

**Society of American Archivists
Council Meeting
November 8-10, 2015
Chicago, Illinois**

**Issue Brief: Strengthening of Federal Records Authority
(Prepared by the SAA Committee on Advocacy and Public Policy)**

BACKGROUND / DISCUSSION

This issue brief addresses the following priority within the SAA Public Policy Agenda, as presented to the Council for approval in May 2015 (Agenda Item 0515-III-C-Public Policy Agenda)¹: “To hold government accountable and ensure its transparency, SAA will pursue the public’s right to equal and equitable access to government information found in archives.”

RECOMMENDATION

THAT the following issue brief on Strengthening of Federal Records Authority be approved:

**SAA Issue Brief:
Strengthening of Federal Records Authority**

SAA Position

The Society of American Archivists encourages and supports an increase of statutory authority granted to the National Archives and Records Administration (NARA) that will more effectively allow NARA to carry out its crucial responsibility for the proper management of federal records.²

The Congress should pass, and the President should sign, legislation that gives NARA the authority and resources to investigate violations of records management laws and policies. Such legislation should also set appropriate penalties – levied according to the degree of authority and responsibility granted to the offender – for noncompliance with existing records management laws and policies. Cases in which violation of records management law are suspected should be referred to the Department of Justice for adjudication.

¹ <http://www2.archivists.org/sites/all/files/0515-III-C-PublicPolicyAgenda.pdf>

² CAPP recognizes that any statutory proposal would require coordination and review by the Office of Management and Budget (OMB) and other agencies.

NARA should be provided the necessary additional resources to carry out a system of robust, regular audits of the records management practices of federal agencies to determine their level of compliance with existing laws and regulations. Agencies should be audited at least once every five years to ensure compliance.

Such legislation should include language permitting private citizens to initiate judicial proceedings against agencies and organizations in specific cases in which federal records laws are not being appropriately followed or enforced.

Legislation should also be enacted to require all federal government employees and contractors to complete annual training that explains their basic records management responsibilities.

SAA will:

- Advocate for pertinent legislation and the development of appropriate agency regulations, and will support NARA in pursuit of these goals.
- Monitor the most recent amendments to the Federal Records Act (FRA, November, 2014)³ and assess how they affect NARA's efforts.⁴

THE ISSUES

1. Although the National Archives and Records Administration, under Title 44, Chapters 21 and 29, United States Code, is the official institution responsible for the proper management of federal records, it lacks sufficient authority to enforce existing federal records laws. Instead, NARA is obliged to rely on federal agency adherence to NARA's records management training and policies and proactive internal enforcement on the part of federal agencies. Current criminal penalties (18 U.S.C. § 2071)⁵ address only the willful concealment, mutilation, or destruction of records, but are silent on instances in which agencies or individuals fail to adhere to records management regulations. The current system of relying on agency compliance without any institutionalized enforcement authority for NARA is ultimately untenable, and has resulted in numerous gaps in the documentary record of the United States government. Although NARA is making every effort to involve agency

³ Presidential and Federal Records Act Amendments of 2014, P.L. 113-187, <https://www.congress.gov/113/plaws/publ187/PLAW-113publ187.pdf>

⁴ Major updates to the Presidential and Federal Records Acts include:

- Strengthening the Federal Records Act by expanding the definition of federal records to clearly include electronic records. This is the first change to the definition of a federal record since the enactment of the act in 1950.
- Confirming that federal electronic records will be transferred to the National Archives in electronic form.
- Granting the Archivist of the United States final determination of what constitutes a federal record.
- Authorizing the early transfer of permanent electronic federal and Presidential records to the National Archives, while legal custody remains with the agency or the President.
- Clarifying the responsibilities of federal government officials when using non-government email systems.
- Empowering the National Archives to safeguard original and classified records from unauthorized removal.
- Codifying procedures by which former and incumbent Presidents review Presidential records for constitutional privileges. Formerly this process was controlled by an Executive Order subject to change by different administrations.

⁵ Concealment, Removal, or Mutilation Generally, 18 U.S.C. § 2071, <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title18/pdf/USCODE-2013-title18-partI-chap101-sec2071.pdf>

Inspector Generals (as NARA's own Inspector General lacks authority) in recordkeeping practices, this simply is not enough.

SAA believes that in order to carry out its vitally important functions, NARA must be vested with statutory authority to investigate potentially illegal activities related to records creation, retention, and management carried out by any and all federal agencies. Further, NARA's current inspection authority based in 44 U.S.C. § 2906 should be amended to explicitly include authority to determine when an agency is failing to adhere to current records management laws and regulations. Approved penalties for violations of federal records laws and regulations should be strengthened and NARA's determination as to whether such violations have occurred should be referred to the Department of Justice, as the nation's leading law enforcement agency, for appropriate action.

2. Despite the fact that records management laws and regulations have been on the books for decades, non-compliance with the letter and spirit of accountability and transparency, which are inherent in these statutes, is a regular occurrence. Currently agencies are required to assess their own records management posture and report their findings to NARA, which in turn issues a consolidated report. After five years of self-assessments, however, the 2013 report⁶ indicates that 71% of Executive agencies are at a moderate to high risk of compromising the integrity of public records. Leaving agencies to self-regulate their compliance with existing regulations has repeatedly proven to be ineffectual, especially given the lack of resources that agencies often dedicate to their records management operations. Further, self-regulation leaves information professionals, some of whom are SAA members, subject to political expediency and pressure from agency leadership. In 2010, NARA restarted an inspection program in accordance with 44 U.S.C. § 2906.⁷ This was done within existing resources and, because of this, NARA has been able to complete only two to three inspections per year.⁸

A more robust outside audit authority, as represented by NARA, would place agency leadership on notice that their records management decisions and practices will be reviewed and assessed against existing regulations. Regular audits would highlight deficiencies and allow agencies to address any shortcomings before they become critical problems affecting the historical record. In his presentation at the 2015 SAA Annual Meeting (Session 304), Archivist of the United States David Ferriero indicated his support for embedding NARA employees in federal agencies. He further opined that NARA could do more if it had 500 additional employees. NARA should be provided the resources necessary to carry out an expanded inspection function.

3. Because the United States Government answers to the American people and protects their liberties and interests, the people have a vested interest in ensuring that the documentary record of their government is complete and accurate, and that public officials follow the law. Because of this, SAA believes that any legislation that expands NARA's records authority must also allow private citizens to sue the government to ensure that agencies are not violating federal records law. When public officials or agencies willfully disobey that law, they prevent citizens from having a full and proper understanding of what the government does in their name. Therefore, SAA believes that a citizen has the inherent standing to sue the government and force compliance with the law.

⁶ NARA Records Management Self-Assessment (RMSA), <http://www.archives.gov/records-mgmt/resources/self-assessment.html>

⁷ Inspection of Agency Records, 44 U.S.C. § 2906, <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title18/pdf/USCODE-2013-title18-partI-chap101-sec2071.pdf>

⁸ NARA Records Management Oversight Inspection Reports, <http://www.archives.gov/records-mgmt/resources/inspections.html>

4. Currently there is no requirement based in law that federal employees receive regular, standardized, and simple records management training across the federal government. The 2012 OMB/NARA Memorandum on Managing Government Records⁹ indicates that Executive agencies must establish records management training, but is silent on methods and procedures due to agency size and structure. This point was reiterated in the 2014 OMB/NARA Memorandum on Guidance on Managing Email.¹⁰ This, however, has resulted in inconsistent and sometimes ineffective efforts, with some agencies doing better than others.¹¹

It is unrealistic to expect all government employees or contractors to understand their responsibilities—much less be equipped to comply with records management statutes and policies—without adequate training. All new employees should be required to complete training within 30 days of entering on duty. Furthermore, the lack of regular, ongoing training is inconsistent and incompatible with the expectation that agencies adhere to proper records management practices. Although each agency may have unique circumstances, there nonetheless are some basic records management concepts, best practices, and regulations with which anyone who creates or receives records as part of their official duties should be intimately familiar. A recent survey of federal employees involved with records management found significant lack of confidence in existing practices whereas “improved training and awareness was cited as one of the most vital recommendations to ensuring federal records are secure.”¹² Basing a training requirement in law would not only reinforce the importance of adhering to current records management requirements, but would strengthen records management across government agencies while also providing a stronger basis for adverse actions against any individual who is complicit in violating records management regulations.

Support Statement: In support of SAA’s Public Policy Agenda, this issue brief provides members and other prospective audiences with SAA’s considered opinion on the topic of federal records authority and its support of the greatest possible public access to government records and permanent preservation of these records.

Relation to Strategic Priorities: Addresses Goal 1. (Advocating for Archives and Archivists), Strategy 1.2. (Educate and influence decision makers about the importance of archives and archivists), Strategy 1.3. (Provide leadership in ensuring the completeness, diversity, and accessibility of the historical record), and Strategy 1.4. (Strengthen the ability of those who manage and use archival material to articulate the value of archives).

Fiscal Impact: Approval of the issue brief does not commit SAA to expend funds on any particular advocacy effort at this time.

⁹ Managing Government Records Directive, OMB/NARA Memorandum, August 24, 2012, <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf>

¹⁰ Guidance on Managing Email, OMB/NARA Memorandum, September 15, 2014, <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2014/m-14-16.pdf>

¹¹ By comparison, every federal employee, including contractors, is required, as part of the Federal Information Security Management Act (FISMA) to complete training in order to access government information systems. This has resulted in annual, online training standardized across agencies.

¹² Amanda Vicinanza, “Information Technology: Federal Agencies Lack Confidence in Records and Information Management Practices,” *Homeland Security Today*, May 18, 2015, accessed June 26, 2015, <http://www.hstoday.us/focused-topics/information-technology/single-article-page/federal-agencies-lack-confidence-in-records-and-information-management-practices.html>.