

Recommendations on Federal Archives and Records Management Issues

**Prepared for the Trump Presidential Transition Team
by the Council of State Archivists, the National Association of Government
Archives and Records Administrators, the Regional Archival Associations
Consortium, and the Society of American Archivists**

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EXECUTIVE SUMMARY

Archives document the critical functions of government, protect citizens' rights, enhance civic engagement, improve cultural knowledge and understanding, and ensure transparency and accountability of public officials. The Council of State Archivists,¹ the National Association of Government Archives and Records Administrators,² the Regional Archival Associations Consortium,³ and the Society of American Archivists⁴ are the four major national organizations representing both archivists and records managers. Archivists and records managers are the professionals who are entrusted by society to ensure preservation of and access to records of the people's government at all levels; to ensure the authenticity and integrity of those records; and to preserve and make accessible a credible and reasonably complete historical account of government and other aspects of society.

Effective management of Federal Government records is both essential to its operation and key to ensuring its accountability and transparency. The National Archives and Records Administration (NARA) has legal responsibility to manage Federal Government archives and records and provides unparalleled, trusted service to the government and U.S. citizens in this regard. The Archivist of the United States, who leads NARA, is a non-partisan professional who is qualified to perform the duties and responsibilities of the office. The National Historical Publications and Records Commission (NHPRC), NARA's grant-making arm, has been a vital partner in preserving and making accessible America's documentary heritage nationwide.

We urge the Trump Administration to place strong emphasis on effective management of Federal Government records and to support the following key issues:

- Executive agencies and officials at all levels, including the President, Vice President, and Cabinet secretaries, must adhere to both the letter and the spirit of all archives and records management laws, regulations, and policies.

¹ www.statearchivists.org

² www.nagara.org

³ <http://www2.archivists.org/groups/regional-archival-associations-consortium-raac>

⁴ www.archivists.org

- Electronic records management must be viewed as a core federal program requirement and enforced for all agencies and for all federal officials.
- All agencies and federal officials must be required to use official government email accounts for the conduct of public business. NARA should have the resources and ability to verify compliance.
- NARA should continue to assert lawful control over all Presidential, Vice Presidential, and permanently valuable Executive Branch records.
- NARA should be given increased statutory authority to enable the agency to meet its responsibility for proper management of federal records.
- NHPRC supports archives and records innovation at the state and local levels that has a major impact on federal records. Given the importance of NHPRC grants and the remarkable return on investment that this agency has realized, we strongly endorse increased funding of NHPRC to support both national competitive grants and pass-through grants to states.
- NARA's National Declassification Center should be appropriately staffed to work with executive agencies to develop and improve declassification policies and procedures based on a risk management approach to ensure timely access to records.

In addition to issues specific to NARA and its functions, several areas of concern warrant the attention of the Trump Administration:

- Public access to federal records should be based on a presumption of openness, with emphasis on consistent application of the Freedom of Information Act by government agencies.
- Protections for intellectual property rights, as codified in the U.S. Copyright Act and any proposed trade agreement, must safeguard the role of archives and libraries in providing access to archival materials to enable ongoing research, scientific progress, and economic growth.

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RECOMMENDATIONS

Records Management Responsibilities of Public Officials

The public trust requires officials at all levels of government to be familiar with and to follow both the letter and the spirit of all applicable federal laws and regulations for recordkeeping requirements. Responsible governments require comprehensive records management laws and adequately funded archives and records management programs to ensure the public's right to know, the accountability of government officials, and the preservation of government records with historical value.

Presidential "papers" (including electronic communications) represent the official records of activity by the Executive Office of the President and thus are the property of the American people. Similarly the Vice President and the Office of the Vice President must preserve and transfer to NARA the records mandated by the Presidential Records Act, as the property of the citizens of the United States.

Currently incremental progress is being made in improving records management at federal agencies. Incoming Cabinet secretaries and senior agency leaders must be cognizant of their records responsibilities and continue to build on these improvements. A 2011 Presidential Memorandum⁵ addressing reform of records management policies and practices across the Executive Branch set successful implementation of records management requirements as a priority for agency officials. We urge the Trump Administration to allow this Memorandum to stand and to be enforced. The Office of Management and Budget (OMB) and NARA issued a joint directive⁶ in 2012 aimed at creating a robust records management framework, and NARA's Bulletin 2013-12⁷ set forth a new "Capstone" approach to managing email records.

Managing email is one part of a comprehensive government archives and records program that facilitates efficient conduct of government operations and services, ensures effective management of information, and provides adequate documentation of official activities. Public officials are required to use official government email accounts for the conduct of public business. Use of unofficial email accounts rather than official government accounts violates the transparency and openness that the public requires from its government, makes it difficult to hold public officials accountable, unnecessarily mixes official and personal records, and ultimately jeopardizes the security of the archival record and its accessibility by the American people.

Federal Electronic Records Management

The Federal Government continues to work on ambitious programs for enterprise-wide electronic records management and electronic information management standards. Both NARA (through its electronic records management initiative) and the Library of Congress (through the National Digital Information Infrastructure and Preservation Program) have demonstrated crucial leadership in managing born-digital records and establishing digitization standards for analog materials.

⁵<https://www.whitehouse.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>

⁶<https://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf>

⁷<https://www.archives.gov/records-mgmt/bulletins/2013/2013-02.html>

The 2012 joint OMB-NARA directive on managing government records requires agencies to manage both permanent and temporary email records electronically by the end of 2016 and all permanent electronic records in an electronic format by 2019. We have concerns regarding the ability of government agencies to meet these standards. We are equally concerned about maintaining an appropriate level of security against cyber-attacks while ensuring government accountability and transparency. In this increasingly digital age, it is imperative that the government address all challenges that born-digital materials pose, including ensuring reliable and trustworthy access to the historical record. We are concerned that the technology infrastructure across the Federal Government (and at the state and local levels) compromises agencies' capacity to manage electronic records as required by law. Electronic records management should be a core program requirement for all agencies, not just an aspirational goal.

National Archives and Records Administration

We support an increase in NARA's statutory authority to allow the agency to more effectively carry out its responsibility for proper management of federal records. NARA should be provided the necessary resources to implement 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. Non-compliance with the letter and spirit of accountability and transparency that are inherent in these statutes is an occasional occurrence that should be rectified.

Currently agencies are required to assess their own records management programs and report their findings to NARA, which in turn issues a consolidated report. After seven years of self-assessments, however, the 2015 Records Management Self-Assessment Report indicates that 64% of Executive agencies are at a moderate to high risk of compromising the integrity of public records.⁸ Although this is a modest improvement from previous years, current compliance activities are insufficient. The Records Management Self-Assessment Report reflects these challenges and the paucity of resources that most agencies dedicate to their records management operations. In 2010, NARA restarted an inspection program in accordance with 44 U.S.C. § 2906.7. Done with existing resources, this allowed NARA to complete only two to three inspections per year. Since then, NARA received support to fund five or six inspections per year. Provision of additional resources for inspections would significantly mitigate risk and malfeasance.

NARA's March 2016 Office of the Inspector General's Semiannual Report to Congress⁹ listed the Top 10 Management Challenges (page 23). They include the Electronic Records Archives; inadequate security for NARA's holdings; inadequate security for information technology and physical holdings; records management; and the growing backlog of unprocessed materials and a need for additional electronic and physical storage. NARA lacks sufficient staffing and resources to resolve these issues, and has had to re-prioritize continually to temporarily address one issue at the expense of another. We urge the Trump Administration to provide sufficient funding to address the security, preservation, and accessibility issues raised through the Inspector General's report.

The Archivist of the United States should continue to adhere to the legal obligations and responsibilities specified in the National Archives and Records Administration Act of 1984 (P.L. 98-497) and related regulations. In particular, 44 U.S. Code § 2103 stipulates that the incumbent should be nonpartisan and

⁸<https://www.archives.gov/files/oig/pdf/2016/semiannual-congress-3-2016.pdf>

⁹<https://www.archives.gov/files/oig/pdf/2016/audit-report-16-04.pdf>

hold the position solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office. In addition to these requirements, our organizations believe that certain personal and professional qualities (outlined in a 2008 statement¹⁰) are important for the Archivist of the United States to be successful in this essential position of public trust.

National Historical Publications and Records Commission

As the grant-making arm of NARA, the NHPRC is the *only* federal program that focuses solely on records programs and archival projects, and thus the *only* federal program that supports Americans' right and need to know both their heritage and the workings of their public offices. NHPRC provides opportunities for the American people to discover and use records that increase understanding of our democracy, history, and culture. During the past 40 years, NHPRC has awarded \$175 million in grants to more than 4,500 state and local government archives, colleges and universities, and other institutions and non-profit groups. Funds are used for various purposes – preserving historical records, digitizing collections, producing oral histories, publishing documentary editions, establishing new archives programs – to preserve and provide access to records of national impact and importance. These grants create jobs that make accessible records and documentary editions for use by classroom teachers, students, biographers, local historians, lawyers, genealogists, surveyors, documentary filmmakers, and many others.

NHPRC has a distinguished record of supporting innovation at the state and local level that has a major impact on federal records. The agency suffered a large cut in FY 2011, reducing its appropriation from \$13 million to \$7 million, and then another cut in FY 2012 that decreased its budget to \$5 million. We believe that, as modest as this funding is, it is vital to the cultural health of the nation. Given the importance of the grants administered by NHPRC and the remarkable return on investment that this agency has realized, we strongly endorse increased funding for NHPRC.

Declassification

Historians, researchers, journalists, and the general public expect to have access to records of their government for purposes of historical research and government accountability. NARA should be commended for creating the National Declassification Center (NDC) in 2012 and significantly reducing the backlog of classified materials awaiting declassification review.

The NDC and executive agencies should work together to develop and improve declassification policies and procedures based on a risk management approach. The government should err on the side of openness when applying the automatic declassification provisions as spelled out in Executive Order 13526. We urge the Trump Administration to limit the propensity to over-classify government records.

In FY 2014, the estimated cost to the government for managing classified information was \$14.98 billion. Eliminating the over-classification of government records would ease pressures on the declassification process and would have a net positive effect on the federal budget. Agencies and the NDC should provide line-by-line review and specific redactions, which would allow portions of documents to be released rather than whole documents being withheld. As part of their records management responsibilities, the

¹⁰<http://www2.archivists.org/statements/joint-statement-on-qualities-of-a-successful-candidate-for-archivist-of-the-united-states>

NDC and government agencies should support the declassification review process with adequate resources and the development of new technologies.

Compliance with the Freedom of Information Act

In 2008 the National Security Archive (NSA) at George Washington University released a report on federal agencies' compliance with the 40-year-old Freedom of Information Act (FOIA). The report described a pattern of long delays in responding to some requests—so long, in fact, that no normal circumstances could explain the decades-long delays. In its 2014 FOIA audit,¹¹ the NSA again reported that nearly half of all federal agencies failed to update their FOIA regulations to comply with the 2007 amendments to the law, while the 2015 audit¹² of the Electronic FOIA Amendments found that only 40 percent of agencies followed that law's provisions. Amendments to the law in 2016 attempt to address issues related to the consistent application of its provisions. Either agencies should be provided more resources to respond in a timely manner to FOIA requests or new streamlined processes should be developed across the federal government. Timely access to government information is a key responsibility of an open, free, and accountable government.

By requiring government offices to respond to requests for records within 20 days, FOIA plays a critical role in maintaining access to federal records that are still in agencies' custody. To paraphrase a crucial truth, access delayed can be access denied. Denial of access to public records damages citizens' trust in their government and ultimately undermines democratic governance itself. Rather than viewing FOIA requests as a burden, federal agencies must understand that FOIA is an essential element of their responsibilities. We call on U.S. government offices to clear up existing backlogs and to comply with FOIA requirements.

All citizens depend on public records to guarantee their rights, to hold their government accountable, and to understand the history and functions of government. Our organizations advocate equal and open access to records, balanced appropriately with maintaining confidentiality and protecting individual privacy. We believe that the Federal Government must allocate sufficient resources to administer FOIA as intended. Like the Presidential Records Act, this is a matter of public access to the records of the citizens' government. More effort must be made to ensure that electronic recordkeeping systems facilitate FOIA review and compliance, thus gradually reducing the human resources necessary for handling requests.

Section 108 of the U.S. Copyright Act

Section 108 of the U.S. Copyright Act is one of several provisions in the law that ensures a balance between the important interests of rights holders and the equally important interests of the public, a balance that is critical to archives' missions. By granting our institutions exemptions to make use of copyrighted works under clearly defined circumstances, Section 108 in particular plays an important part in incentivizing the vital part that archives and libraries play in our society.

Although there have been numerous calls to “correct” Section 108 for the digital age, our organizations do not consider Section 108 to be obsolete or in need of serious reform. While we agree that there are aspects of Section 108 that might be updated, we also find the statute to be a remarkably resilient law that

¹¹National Security Archive FOIA Audit, March 14, 2014, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB460/>

¹²National Security Archive E-FOIA Audit, March 13, 2015, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB505/>

is used every day by practicing archivists. Combined with other important provisions in the Act, in particular the Fair Use doctrine as codified in Section 107, Section 108 has proven to be an invaluable tool for archivists in conducting their collective mission to preserve the historical record.

We oppose any attempts to change Section 108 that are not made specifically to expand permitted uses by archives and libraries. We strongly favor keeping Section 108 intact.

Trans-Pacific Partnership and Other Trade Agreements

We oppose the parts of the Trans-Pacific Partnership (TPP) agreement and all similar initiatives that would use trade agreements—negotiated in secret—to bypass the appropriate treaty process in order to change the global landscape of intellectual property regulation. One objective of the TPP was to establish a common framework for intellectual property, but aspects of this initiative presented potentially serious threats to archivists and researchers.

The TPP language is unclear about whether the exceptions and limitations allowed by the agreement would expand or constrict rights that users currently have under U.S. law. Other provisions of the TPP actively undermine copyright's delicate balance, such as those that expand copyright terms or restrict the Fair Use doctrine.

Users cannot exploit archives for new scholarship and economic growth without a robust system of exceptions and limitations on the monopoly rights of copyright owners. For these and other reasons, we urge continued opposition to implementation of the intellectual property provisions of this agreement, as well as other agreements that would rewrite intellectual property rules limiting existing rights under U.S. law.

For more information, contact:

- Nancy Beaumont, Executive Director, Society of American Archivists, 312-606-0722, nbeaumont@archivists.org.
- Anne Ackerson, Executive Director, Council of State Archivists, 518-473-9098, awackerson@statearchivists.org.
- Johnny Hadlock, Program Manager, NAGARA National Office, 202-508-3800, jhadlock@sso.org.
- Regional Archival Associations Consortium Co-Chairs Kristen Chinery (313-577-8377, kristen.chinery@wayne.edu) or Jennifer McGillan (662-325-3071, jmcgillan@library.msstate.edu).