

Date

TO: The Council of the Society of American Archivists

SUBJECT: Request to Review Records and Records Appraisal Issues Relating to the National Security Agency Mass Surveillance Programs

Summary

The Society of American Archivists (“SAA”) believes the communications collected by the National Security Agency mass surveillance programs,¹ (“NSA mass surveillance programs”), meet the necessary criteria for the documents to be considered federal records.

Further study, including consultation with the staff of the National Archives and Records Administration, is needed to determine if these records should be classified as permanent.

Issue

Three issues are addressed in this document

- Whether material gathered by the NSA mass surveillance programs constitutes legal federal records under the Federal Records Act.
- If the materials are considered federal records, how then should they be appraised? Should they be deemed permanent archival records?
- If the records are appraised as permanent, what steps will be taken to ensure the security of the personal information contained therein and the privacy of the individuals and groups under surveillance?

Solution

The Federal Records Act provides this definition of a federal record:

“Records include all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them” (44 U.S.C. 3301).

¹ The National Security Agency programs include Section 215 of the so-called Patriot Act (50 U.S.C. 1861), and other mass surveillance programs such as PRISM, officially designated as SIGAD US-984XN.

As no current legislation or court ruling makes the NSA's collection of citizens' data clearly illegal, the SAA considers it likely that material collected by the NSA programs constitute legal federal records.

The question of how to appraise these records is a complex and difficult one which will involve thoughtful and likely extensive professional discussion.

- SAA encourages the relevant staff within the National Archives and Records Administration ("NARA"), as well as others familiar with federal records appraisal, to make informed comments regarding the scheduling of these documents, with a particular focus on their permanent value. SAA recognizes that without access to the records these comments must inevitably be speculative, but nevertheless believes that they are important tools with which to begin a conversation.
- SAA encourages the widespread distribution of these comments throughout the archival and records professional community.
- SAA supports the development of an evaluation regarding the permanent legal, administrative or historical need for these records, and also supports the sharing of these preliminary evaluations within the profession
- SAA encourages professional discussion of these preliminary evaluations in order to clarify issues and sharpen analysis. Therefore, SAA asks that NARA open and publicize to the archival profession and interested others the availability of a formal comments period as outlined above.
- As a preliminary step, SAA supports the creation of a Working Group to address the appraisal issues associated with these records. Such a group should include an archivist from NARA, with access to legal counsel. Furthermore, it would be helpful if the group were provided a statement and clarification of any issues that NSA believes are not open for discussion.

In crafting a discussion of NSA surveillance programs materials around appraisal questions, SAA believes the following points should be addressed:

- What is the administrative value of NSA surveillance program records?
- What is the legal value of the records, given their use by citizens to protect rights?
- Do the records hold value as a historical resource? Large, undifferentiated masses of raw personal communications (such as Congressional case files, for example) have proven to be of little value in this regard. Is this likely to hold true for the NSA surveillance programs records as well?
- If the records in question are indeed legal federal records, containing private information about American citizens, the Federal Government has the responsibility of ensuring the security of that private information and preventing its misuse or illegal access. What steps has the Government taken or will it take to protect the privacy of citizens documented in these records?
- If the records in question are indeed legal federal records, what steps has the Government taken or will it take to ensure their preservation for future authorized access?

Background

The Society of American Archivists' Issues & Advocacy (I & A) and Privacy & Confidentiality (P & C) Roundtables released an April 30, 2014 memo to the Council of the Society of American Archivists requesting a review of archival issues raised by the National Security Agency's mass surveillance programs.

The April 30 memo identified 15 issues and recommended that the Council conduct a comprehensive and detailed study into the complex range of issues triggered by the NSA mass surveillance programs in preparation for the issuance of a formal statement by SAA.

Council sought the advice of CAPP regarding how to respond to the memo of April 30.

On May 8, 2014 CAPP responded. CAPP acknowledged that the issues identified by the two roundtables are important public policy matters, but CAPP recommended to Council that SAA concentrate on records scheduling, a topic uniquely relevant to the archival profession. Legal and constitutional issues raised by the surveillance programs, CAPP believed, were best resolved by legislative action or adjudicated by American courts.

However, CAPP recommended that SAA address two of the questions raised by the roundtables:

- Are these documents of a character making them federal records?
- If they are federal records, how should they be appraised by employing professional standards, guidelines and best practices shared within the archival profession?

At its meeting on May 22-24, 2014, SAA Council accepted CAPP's recommendation and directed that CAPP work with the Issues and Advocacy and Privacy & Confidentiality Roundtables to develop the requested document.

At the direction of Council, CAPP's chair contacted the leadership of the Issues & Advocacy and Privacy & Confidentiality Roundtables seeking volunteers to work with CAPP on the requested position paper. A Working Group was formed consisting of:

Menzi Behrnd-Klodt, Klodt and Associates
Jeremy Brett, Texas A&M University
Sarah Quigley, Emory University
Amy Fitch, Rockefeller Archive Center