more than three days, the adjourned days do not count when computing the 60-day timeline. The President submits copies of the proposed disposal schedule to the Senate Committees on Rules and Administration and Homeland Security and Governmental Affairs, and to the House Committees on House Administration and Oversight and Government Reform.

**§ 1270.32 Disposing of Presidential records in the Archivist's custody.**

(a) The Archivist may dispose of Presidential records in the Archivist's legal custody that the Archivist appraises and determines to have insufficient administrative, historical, informational, or evidentiary value to warrant continuing to preserve them.

(b) If the Archivist determines that Presidential records have insufficient value under paragraph (a) of this section, the Archivist publishes a proposed disposal notice in the Federal Register with a public comment period of at least 45 days. The notice describes the records the Archivist proposes to dispose of, the reason for disposing of them, and the projected earliest disposal date.

(c) After the public comment period in paragraph (b) of this section, the Archivist publishes a final disposal notice in the Federal Register at least 60 calendar days before the earliest disposal date. The notice includes:

- (1) A reasonably specific description of the records scheduled for disposal;
- (2) The earliest disposal date; and
- (3) A concise statement of the reason for disposing of the records.

(d) Publishing the notice required by paragraph (c) of this section in the Federal Register constitutes a final agency action for purposes of review under 5 U.S.C. 701–706.

**Subpart D—Accessing Presidential Records**

**§ 1270.38 Public access to Presidential records.**

Public access to Presidential records generally begins five years after the President leaves office, and is administered through the Freedom of Information Act (5 U.S.C. 552), as modified by the Presidential Records Act (44 U.S.C. 2204(c)).

**§ 1270.40 Restricting access to Presidential records.**

(a) An incumbent President may, prior to the end of the President's term of office or last consecutive term of office, restrict access to certain information within Presidential records created during their administration, for

a period not to exceed 12 years after the President leaves office (in accordance with 44 U.S.C. 2204).

(b) If a President specifies such restrictions, the Archivist consults with that President or the President's designated representative to identify the affected records, or any reasonably segregable portion of them.

(c) The Archivist then restricts public access to the identified records or the restricted information contained in them until the earliest of following occurs:

- (1) The restricting President waives the restriction, in whole or in part;
- (2) The restriction period in paragraph (a) of this section expires for the category of information; or
- (3) The Archivist determines that the restricting President or an agent of that President has published the restricted record, a reasonably segregable portion of the record, or any significant element or aspect of the information contained in the record, in the public domain.

**§ 1270.42 Appealing restricted access.**

(a) If the Archivist denies a person access to a Presidential record or a reasonably segregable portion of it due to a restriction made under § 1270.40, that person may file an administrative appeal. To file an administrative appeal requesting access to Presidential records, send it to the director of the Presidential Library of the President during whose term of office the record was created, at the address listed in 36 CFR 1253.3. To file an administrative appeal requesting access to Vice Presidential records, send it to the director of the Presidential Materials Division at the address listed in 36 CFR 1253.1.

(b) An appeal must arrive to the director within 90 calendar days from the date on the access denial letter.

(c) Appeals must be in writing and must identify:

- (1) The specific records the requester is seeking; and
- (2) The reasons why the requester believes they should have access to the records.

(d) The director responds to the requester in writing and within 30 working days from the date they receive the appeal. The director's response states whether or not the director is granting access to the Presidential records and the basis for that decision. The director's decision to withhold release of Presidential records is final and is not subject to judicial review.

**§ 1270.44 Exceptions to restricted access.**

(a) Even when a President imposes restrictions on access under § 1270.40,

NARA still makes Presidential records of former Presidents available in the following instances, subject to any rights, defenses, or privileges which the United States or any agency or person may invoke:

(1) To a court of competent jurisdiction in response to a properly issued subpoena or other judicial process, for the purposes of any civil or criminal investigation or proceeding;

(2) To an incumbent President if the President seeks records that contain information they need to conduct current Presidential business and the information is not otherwise available;

(3) To either House of Congress, or to a congressional committee or subcommittee, if the congressional entity seeks records that contain information it needs to conduct business within its jurisdiction and the information is not otherwise available; or

(4) To a former President or their designated representative for access to the Presidential records of that President's administration, except that the Archivist does not make any original Presidential records available to a designated representative that has been convicted of a crime that involves reviewing, retaining, removing, or destroying NARA records.

(b) The President, either House of Congress, or a congressional committee or subcommittee must request the records they seek under paragraph (a) of this section from the Archivist in writing and, where practicable, identify the records with reasonable specificity.

(c) The Archivist promptly notifies the President (or their representative) during whose term of office the record was created, and the incumbent President (or their representative) of a request for records under paragraph (a) of this section.

(d) Once the Archivist notifies the former and incumbent Presidents of the Archivist's intent to disclose records under this section, either President may assert a claim of constitutionally based privilege against disclosing the record or a reasonably segregable portion of it within 30 calendar days after the date of the Archivist's notice. The incumbent or former President must personally make any decision to assert a claim of constitutionally based privilege against disclosing a Presidential record or a reasonably segregable portion of it.

(e) The Archivist does not disclose a Presidential record or reasonably segregable part of a record if it is subject to a privilege claim asserted by the incumbent President unless:

- (1) The incumbent President withdraws the privilege claim; or

(2) A court of competent jurisdiction directs the Archivist to release the record through a final court order that is not subject to appeal.

(f)(1) If a former President asserts the claim, the Archivist consults with the incumbent President, as soon as practicable and within 30 calendar days from the date that the Archivist receives notice of the claim, to determine whether the incumbent President will uphold the claim.

(2) If the incumbent President upholds the claim asserted by the former President, the Archivist does not disclose the Presidential record or a reasonably segregable portion of the record unless:

(i) The incumbent President withdraws the decision upholding the claim; or

(ii) A court of competent jurisdiction directs the Archivist to disclose the record through a final court order that is not subject to appeal.

(3) If the incumbent President does not uphold the claim asserted by the former President, fails to decide before the end of the 30-day period detailed in subparagraph (f)(1) of this section, or withdraws a decision upholding the claim, the Archivist discloses the Presidential record 60 calendar days after the Archivist received notification of the claim (or 60 days after the withdrawal) unless a court order in an action in any Federal court directs the Archivist to withhold the record, including an action initiated by the former President under 44 U.S.C. 2204(e).

(g) The Archivist may adjust any time period or deadline under this subpart, as appropriate, to accommodate records requested under this section.

**§ 1270.46 Notice of intent to disclose Presidential records to the public.**

When the Archivist determines it is in the public interest to make a Presidential record available to the public for the first time, the Archivist will:

(a) Promptly notify, in writing, the former President during whose term of office the record was created and the incumbent President, or their representatives, of the intended disclosure. This notice informs the Presidents of the 60-day period in which either President may make a claim of constitutionally based privilege under § 1270.48; and

(b) Notify the public. The notice includes the following information about the intended disclosure:

- (1) The number of pages;
- (2) A brief description of the records;
- (3) The NARA case number;

(4) The date on which the 60-working-day period set out in § 1270.48(a) expires; and

(5) Any other information the Archivist may decide.

**§ 1270.48 Releasing records to the public and claiming privilege against disclosure.**

(a) Once the Archivist notifies the former and incumbent Presidents of the Archivist's intent to disclose records under § 1270.46, either President may assert a claim of constitutionally based privilege against disclosing the record or a reasonably segregable portion of it. A President must assert their claim within 60 working days after the date of the Archivist's notice, and make the claim in accordance with paragraph (d) of this section.

(b) If neither President asserts a claim within the 60-working-day period, the Archivist discloses the Presidential record covered by the notice. If either President asserts a claim on a reasonably segregable part of the record, the Archivist may disclose only the portion of the record not subject to the claim.

(c)(1) The incumbent or former President may extend the period under paragraph (a) of this section once, for not more than 30 additional working days, by sending the Archivist a written statement asserting that the President needs the extension to adequately review the record.

(2) However, if the 60-day period under subparagraph (a) of this section, or any extension of that period under subparagraph (c)(1) of this section, would end during the first six months of the incumbent President's first term of office, then the 60-day period or extension automatically extends to the end of that six-month period.

(d)(1) The incumbent or former President must personally make any decision to assert a claim of constitutionally based privilege against disclosing a Presidential record or a reasonably segregable portion of it.

(2) The President must notify the Archivist, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate, of a privilege claim under paragraph (a) of this section on the same day that the President asserts such a claim.

(e)(1) If a former President asserts the claim, the Archivist consults with the incumbent President, as soon as practicable and within 30 calendar days from the date that the Archivist receives notice of the claim, to determine whether the incumbent President will uphold the claim.

(2) The Archivist notifies the former President and the public of the incumbent President's decision on the former President's claim no later than 30 calendar days after the Archivist receives notice of the claim.

(3) If the incumbent President upholds the claim asserted by the former President, the Archivist does not disclose the Presidential record or a reasonably segregable portion of the record unless:

(i) The incumbent President withdraws the decision upholding the claim; or

(ii) A court of competent jurisdiction directs the Archivist to disclose the record through a final court order that is not subject to appeal.

(4) If the incumbent President does not uphold the claim asserted by the former President, fails to decide before the end of the 30-day period detailed in subparagraph (e)(1) of this section, or withdraws a decision upholding the claim, the Archivist discloses the Presidential record 90 calendar days after the Archivist received notification of the claim (or 90 days after the withdrawal) unless a court order in an action in any Federal court directs the Archivist to withhold the record, including an action initiated by the former President under 44 U.S.C. 2204(e).

(f) The Archivist does not disclose a Presidential record or reasonably segregable part of a record if it is subject to a privilege claim asserted by the incumbent President unless:

(1) The incumbent President withdraws the privilege claim; or

(2) A court of competent jurisdiction directs the Archivist to release the record through a final court order that is not subject to appeal.

**§ 1270.50 Consulting with law enforcement agencies.**

(a) The Archivist requests specific guidance from the appropriate law enforcement agency when the Archivist is determining whether to release Presidential records compiled for law enforcement purposes that may be subject to 5 U.S.C. 552(b)(7). The Archivist requests guidance if:

(1) No general guidance applies;

(2) The record is particularly sensitive; or

(3) The type of record or information is widespread throughout the files.

(b) When the Archivist decides to release Presidential records compiled for law enforcement purposes, the Archivist notifies any agency that has provided guidance on those records under this section. The notice includes the following:



(1) A description of the records in question;

(2) A statement that the records described contain information compiled for law enforcement purposes and may be subject to the exemption provided by 5 U.S.C. 552(b)(7) for records of this type; and

(3) The name of a contact person at NARA.

(c) Any guidance an agency provides under paragraph (a) of this section is not binding on the Archivist. The Archivist decides whether Presidential records are subject to the exemption in 5 U.S.C. 552(b)(7).

Dated: December 15, 2016.

David S. Ferriero,

Archivist of the United States.

[FR Doc. 2016-31011 Filed 12-27-16; 8:45 am]

BILLING CODE 7515-01-P

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Office of Government Information Services

#### 36 CFR Chapter XII

[FDMS No. NARA-16-0004; NARA-2017-001]

RIN 3095-AB88

### Office of Government Information Services

AGENCY: Office of Government Information Services, NARA.

ACTION: Proposed rule.

**SUMMARY:** The Open Government Act of 2007 created the Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA). OGIS has three statutorily defined functions: OGIS offers mediation services to help resolve FOIA disputes; reviews agency FOIA policies, procedures and compliance; and identifies procedures and methods for improving compliance under the FOIA. This proposed rule sets out the implementing guidance and procedures by which OGIS carries out its statutory mission, and explains OGIS's role in the FOIA process.

**DATES:** Submit comments on or before February 27, 2017.

**ADDRESSES:** You may submit comments on this rule, identified by RIN 3095-AB88, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* [Regulation\\_comments@nara.gov](mailto:Regulation_comments@nara.gov). Include RIN 3095-AB88 in the subject line of the message.

- *Mail (for paper, disk, or CD-ROM submissions):* Send comments to: Regulations Comments Desk (External Policy Program, Strategy & Performance Division (SP)); Suite 4100; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740-6001.

- *Hand delivery or courier:* Deliver comments to front desk at 8601 Adelphi Road, College Park, MD, addressed to: Regulations Comments Desk, External Policy Program; Suite 4100.

**FOR FURTHER INFORMATION CONTACT:** For information or questions about the regulation and the comments process, contact Kimberly Keravuori, External Policy Program Manager, by email at [regulation\\_comments@nara.gov](mailto:regulation_comments@nara.gov), or by telephone at 301.837.3151. For information or questions on the OGIS program, contact Nikki Gramian, Deputy Director, OGIS, by telephone at 1-877-684-6448.

#### SUPPLEMENTARY INFORMATION:

##### Background

The OPEN Government Act of 2007 (Pub. L. 110-175, 121 Stat. 2524) amended the Freedom of Information Act, or FOIA (5 U.S.C. 552, as amended), and created the Office of Government Information Services (OGIS) within the National Archives and Records Administration. OGIS began receiving FOIA cases in September 2009.

This proposed regulation explains OGIS's statutory role in the FOIA process and sets out procedures for one of OGIS's primary functions: Assisting agencies and FOIA requesters with efforts to resolve FOIA disputes. In the future, this regulation will also include provisions on OGIS's other functional areas, which are currently under development.

##### OGIS's Mediation Function

Title 5, United State Code § 552(h)(3), states that "The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation. . . ." As a result, we offer dispute resolution services, which is an umbrella term encompassing formal mediation (where a mediator conducts formal sessions to assist in resolving a dispute), facilitation (an informal process in which a mediator aids communication among and between the parties to resolve a dispute), and other commonly recognized resolution methods. OGIS's dispute resolution services may also include OGIS's

ombuds services (which include providing information) when those services aid in resolving disputes. Our goal is to be an alternative to litigation by facilitating communication between a requester and the agency and by attempting to resolve disputes arising out of requests for information. We provide all our dispute resolution services in accordance with the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. 571, *et seq.*

Both FOIA requesters and agencies may contact us to help resolve a dispute at any point in the FOIA process. We do not advocate on behalf of a requester or agency; the office promotes a fair FOIA process and works with parties to reach a mutually agreeable resolution. If the parties agree that the dispute has been resolved, we will close the case and may follow-up with the agency to confirm that any agreed-upon action was taken. However, if the parties cannot agree on a resolution, OGIS will issue a final response letter to the parties indicating that we are concluding the dispute resolution efforts.

##### Regulatory Analysis

*Review Under Executive Orders 12866 and 13563*

Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (September 30, 1993), and Executive Order 13563, Improving Regulation and Regulation Review, 76 FR 23821 (January 18, 2011), direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). This proposed rule is "significant" under section 3(f) of Executive Order 12866 because it establishes OGIS implementing regulatory provisions for the first time. The Office of Management and Budget (OMB) has reviewed this proposed regulation.

*Review Under the Regulatory Flexibility Act (5 U.S.C. 601, et seq.)*

This review requires an agency to prepare an initial regulatory flexibility analysis and publish it when the agency publishes the proposed rule. This requirement does not apply if the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 603). NARA certifies, after review and analysis, that this proposed rule will not have a significant adverse economic



## Notification Procedures

NARA provides the White House Counsel's Office, on behalf of the incumbent President, notifications of requests for access to and/or release of Presidential or Vice Presidential records in NARA's custody. The notification is required by the Presidential Records Act of 1978, as amended, 44 U.S.C. 2201-2209 and NARA's regulations, 36 C.F.R. § 1270.44-46. The purpose of providing the White House with such notification is to give the Counsel, on behalf of the incumbent President, the opportunity to review the records and consider whether to invoke a constitutionally based privilege in order to restrict access to or release of Presidential or Vice Presidential records in the Archivist's legal custody.

### Notification Types

Notifications will be one of two types. First, NARA will notify the incumbent President of any intent to release Presidential records to the general public, known as "regular notification." Second, NARA will notify the incumbent President of any intent to provide access to or release of Presidential records in response to a request by Congress, the Courts, or other Executive branch agencies for records that are not available to the public under the exceptions to restricted access provisions of the PRA, 44 U.S.C. § 2205(2), known as "special access notification."

- ***Regular notifications***

Once NARA has completed a page-by-page review of a group of records to determine which material must be withheld under applicable PRA restrictions and/or FOIA exemptions, NARA will notify the incumbent President of our intent to publicly release the remaining processed records not properly restricted from release. This notification includes the following:

- number of pages processed
- number of pages restricted from release
- number of pages proposed for opening
- general topic of request
- brief narrative description of the records being proposed for release

NARA provides a simultaneous written notification to the representative of the living former President. If the notification pertains to Vice Presidential records, the appropriate former Vice President is also notified, if his former President is still living. 44 U.S.C. 2208 stipulates that both the former and incumbent Presidents have 60 calendar days (which can be extended once by 30 calendar days) to assert a claim of privilege. (A new Administration has an initial six-month period to review all such notices.) Absent an assertion of privilege, NARA will release the records at the expiration of that time. If a constitutionally-based privilege is invoked, NARA will not release the record until so required by a final court order or the privilege claim is withdrawn.

- ***Special Access notifications***

*Request from the courts or Congress* – In accordance with the PRA, NARA responds to Congressional special access requests only from the House or Senate as a whole or from a chair of a committee or subcommittee. NARA responds to requests or orders from the federal courts that are signed by a judge. NARA will inform the former President and the incumbent President of the receipt of such a request and, if responsive documents are located, NARA will provide notice to the former and incumbent Presidents of our intent to release these records to the courts or Congress. The PRA and NARA's regulations outlined in 36 C.F.R. §1270.44 govern this notification process, which states that both the former and incumbent President have 30 calendar days to determine if they intend to claim a Constitutionally-based privilege. If requests are of a time-sensitive nature, the Archivist may shorten the time period allowed for review. Once NARA has clearance from both the former and incumbent Presidents, copies of the responsive documents will be provided to the requester. Occasionally, the former or incumbent President will place restrictions on this access, such as not providing copies, but allowing read access only, which NARA will implement.

*Request from the incumbent President (including on behalf of other Executive branch agencies)* – NARA will inform the former President of the receipt of the request and of our intent to search for responsive documents. Once responsive documents are located, NARA will provide a notification to the former President of our intent to release these records to the incumbent President. Because the current administration has requested copies of these records for its own use, there usually is no need to notify the incumbent President for a privilege review. Instead, the responsive records, or access to them, are provided directly to the current administration once the former President has approved their release in accordance with the PRA and NARA's regulations outlined in 36 C.F.R. §1270.44. Occasionally, however, the incumbent President puts conditions on access requests by other agencies. In these instances, NARA will meet any conditions stipulated by the incumbent President before releasing the documents to the requester.

## **Exceptions to the Notification Procedures**

With certain exceptions, NARA will notify the incumbent President of our intent to release or provide access to Presidential and Vice Presidential records not already in the public domain. NARA does not notify the incumbent President when providing Presidential records directly to a former President, former Vice President or his designated representative(s). Additionally, the George W. Bush and Obama administrations waived their privilege review of NSC Presidential records created prior to the Reagan administration that were transferred to NARA as Clinton Presidential records in response to the *Armstrong v. EOP III* ruling that NSC records are not subject to FOIA, and therefore are subject only to the PRA (90 F.3d 553 (D.C. Cir. 1996)). Finally, the Obama Administration waived its privilege review of most Reagan and George H.W. Bush Presidential records and most Bush Vice Presidential records.

## Approved Requests for Waiver of Incumbent President Privilege Review

- 1) All National Security Council records generated prior to the Reagan Administration but determined to be Presidential records as a result of Armstrong litigation.

*Per the December 9, 2005 email from George W. Bush Associate Counsel Jennifer Brosnahan and per the April 19, 2010 letter from Obama Deputy Associate Counsel Blake Roberts to Nancy Smith.*

- 2) Reagan Presidential Records

*Per February 3, 2015 letter from Lynn Eisenberg to John Laster, the White House Counsel's Office waived its privilege review for all Reagan Presidential records except for files from the following offices.*

- *Office of the Chief of Staff*
- *Office of Counsel to the President*
- *Office of the Deputy Chief of Staff*

- 3) George H.W. Bush Presidential Records

*Per July 23, 2014 letter from Josh Friedman to John Laster, the White House Counsel's Office waived its privilege review for all George H.W. Bush Presidential records except for files from the following offices.*

- *Chief of Staff's Office*
- *Office of the Counsel to the President*
- *National Security Council*
- *Secret Service*

- 4) Bush Vice Presidential Records

*Per July 23, 2014 letter from Josh Friedman to John Laster, the White House Counsel's Office waived its privilege review for all Bush Vice Presidential records except for files from the following offices.*

- *Chief of Staff's Office*
- *Counsellor's Office*
- *National Narcotics Border Interdiction System (NNBIS)*
- *Office of National Security Affairs*
- *Secret Service*
- *South Florida Task Force*
- *Task Force on Combatting Terrorism*

## **Approved Requests for Disposal of Incumbent Presidential Records**

Following a practice begun during the Reagan Administration, the National Archives has worked with administrations to establish an authority for the routine disposal of certain high-volume Presidential records, such as those that meet the definition of bulk mail, both in textual and electronic formats. The administration proposes such routine disposals and the Archivist provides his views in response, thus establishing the disposal process for these records.

With the growing use of technology in each new administration, more computer system files were also approved for disposal. Following are the list of disposals requested and authorized during the Obama Administration.

- Public mail to the President, the First Lady, and their staffs, including anonymous correspondence, correspondence with incomplete address, mail from prolific writers, and public opinion mail. This includes mail sent by all forms of media, including letters, faxes, emails, and any other current or future means of communication.
- Publications, brochures, clippings, and other types of enclosures in public mail, when there is not immediate or historical importance to the materials.
- Public mail to the Vice President, the spouse of the Vice President, and their staffs, including anonymous correspondence, correspondence with incomplete address, mail from prolific writers, and public opinion mail. This includes mail sent by all forms of media, including letters, faxes, emails, and any other current or future means of communication.
- Publications, brochures, clippings, and other types of enclosures in public mail, when there is not immediate or historical importance to the materials.
- For pieces of mail that the White House Correspondence Office refers to a Federal agency for review or action, the White House Correspondence Office will dispose of any attachments, additional pages, or other accompanying material that it determines not to forward to the federal agency.
- Applications for Presidential Memorial Certificates that the White House Correspondence Office forwards to the Department of Veterans Affairs. These materials will not actually be disposed of, rather the White House Correspondence

Office will retain copies of a sample of this material pursuant to an agreement between the National Archives and the White House Correspondence Office.

- Public mail to the National Commission on Fiscal Responsibility and Reform, including anonymous correspondence, correspondence with incomplete address, mail from prolific writers, and public opinion mail. This includes mail sent by all forms of media, including letters, faxes, emails, and any other current or future means of communication. The Commission will consult with the White House Office of Records Management, the White House Correspondence Office and the National Archives on an appropriate sampling and disposal system, and will only dispose of these materials pursuant to an agreement among those same parties.
- Logs of information automatically captured when individuals visit a website, such as [www.whitehouse.gov](http://www.whitehouse.gov), operated by the White House Office or any other component of the Executive Office of the President subject to the Presidential Records Act. This typically includes information such as the computer's Internet Protocol (IP) address, the internet domain name, the date, time, and duration of the visit, the specific pages visited by the individual, and similar information. This information may be collected through the internet servers hosting the website or through other mechanisms.
- Logs of information automatically generated when computers or other devices visit a website through any network or internet connection maintained by the Executive Office of the President. This typically includes information such as the computer or device's Internet Protocol (IP) address, the specific web pages visited, the date and time of the visit and similar information. This information may be collected automatically by the network through the network servers or through other mechanisms.
- Data relating to email and network traffic which are automatically generated by information technology systems. This typically includes information such as the source Internet Protocol (IP) address, destination IP address, time, date, port, and other similar data relating to the traffic. This information may be collected automatically through individual software and hardware systems or other mechanisms and is separate from the email system. Consistent with OMB Memo 10-22, it may specifically include data generated by web and bulk email measurement tools (i.e., raw data used for analysis; reports generated from this data will be preserved separately).
- Non-substantive technical data automatically generated by applications, databases, servers, and other information technology systems. This typically includes

installation logs, event logs, error logs, and diagnostic logs. This information may be collected automatically through individual software and hardware systems, or other mechanisms. EOP does not propose to dispose of logs containing substantive information.

- Reservation requests for facilities and events, including appointment and permanent parking spots, on-campus sports facilities, conference rooms and supplies, and White House tour slots.
- Administrative service request systems used to request maintenance work, request EOP Library services, track incoming and outgoing courier requests, and manage access-related items such as badges.
- Tracking systems used to inventory furniture, manage staff assets, and collect survey-related data.

NATIONAL SECURITY COUNCIL  
WASHINGTON, D.C. 20504

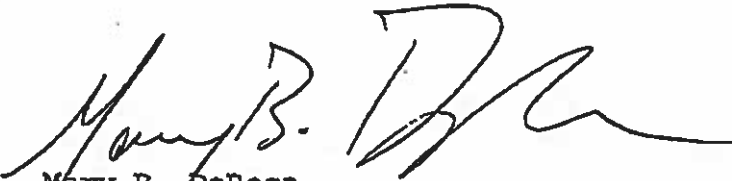
February 6, 2009

MEMORANDUM FOR SHARON FAWCETT  
Assistant Archivist  
Office of Presidential Libraries

An NSC policy staffer has asked for the retrieval of copies of records that are located at the George W. Bush Library. Since this is the first such request submitted by a member of the NSC staff during the Obama administration, I am writing to you to establish a routine procedure for handling such requests.

I suggest that Bill Leary, the NSC's Senior Director for Records and Access Management forward such requests to you for transmittal to the appropriate Library. The requests would identify the requested records as specifically as possible and indicate the purpose of the request. After securing the permission of the former President or his designated representative, responsive records would be shipped to Mr. Leary, under appropriate safeguards, for transmittal to the interested NSC staff member. Mr. Leary will ensure that such records are destroyed or returned to the Library when the immediate purpose has been fulfilled.

The instant request is for George W. Bush records regarding Daniel Poneman, who served as an NSC Senior Director during the George H.W. Bush, Clinton, and George W. Bush administrations. In connection with upcoming Senate confirmation hearings, Mr. Poneman is seeking any information from his security file regarding security violations. If there are any questions about this request, please ask the Library staff to contact Bill Leary at 202-456-9201.



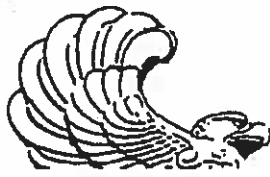
Mary B. DeRosa  
Deputy Counsel to the President

## Attachments in Response to

### Question 4

- Archivist's Memo to Senior Agency Officials for Records Management on Records Management Priorities for 2017 (March 15, 2017)
- NARA Records Express Blog on Records Management of Social Media and Electronic Records (January 27, 2017)





**NATIONAL  
ARCHIVES**

**ARCHIVIST *of the*  
UNITED STATES**

**DAVID S. FERRIERO**

**T: 202.357.5900**

**F: 202.357.5901**

***david.ferriero@nara.gov***

**Date:** March 15, 2017

**Memorandum for:** Senior Agency Officials for Records Management

**From:** David S. Ferriero  
Archivist of the United States

**Subject:** Records Management Priorities for 2017

Federal agencies and officials must remain aware of the laws, regulations, and guidance governing how records and information are identified and managed in compliance with the Federal Records Act and its recordkeeping requirements. Managing government records is essential not only to ensure agency activities are documented in order to meet legal requirements, but also to preserve our Nation's history for future generations. As a designated Senior Agency Official for Records Management (SAORM), you bear a special responsibility for ensuring your agency meets its obligations.

NARA has identified a need to modernize recordkeeping practices across the Government with specific actions required for all agencies related to the management of email and permanent electronic records. With the December 2016 requirement for managing all email records electronically having just come into effect, the next focus area is the requirement that your agency manage all permanent electronic records electronically by December 31, 2019 (see [OMB/NARA M-12-18, Managing Government Records Directive](#)).

In addition to stressing the need to address these important requirements, I would like to identify three high-visibility records and information management topics that agencies must address in the coming year: electronic messaging and encrypted messages; managing web records; and ensuring that all staff, especially incoming political appointees, are properly trained on their responsibilities for records management.

**NATIONAL ARCHIVES *and*  
RECORDS ADMINISTRATION**

**700 PENNSYLVANIA AVENUE, NW**

**WASHINGTON, DC 20408-0001**

***www.archives.gov***

## **Electronic Messaging and Encrypted Messages**

The Federal Records Act, as amended in 2014, defines a record as "all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business...." This includes messages created using an ever increasing variety of electronic messaging platforms. Further, electronic messages related to the conduct of agency business are presumed to be Federal records.

Agencies are responsible for properly managing electronic messages that are Federal records, whether they are SMS texts, encrypted communications, direct messages on social media platforms, email, or created on any other type of electronic messaging system or account. This also includes managing official alias or group accounts, where multiple individuals may be involved in the day-to-day operation of the account. Regardless of how many Federal electronic messaging or email accounts individuals use to conduct official business, agencies must ensure that all accounts are managed and identifiable according to Federal recordkeeping requirements.

In addition, if an agency employee uses a non-official or personal electronic messaging account to conduct agency business, they must copy or forward the record to their official electronic messaging account within 20 calendar days of the original creation, receipt, or transmission of the record. NARA advises using personal devices or accounts to conduct official business should only be done in exigent circumstances.

There have been several recent news stories referring to the possible use by government employees of non-official, commercial communication applications, such as WhatsApp, Signal, Confide, and others that support encryption or the ability to automatically delete messages after they are read or sent. Any use of such communication applications requires coordination with your legal counsel and records management officials to ensure compliance with the Federal Records Act and related regulations. Agencies are responsible for setting policies and procedures that govern the use of these applications prior to their deployment and must take steps to manage and preserve records created through their use for as long as required.

## **Managing Web Records**

Agencies must identify and manage all Federal records in accordance with NARA guidance, including the records and data sets available on agency websites. NARA presumes that much of the information presented on agency websites meets the definition of a Federal record and should be managed accordingly. As such, the records must be scheduled and can only be disposed of in accordance with a NARA-approved records schedule.

Agencies should work with their NARA appraisal archivist to identify, appraise, schedule, and transfer Federal web records of permanent value. To help agencies do this, NARA has issued guidance for the scheduling, managing, and transferring of web records in NARA Guidance on Managing Web Records and Format Guidance for the Transfer of Permanent Records.

### **Records Management Training**

There are several new requirements that agencies should be aware of to ensure that all incoming government personnel, including political appointees, are properly trained in their records management responsibilities. At our last SAORM meeting in December 2016, my staff provided a briefing on NARA Bulletin 2017-01, Agency Records Management Training Requirements. The Bulletin specifies how often agency records management training must be taken, identifies personnel who must complete the training, and describes mandatory training content. The Bulletin requires that new personnel receive records management training within 60 days of employment. NARA has produced several products to assist agencies with this responsibility:

- Records Management Training 101 (developed in collaboration with the Federal Records Officer Network),
- Documenting Your Public Service,
- Records Management Guidance for Political Appointees (including training materials and a video briefing), and
- Model Federal Records and Information Management Entrance and Exit Checklists.

Good recordkeeping practices are necessary to meet your mission responsibilities in an efficient and effective manner. Through proper records management you will be able to meet your obligations under the Federal Records Act to document actions and decisions and transfer permanently valuable records to the National Archives of the United States.

My staff is available to provide in-person briefings at your agency to help you understand these critical records management responsibilities. For more information, or to arrange a briefing, please contact Laurence Brewer, the Chief Records Officer for the U.S. Government, at [laurence.brewer@nara.gov](mailto:laurence.brewer@nara.gov). I look forward to seeing you at future SAORM meetings. Thank you for your work in preserving our Nation's history.



DAVID S. FERRIERO  
Archivist of the United States

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## Records Management of Social Media and Electronic Records

Posted on [January 27, 2017](#) by [Arian Ravanbakhsh](#)

We have been receiving questions about the records management responsibilities for content created in social media and through the use of electronic messages. We would like to remind Federal agencies that we have issued guidance on both of these topics:

[NARA Bulletin 2014-02](#) for Guidance on Managing Social Media Records, and [NARA Bulletin 2015-02](#) for Guidance on Managing Electronic Messages.

Agencies are responsible for complying with these bulletins, and managing social media and electronic messages – including traditional SMS texts, encrypted communications, messaging applications, and direct messages on social media platforms – that are Federal records. Social media content and electronic messages related to the conduct of agency business are presumed to be Federal records.

Agencies must properly manage all Federal records, regardless of medium or format, which includes determining whether an existing disposition authority applies. The disposition authority (or records schedule) governs how long the records must be maintained. If no disposition authority exists, then agencies must develop it and submit it to NARA for review and approval by the Archivist of the United States.

Bulletin 2014-02 informs agencies that content created on social media platforms, including Twitter, is likely to be a Federal record and must be managed appropriately. For records posted on third-party social media platforms, agencies must determine how best to manage the records for the appropriate retention period and capture them where appropriate. Some social media records may be temporary, with a transitory, short, or long-term retention. However, some dispositions may be permanent, requiring the records to be preserved until their eventual transfer to the National Archives.

Bulletin 2015-02 provides records management guidance for electronic messages. Specifically, this Bulletin applies to text messaging, chat/instant messaging, direct messaging functionality in social media tools or applications, voice messaging, and similar forms of electronic messaging systems. Electronic messages created or received in the course of agency business are Federal records. Like all Federal records, these electronic messages must be scheduled for disposition. Some types of electronic messages, such as email messages, are more likely to contain substantive information and thus are likely to require retention for several years, or even permanently. Electronic messages, including email, created or received in a personal account meeting the definition of a Federal record must be forwarded to an official electronic messaging account within 20 days.

Once records, including tweets and messages, are scheduled, they may not be deleted until the authorized retention period has been met. NARA authorizes Federal agencies to disposition records through approved records schedules, so any alteration, deletion, destruction, or removal of records that occurs without following the applicable records schedule must be promptly reported to NARA.

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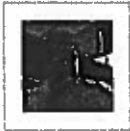
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Opportunity for Comment: Managing Electronic Messages In "General"

Social Media Bulletin Issued In "General"



About Arian Ravanbakhsh  
Supervisory Records Management Policy Analyst in the Office of the Chief Records Officer.  
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2 Responses to *Records Management of Social Media and Electronic Records*



Alexandra Vidal - Arquivo Digital says:  
January 27, 2017 at 7:51 pm

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