

April 30, 2014

To: The Council of the Society of American Archivists

Subject: Request to Review Archival Issues in the National Security Agency Agency Mass Surveillance Program

This memo is in response to the recent request by President Dana Bell that the Issues & Advocacy Roundtable and the Privacy & Confidentiality Roundtable collaborate on a review request of the ongoing and controversial situation concerning the National Security Agency and its data mining operations and mass surveillance of American citizens. The review group consisted of I&A Roundtable co-chairs Jeremy Brett and Sarah Quigley, and from the P&C Roundtable, Menzi Behrnd-Klodt and Amy Fitch, chair and vice-chair respectively. All members of the group reviewed this memo and are in agreement with its contents.

The group was specifically asked to advise SAA on whether it should issue any official statement, avoiding mention of any moral or ethical issues surrounding the controversy, and focusing on any archival issues that may arise in the context of the NSA situation.

We note that SAA has already taken a position of sorts on the issue, having, in September 2013, signed on to a www.openthegovernment.org letter urging Senators Dianne Feinstein and Saxby Chambliss to make publicly available their proposal to address the NSA's surveillance programs prior to the Senate Select Committee on Intelligence's mark-up of legislation on this issue. We welcome this small step, as we hope it will demonstrate an ongoing and firm commitment by SAA to confronting and addressing the situation.

Opinions of Other Groups

We sought the opinions of select SAA constituent groups, including the Government Records Section; the Electronic Records Section; the Records Management Roundtable; the Congressional Papers Roundtable; the International Archival Affairs Roundtable; and the Metadata and Digital Object Roundtable.

We heard from the Government Records Section and the Metadata and Digital Object Roundtable. We received a robust series of comments from Dennis Roman Riley and Dave Evans, co-chairs of the Government Records Section, who surveyed their members and provided a number of responses.

Dennis and Dave noted that most GRS members who responded felt SAA should NOT make a statement on the NSA bulk data collection programs. However, a range of comments suggests that some would welcome further investigation or study by SAA on this issue. Comments include:

- SAA should ask the hard questions about how NSA plans to store the information it gathers and what plans it has to make this information secure. Information storage and security procedures are legitimate archival concerns.
- There is support among the GRS membership for President Obama's recommendations for NSA reform, as expressed in the following document:
http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf.
- There is some concern that any response SAA might issue should be nonpartisan and nonpolitical in nature, thus maintaining the same ethical standards that archivists expect and demand regarding the maintenance and storage of records of long-term value.
- Placing the controversial issues of domestic spying and violation of privacy to one side, there was an acknowledgment by GRS members that the data collected represents an historically significant documentation of global society, and of how people exchange information and document their lives. Therefore, the information being gathered represents a potential source for future historical research beyond simply the role and functions of the NSA.
- There was acknowledgement that the issues are complex as they relate to Freedom of Information Act analyses.
- A valid point was raised that this subject is excellent for legislative advocacy (i.e. Congressional oversight), and for public awareness via journalism (i.e. *The Guardian* in the United Kingdom).
- Respondents noted that SAA is a professional society that does best in a more technical standards setting, and many of the changes to the NSA programs will come about through large data-centric enterprises altering their infrastructure and policies. The technical complexities suggest to some that these are matters few in SAA would feel comfortable or competent leading.
- Respondents noted that large banking and insurance companies have housed big data for decades, and the volume is such that individual liberties (rights or privileges guaranteed by a constitutional argument) are, as a practical matter too small to be visible or actionable.
- The question was raised as to the established retention period or disposition policy for the bulk data collected, as that would naturally inform any archival implications of the bulk data.
- It was noted that long-term retention of the bulk data by any institution would likely be both expensive and complex, and presents the possibility of hampering future international relations, given the revelations about NSA surveillance of foreign nationals.
- There was recognition that the data collected is of historical importance to the history of countries that are the source of this data as well as to the United States. As such, there should be assurances by the federal government that the material will be accessible at a future date if legitimate requests for historical research are made.
- Respondents noted that the length of retention as classified information may be long and the cost for access may be prohibitive, but that a commitment should be made in principle to give some form of access to the data.

There is a wide variety of opinions on the NSA program among the respondents in the Government Records Section, and the review group assumes that this variety will be reflected in the opinions of other SAA members.

The review group, in addition, received a question from the Metadata and Digital Objects Roundtable asking whether NSA has or is subject to federal records schedules. If so, MDO suggested that perhaps the Library of Congress (or the National Archives) should obtain the pertinent records, on the grounds of the people's right of access to government information.

The Issues at Hand

The review group has considered the issues, in light of our own investigation and discussions of the responses gathered from our sister constituent groups. These are issues that we believe SAA should investigate further before developing an explicit advocacy position on the NSA situation. The issues follow:

1. The Public's First Amendment and Democratic Rights: What is the public's right to know in this instance? How will the issues of privacy (of individuals) and confidentiality (of organizations) be managed and protected by the NSA or whoever else has access to the information, and how will the tension between privacy and the public's right to know be addressed? Can issues of notice/notification of the privacy rights of third parties even be addressed?
2. The Question of Records Ownership: Does the bulk data qualify as federal government records, or have they been transformed in such a way that they are or are not government records? If the data is gathered from individuals, do they own the data? If gathered from businesses or other organizations, do *they* own the data? How can copyright ownership be addressed and copyrights protected and preserved, when necessary?
3. The Question of Contract Law and Legal Rights to the Information: This issue is related to copyright ownership, but also to the actual ownership of the records (as property or by contract). How will these issues be addressed?
4. The Question of Property Misappropriation: This issue applies to both individual and corporate property. How should these rights be protected and managed?
5. The Question of Digital Rights Management: What resources are likely to be needed regarding future preservation and access to the NSA records, and who will provide and be responsible for these? How will any relevant digital asset management system ensure the integrity of the information?
6. The Question of Records Scheduling: Is this information subject to federal records scheduling, and should it be?
7. The Question of Information Security: Are there procedures and systems in place that will ensure the security of the information?
8. The Question of Misuse: There is an immense possibility for damage and destruction resulting from misuse or abuse of the information being gathered by the NSA. What steps are being taken to address this possibility?

9. The Question of Access: Who can access these records, and how is this access controlled? Who is authorized to see or use the information? Are there methods in place for citizens to find out who is accessing the information?

10. The Question of FOIA: Does the Freedom of Information Act, which is central to the modern concept of citizen access to information, apply at all to the information that NSA is gathering? If not, why not and who determined that stance? Might any state freedom of information laws apply to information about individuals and organizations resident in various states?

11. The Question of Information Structure: How is this information being structured? Is it structured in such a way that the information is accessible and readable?

12. The Question of the U.S. Privacy Act: The U.S. Privacy Act provides privacy to federal government records kept within a “system of records”. Does the NSA data reside in such a “system”?

13. The Question of International Law – Do we know where exactly the records are stored – on servers within the United States, on foreign servers, by cloud services that are controlled by foreign businesses, etc? Is there any foreign “touchpoint”, and might some countries’ “long arm jurisdiction” allow foreign courts to reach these records and their custodians, applying foreign law? What are the ramifications for the records, ownership of and access to records, copyright, and for the privacy of U.S. citizens?

14. The Question of Corporate Relations: What is the likely involvement by businesses and corporations in this program, and how should corporate archivists respond?

15. The Question of National Security: How do national security concerns – which have been used in the past and are still used today to deny access to records by citizens – impact SAA’s response to this issue? How much leeway do we as an organization of information professionals grant to the federal government and the NSA on the grounds of preserving “national security”?

Conclusion

The review group, after studying the complex range of issues involved in this situation, recommends the following course of action:

This is a serious issue, with the potential for deep and significant impact on the security, privacy and rights of American citizens, and we believe that the matter merits further considered study. We recommend to Council that it direct a more detailed and serious investigation into this issue, in preparation for the issuance of a formal statement. We leave it to Council’s discretion to decide who will be assigned to this task, whether it be the Committee on Archives and Public Policy, the existing review group, or a specially constructed and assigned task force.

Respectfully submitted,

**Jeremy Brett and Sarah Quigley, Issues & Advocacy Roundtable
Menzi Behrnd-Klodt and Amy Fitch, Privacy & Confidentiality Roundtable**

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