

Recommendations on Federal Archives and Records Management Issues

**Prepared for the Biden Presidential Transition Team by
Council of State Archivists
National Association of Government Archives and Records Administrators
Regional Archival Associations Consortium
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 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. 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 federal government provides critical, irreplaceable leadership in the field of archives and records management that has a profound, positive impact for states, municipalities, and the public. This includes research and development of technologies and modeling of best practices that can be transferred and applied to a wide spectrum of archival environments, as well as providing essential, cost-effective grant funding to archives throughout the country.

¹ www.statearchivists.org

² www.nagara.org

³ www2.archivists.org/groups/regional-archival-associations-consortium-raac

⁴ www2.archivists.org/

Federal agencies have been vital partners in preserving and making accessible America's documentary heritage nationwide. Funding to archives provided by federal agencies, including the Institute of Museum and Library Services (IMLS), the National Endowment for the Humanities (NEH), the National Historical Publications and Records Commission (NHPRC, NARA's grant-making arm), and the National Park Service (NPS), has a critical positive impact on local communities and spurs innovation and creativity in advancing best practices in archives.

We urge President-Elect Biden and Vice President-Elect Harris 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 embrace the concept that the records they create are public assets and must adhere to both the letter and the spirit of all archives and records management laws, regulations, and policies.
- 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 must be given the authority, resources, and capacity to support agency efforts and 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 and the necessary resources to enable the agency to meet its responsibility for proper management of federal records.
- NARA's National Declassification Center should be staffed appropriately 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 Biden Administration:

- IMLS, NEH, NHPRC, and NPS support archives and records innovation at the state and local levels through their grant programs. Given the importance of federal grants and the remarkable return on investment that these agencies have realized over several decades, we strongly endorse increased funding to support both national competitive grants and pass-through grants to states.
- 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 international agreements, must safeguard the role of archives and libraries in providing access to archival materials to enable ongoing research, scientific progress, and economic growth.

A comprehensive review of these subjects—with recommendations—follows.

REVIEW AND RECOMMENDATIONS

Records Management Responsibilities of Public Officials

The public trust requires officials at all levels of government to be cognizant of and to comply with 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 these are the property of the citizens of the United States.

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.

Currently incremental progress is being made in improving records management at federal agencies. Incoming Cabinet secretaries and senior agency leaders must be familiar with 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. Since then, the Office of Management and Budget (OMB) and NARA have issued a series of directives and bulletins⁶ aimed at creating a robust records management framework, including addressing email management, training, and the

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

⁶ <https://www.archives.gov/records-mgmt/policy>

responsibilities of senior agency officials. In 2019, a joint OMB/NARA memorandum established ambitious goals for Executive agencies to manage their permanent electronic records.⁷ We urge the Biden Administration to continue to build on the strong foundation that these policies have established.

Federal Electronic Records Management

The federal government continues to work on ambitious programs for enterprise-wide electronic records management and electronic information management standards. NARA, through its electronic records management initiatives, has demonstrated crucial leadership in managing born-digital records and establishing digitization standards for analog materials.

The 2012 joint OMB/NARA directive on managing government records required 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. Office of Management and Budget M-19-21, *Transition to Electronic Records*,⁸ established new goals for electronic recordkeeping to support government-wide efforts to transition to a fully electronic (paperless) government. This new directive requires, *inter alia*, agencies to manage all of their permanent records in electronic format by December 31, 2022. As NARA's 2020 Inspector General's report to Congress stated: "NARA and the rest of the government is challenged with meeting these deadlines while determining how best to manage electronic records and make e-Government work more effectively."⁹ NARA also has asserted in its review of Executive agency records management programs that "electronic records management, including email management, requires more conscious effort to integrate with information governance, stewardship, and information technology to be successful."¹⁰

We share these concerns. 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 official historical records. 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—including funding for staff at competitive salary levels—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

⁷ <https://www.archives.gov/files/records-mgmt/policy/m-19-21-transition-to-federal-records.pdf>

⁸ <https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-21.pdf>

⁹ <https://www.archives.gov/files/oig/reports/nara-oig-sar-fy20a-1oct19-to-31mar20.pdf>

¹⁰ <https://www.archives.gov/files/records-mgmt/resources/dept-series-summary-report-final-3-28-2019-508.pdf>

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. It is encouraging that in terms of email management, agencies have consistently reported a significant, steady increase since 2016 in their confidence in managing these types of electronic records. After more than a decade of self-assessments, however, the 2019 Records Management Self-Assessment Report indicated that 62% of Executive agencies are still at a moderate to high risk of compromising the integrity of public records.¹¹ Although risk levels have remained relatively stable over the years, current compliance activities are insufficient. In fact, the number of agencies reaching low risk has never made it above 50% in the past decade. 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. Although the numbers of annual inspections have increased gradually since then, 2019 represents the greatest activity—with just eight individual reports completed. NARA’s summary review of its inspection findings reveals a series of consistent deficiencies at Executive departments, including by agency senior leadership. Provision of sufficient resources for continuing a robust system of inspections would significantly mitigate risk and malfeasance.

NARA’s 2020 Office of the Inspector General’s Semiannual Report to Congress¹² listed the Top 10 Management Challenges (page 24). They include the need to: develop systems to address electronic records archives and improve records management within a rapidly changing technological environment; meet storage, preservation, and security needs of growing quantities of records in all formats; and expand public access to records. NARA requires 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 Biden Administration to provide funding to address the security, preservation, accessibility, and management issues raised in 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 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, we believe that certain personal and professional qualities¹³ are important for the Archivist of the United States to be successful in this essential position of public trust.

¹¹ <https://www.archives.gov/files/records-mgmt/resources/2019-federal-agency-records-management-annual-report.pdf>

¹² <https://www.archives.gov/files/oig/reports/nara-oig-sar-fy20a-1oct19-to-31mar20.pdf>

¹³ <https://www2.archivists.org/statements/joint-statement-on-qualities-of-a-successful-candidate-for-archivist-of-the-united-states>

Federal Funding for Archives

Federal grants to archives and archival projects represent a productive and positive investment of very modest funds that help to ensure that documentation, especially in electronic form, is preserved and made accessible to a wide array of users. These grants also create jobs in archives and other cultural heritage institutions and enable the purchase of goods and services in local communities. Grant recipients typically are required to match federal funds at up to 50 percent of the overall project budget. In this way, federal funding stimulates private support for archival projects and acts as a catalyst that cannot be substituted from private sources.

The IMLS, NEH, NHPRC, and NPS have supported work in every state in the U.S., funding archival repositories within academic institutions, local and state governments, museums, and public libraries. Federal grants demonstrate a commitment on the part of the government—on behalf of the American people—to ensure that the nation’s social, cultural, economic, scientific, and political experience is available to future generations. These agencies have a proven track record for cost-effective and meaningful use of taxpayer funds that has had a critical impact on local communities and represents an excellent return on investment. Without the leadership of these programs, Americans’ understanding of our cultural heritage would be greatly diminished.

Although in recent years these programs have seen stagnant budgets or only modest increases, we urge the Biden Administration to increase funding to these programs, thereby demonstrating the federal government’s commitment to ensuring that the historical record of our collective human experience is preserved and accessible for use by the American public, including teachers and students, scholars, scientists, family historians, the business community, and governments themselves.

Declassification

Researchers, historians, journalists, and the general public expect to have access to records of their government for purposes of government accountability and historical research. NARA should be commended for creating the National Declassification Center (NDC) in 2012 and significantly reducing the backlog of classified materials awaiting declassification review. In August 2019, however, the director of the Information Security Oversight Office (ISOO), in a letter to the President, observed that the current declassification framework was unsustainable. This bleak assessment was reiterated in the 2019 ISOO report to the President (submitted in June 2020), which underscored that practices have not kept pace with the volume of digital data and the problem will worsen if methods for overseeing information security programs across the government are not reformed. The 2020 report of the Public Interest Declassification Board also emphasized that the current system is untenable and any meaningful reform will require a substantial commitment and effort at a government-wide level.

In FY 2017, the estimated cost to the government for managing classified information was \$18.39 billion, which continues to increase each year.¹⁴ Eliminating the over-classification of government records would ease pressures on the declassification process and would have a net

¹⁴ FY 2014 declassification costs were estimated at \$14.98 billion; in 2015 the costs were estimated at \$16 billion.

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

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 Biden Administration to limit the propensity to over-classify government records and to create a more sustainable framework for declassification.

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 then-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. Since then, the federal government has continued to struggle to meet its obligations and comply with the law. In its 2019 FOIA audit,¹⁵ the NSA reported that federal agencies collectively had a backlog of 108,451 FOIA requests. All agencies reviewed had requests pending for several years, with five agencies having requests that were more than a decade old. Amendments to the FOIA law in 2016 attempted to address issues related to the consistent application of its provisions. However, the intended impact of these reforms has not materialized. 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 borrow from 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. As with the Presidential Records Act, FOIA is a matter of public access to the records of the citizens' government. We believe that the federal government must allocate sufficient resources to administer FOIA as intended. Greater 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.

¹⁵ <https://nsarchive.gwu.edu/foia-audit/foia/2019-03-08/25-year-old-foia-request-confirms-foia-delays-continue-unabated>

U.S. Copyright Act and Intellectual Property Rights

Section 108 of the U.S. Copyright Act is one of several provisions in law that ensure 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 facilitating the vital role that archives and libraries play in our society.

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

We support extension of the Copyright Office's exception to the Digital Millennium Copyright Act (DCMA). The exception allows archives to preserve and provide access to computer software that represents an important facet of our cultural heritage. The concerns that archives might monetize this exception are completely unfounded. Our core professional ethics and centuries of experience have demonstrated that archives have explicitly not monetized our work to the detriment of the communities we serve. We urge the Biden Administration to make this exception permanent to avoid the unnecessary process of renewing it every three years. Further, we support expansion of the exception to permit the preservation of and access to all of the cultural heritage found in archives and museums.

We oppose trade and other international agreements that might pose threats to the mission of archives and the ability of researchers to use our collections. Users cannot make full and appropriate use of archives for new scholarship and economic growth without a robust system of exceptions and limitations on the monopoly rights of copyright owners. We urge continued opposition to implementation of any intellectual property provisions in international agreements that would rewrite intellectual property rules limiting existing rights under U.S. law. In addition, we support international agreements and treaties that enshrine limited exceptions to copyright for libraries and archives. In particular, we call on the United States to take a leadership role within the World Intellectual Property Organization on text-based work for an international instrument that would help coordinate copyright exceptions for archives and libraries across borders. Such international agreements would, by design, cause no harm to rights holders, but would create a substantial benefit to researchers worldwide and would facilitate the study of our great cultural heritage from outside our borders.

THE IMPORTANCE OF ARCHIVES AND RECORDS MANAGEMENT

Government records management programs can lead to more effective and efficient operations—which in turn result in long-term cost savings while ensuring that records of enduring value are

identified, preserved, and made accessible to future generations. Federal archives not only document official actions and policies but reflect society at large. Public records represent essential evidence that serves as the basis for understanding our common political, social, economic, scientific, and cultural heritage. We urge the Biden Administration to demonstrate a concrete commitment to supporting the role and mission of archives and records management in the federal government.

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