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Presidential and Federal Records: Transition Considerations

At the conclusion of a presidency, both the President and the Administration have likely generated millions of government records that document the actions and decisionmaking processes of the executive branch and may be of long-term interest to Congress, federal agencies, incoming Presidents, researchers, and members of the general public.

Preservation of these materials is guided by two key laws. The Presidential Records Act (PRA; 44 U.S.C. §§2201-2209) governs materials created by the President and certain components of the Executive Office of the President. The Federal Records Act (FRA; 44 U.S.C. Chapters 21, 29, 31, and 33) governs materials created by agencies. The National Archives and Records Administration (NARA) and its head, the Archivist of the United States, provide a supporting role in the case of presidential records and a coordinating and directing role in the case of federal records. This In Focus provides an overview of the definitions of *presidential records* and *federal records*, presidential and agency records management programs, and NARA's role in records management.

What Are Presidential Records?

The PRA defines *presidential records*, which are materials appropriate for government preservation, and *personal records*, which need not be retained. Prior to the PRA's 1978 enactment, all presidential materials were considered to be the President's private property. Now, statute states that the "United States shall reserve and retain complete ownership, possession, and control of Presidential records" (44 U.S.C. §2202).

The PRA defines *presidential records* as

documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term—

(A) includes any documentary materials relating to the political activities of the President or members of the President's staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President (44 U.S.C. §2201).

Personal and Election Records

During their time in office, Presidents also create personal records. Personal records are considered in law to be documentary materials "of a purely private or nonpublic character" that do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President (44 U.S.C. §2201(3)). Such materials include diaries, journals, and other personal notes.

However, this definition also includes certain other political materials provided they also do not relate to or have an effect upon the carrying out of presidential duties, such as those relating (1) to private political associations; (2) exclusively to the President's own election to the office of the presidency; and (3) directly to the election of a particular individual or individuals to federal, state, or local office. NARA guidance further stipulates that a President-elect's transition team does not create presidential records, although federal agency briefing materials shared with the team are considered to be federal records.

What Are Federal Records?

Other components of the Administration and federal agencies also create records materials governed by the FRA. Under the FRA, *federal records* are defined as

all recorded information, regardless of form or characteristics, made or received by a Federal agency 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).

The 2014 amendments to the FRA incorporated the phrase *all recorded information* to make clearer that federal records include digital and electronic information—not just physical materials—made or received by a federal agency in connection with the transaction of public business. NARA continues to issue guidance specific to electronic records, discussed further below.

Records Management Programs

The FRA requires each agency head to make and preserve records containing proper documentation of the agency's activities through a records management program (44 U.S.C. §3102). In the case of maintaining a presidential records program, the incumbent President serves as the agency head (44 U.S.C. §2203(a)).

A federal records program is to include effective controls over the creation, maintenance, and use of records in the conduct of current business; procedures for identifying records of general public interest or use that are appropriate for disclosure and posting in accessible electronic formats; and cooperation with the Archivist in applying standards, procedures, and techniques related to records management.

For presidential records, in contrast, NARA notes that the agency is available to consult with the President regarding records management practices upon request, although the PRA does not require such consultation. In its 2020 *Guidance on Presidential Records*, NARA recommends that an incoming Administration designate an attorney in the White House Counsel's Office "as soon as possible" to serve as contact with NARA on all PRA issues, including "responding to special access requests that NARA receives from Congress and the Courts for the Presidential records of former Presidents."

For How Long Are Records Maintained?

Once government materials are determined to be records, agencies must then work with NARA to determine how long to maintain the records through creation of a records schedule. A records schedule is created by an agency in consultation with NARA and sets a timeline for the eventual disposition of temporary records or transfer of permanent records to NARA.

A *permanent record* is considered to have permanent value and should be maintained in perpetuity by the federal government. A *temporary record* may be destroyed after a period of time specified in the records schedule, be it months or decades (36 C.F.R. §1220.18). Only permanent records (which include some federal records and initially all presidential records) may be transferred to NARA. In 2021, NARA estimated that less than 5% of federal records are permanent records.

Capstone Officials

In recognition of the increasing and overwhelming volume of emails and other electronic records that federal agencies produce, in 2013 NARA offered federal agencies the option to implement a role-based method of managing electronic materials known as "Capstone." Typically, lower-level agency staff would be expected to file email records individually. The Capstone approach, described in part in NARA Bulletin 2013-02, allows for the capture of records that "should be preserved as permanent from the accounts of officials at or near the top of an agency or an organizational subcomponent."

NARA's Role

In addition to advising and consulting with regard to records management programs, NARA plays a key role in accessioning permanent records and maintaining records during presidential transitions, helping agencies understand records management in the context of new formats, and ensuring continued access to and appropriate disposal of records materials (44 U.S.C. §2904). NARA also writes blog posts about transition period records management and produces resources directly for political employees about their records responsibilities.

At the Conclusion of a Presidency

After a presidency, the responsibility for the custody, control, preservation, and access to presidential records shifts to the Archivist (44 U.S.C. §2208). NARA also takes custody of gifts given to the President and the President's immediate family. NARA explains that these gifts "are accepted on behalf of the United States and include a range of objects that have been received from foreign governments or the American people and foreign citizenry."

Electronic Records Guidance

As part of NARA's statutory responsibilities to promulgate standards, procedures, and guidelines with regard to records management, NARA has issued specific guidance on the management of email, social media, and instant and text message records. Staff-level preservation of records, while often considered a support activity, also involves maintaining documentation of essential government functions and providing information for public and congressional oversight.

To facilitate records schedule updates and streamline the timely transfer of records materials, NARA continues to modernize its existing Electronic Records Archives system. NARA explains that the system will ultimately provide end-to-end lifecycle coverage for electronic records and "a processing environment, the digital repository, and forms/workflows to support the scheduling of Federal records as well as the transfer of permanent Federal records into NARA's custody." In addition, federal agencies are required to manage all permanent records in an electronic format by June 30, 2024, to facilitate NARA's continued move toward electronic preservation.

Disposal of Records

While temporary records are to be disposed of in accordance with their approved records schedules and all presidential records are initially considered permanent, the PRA provides a process for the incumbent President to seek a change in the disposal schedule of the President's own records by obtaining the Archivist's written approval (44 U.S.C. §2203(c)).

The PRA does not provide the former President with a process for disposing of presidential records. In contrast to the disposal request process for incumbent Presidents, the Archivist may dispose of a former President's presidential records if the Archivist deems them to have insufficient value to warrant their continued preservation. The Archivist must publish a notice in the *Federal Register* at least 60 days in advance of the proposed disposal date (44 U.S.C. §2203(g)(4)).

Agency heads are to notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, or erasure of records, and statute requires the Archivist to initiate action through the Attorney General for the recovery of the records (44 U.S.C. §3106). NARA provides information on missing records and efforts to retrieve materials on its website.

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