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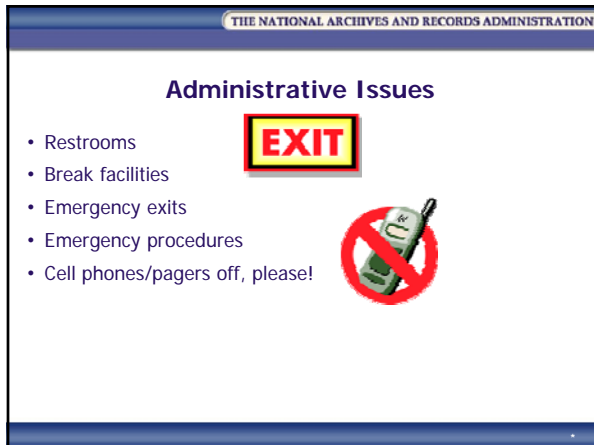
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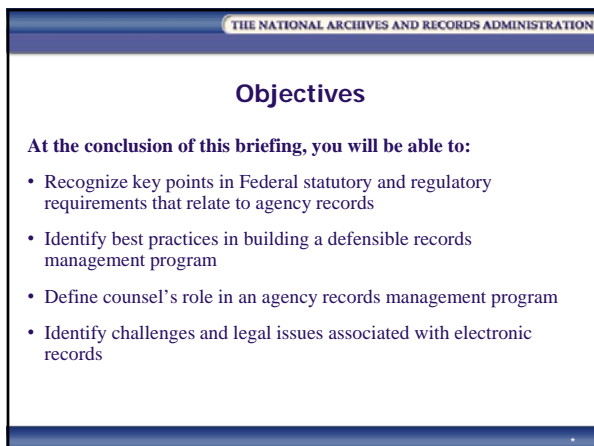
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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Agenda

- **Section 1:** Records Management As It Relates to Legal Counsel
- **Section 2:** E-recordkeeping and E-Discovery: Hot Topics & Current Case Law
- **Section 3:** Implementing the Presidential Memorandum
- **Wrap-Up**

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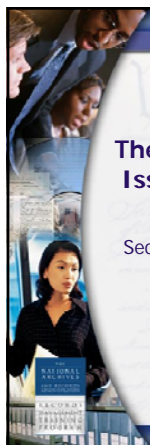
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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### The Case for Records Management: Issues for Federal Agency Counsel

Section 1: Records Management As It Relates to Legal Counsel

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Agency Counsel and Records Management

- Two roles:
  - Provide agency-wide assistance on legal issues with records
  - Ensure the creation, management, and disposition of agency counsel records

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Legal Counsel and Records Management

- Review and approve agency policies:
  - Record, nonrecord, personal papers
  - Email, wikis, blogs, Facebook, YouTube and other electronic communication tools
  - Contractor-created records
  - Removal of records
  - Records schedules

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Definition of a Record

- “...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)

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Federal Records

Archivist of the United States determines for all federal agencies which records are:

- Permanent
- Temporary

NARA also determines the retention period:

- The length of time that records must be held by an agency before transfer to NARA, or destruction at the end of the records lifecycle

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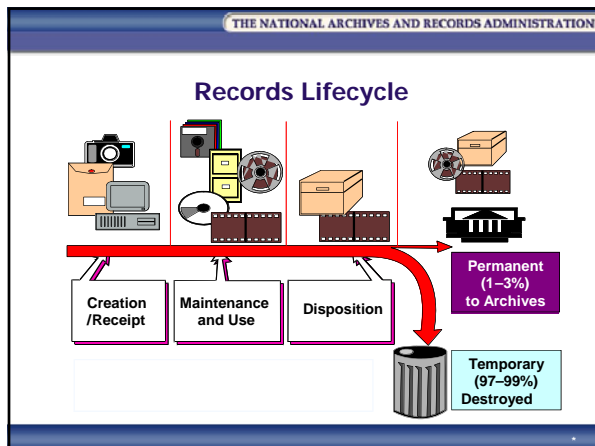
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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Nonrecords

Agencies must manage nonrecords in order to effectively identify and preserve actual Federal records

- Disposition of Federal Records Handbook (2000):
  - Identifying [Federal] records means distinguishing them from nonrecord materials and personal papers
  - Managing includes:
    - Up-to-date inventories of both records and nonrecords
    - Established policies for filing, maintaining, and dispositioning nonrecords

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Nonrecords

- Nonrecord materials are identified by the agency, not NARA, and the agency provides internal approval for disposition
- Grey areas:
  - Working papers and notes
  - Preliminary drafts not circulated for comment
  - Reference material used in preparing reports or studies
    - Still U.S. government-owned... but excluded from the legal definition of a record or falling into one of three specific categories

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Working Papers and Drafts

- Might be a record if...
  - They contain unique information, such as substantive annotations or comments that add to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities.

(36 CFR 1222.12(c))

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Working Papers and Drafts

**Working files and background materials may be needed to adequately document agency activities.**

- Agencies should evaluate the documentation practices of:
  - Senior officials and high-level staff
  - Engineers, scientists, and other professionals and specialists
  - Managers of unique agency programs and major contracts

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Working Papers and Drafts

Preserve drafts and working papers or files that:

- Propose and evaluate options or alternatives
- Examine implications in the development of high-level policies and decisions
- Document findings or support recommendations
- **Remember:** Senior officials or their staff members **should not** keep such Federal records as personal papers.

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Nonrecords

- Extra copies of documents preserved only for convenience or reference.
- Stocks of publications and of processed documents (separate from the record copy of any publication)
- Library or museum material maintained solely for exhibit and reference

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Nonrecords

- Information copies of correspondence, directives, forms, etc
- Routing slips and transmittal sheets
- Ticklers, follow-ups, suspense copies
- **Duplicate copies of documents maintained in the same file**
- Physical exhibits or artifacts lacking evidential value

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## Nonrecords

- Guidelines for management:
  - Establish a policy that only the agency Records Officer should determine record or nonrecord status
  - Giving that responsibility to operating staff can lead to misapplication of the nonrecord label, weaken the agency's disposition program, and result in loss or alienation of records
  - The Records Officer should consult with General Counsel and NARA on documents with marginal value which may be records
  - When in doubt, default to record status

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## Nonrecords

- Nonrecords should never be interfiled with records
- Nonrecords should be destroyed when no longer needed
  - Anticipate volume and storage needs
  - May need to apply firm disposition dates
- Nonrecords should not be removed from agency custody without the agency's approval
  - Nonrecords may still contain security-restricted or sensitive information
- These criteria establish a defensible management program

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## Personal Papers

- **Personal papers** are documentary materials of a private or nonpublic character that do not relate to, or have an effect on, the conduct of agency business.
- Not government-owned

(36 CFR 1222.20)

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### Personal Papers (cont'd.)

- Calendars are not considered personal papers.
- Personal papers must be clearly designated and maintained separately from records.
- If information about private matters and agency business appears in the same document, the document should be copied, the personal information deleted, and the document treated as a Federal record.

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### Email

An **email message** is created or received on an agency email system, including brief notes, more formal or substantive documents

- Could include attachments
- Always includes routing information (metadata)
- An **email program** is just a delivery mechanism. It is a computer application used to create, receive, and transmit email messages.

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### Email Archiving

- **Email archiving** refers to applications that remove email from the mail server and manage it in a central location.
- Agencies are responsible for addressing areas where the applications do not meet the requirements of the Federal Records Act and NARA regulations.

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Email Archiving

Email archiving applications (NARA Bulletin 2008-05)

- Email removed from the mail server manually or automatically
- The archive server indexes the email and associated files for future search and retrieval.
- Individual e-mail systems provide access to archived email. **Only one copy** of the email gets archived.

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Email Archiving

Issues:

- May not be capable of grouping related records;
- May not be able to maintain the records in a usable format for their full required retention periods;
- May make it difficult to identify permanent records and temporary records and carry out proper disposition at the end of their retention periods;
- Users may assume that the e-mail application has replaced the email recordkeeping system.

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Email Management

Reduce what has to be managed by culling or allowing the system to **auto-delete**:

- Personal emails
- Nonrecord emails
- Transitory emails

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Email Management

**Transitory email**

- How many emails does it take to set up a meeting?
- How many routine questions or requests for information?
- How many reminders do you get that work is due?
- How many agency notifications do you get?
- How many distribution lists are you on?
- How many confirmation emails do you get for training, conferences, and travel?

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Email Management

- Transitory – records with short life spans (GRS 23, Item 7)
- **Destroy immediately**, or when no longer needed for reference, or according to a predetermined time period or business rule (e.g., implementing the **auto-delete** feature of electronic mail systems).

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Email Management

- NARA Bulletin 2013-02
  - Outlines the “Capstone” approach for managing email electronically
  - Supports the Presidential Memorandum on Managing Government Records
  - Provides a method of compliance with OMB/NARA M-12-18 Managing Government Records Directive to “manage both permanent and temporary email records in an accessible electronic format”

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Email Management

- Capstone:
  - Categorize email based not on content of each individual record, but by the position/office of the account holder
  - Based on likelihood of high-level agency managers producing consistently high-value (i.e., permanent) email records
  - By identifying Capstone officials, temporary accounts can be so designated and handled by a bulk retention as well

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Social Media

Social Media and Web 2.0

- Umbrella terms for various activities integrating web activity, social interaction, and web-user generated content

**How are agencies using social media?**

- To connect people to government
- To solicit information and responses from the public
- To recruit personnel
- To provide collaborative spaces

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Social Media

- Blogs, wikis, social networking tools, crowdsourcing / social voting, video sharing, storage, content management
- **Is it a record?**
  - Is the information unique and not available anywhere else?
  - Does it contain evidence of the agency's policies, business, mission, etc?
  - Is this tool being used for agency work?
  - Is the use of the tool authorized by the agency?

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### Social Media

- Agencies need to develop policies and procedures for use of social media which includes records management.
- Challenges:
  - Public expectation that all web content is permanent and permanently available
  - Content located in multiple places
  - Ownership and control of data that resides with a third party

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### Social Media

- Other considerations:
  - Does your agency allow public comments? Is there any moderation of public contents (monitoring, responding, enforcing rules of behavior)?
  - Social media practices should be consistent with other agency recordkeeping policies
    - Clearly defined roles
    - Recordkeeping responsibilities
    - Monitoring use to be aware of changes in record value over time

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### Case Study: Social Media

- Department-wide schedule establishes policy and disposition for all component agencies
- Defines "record" content on both agency-owned and third-party platforms and clearly delineates recordkeeping responsibility
- Mission-specific content is scheduled according to the mission program; all other content on all software applications, no matter where hosted, is governed by one policy

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Case Study: Social Media

- Defines content (all submissions, documents, pictures, videos, hyperlinks, official statements, etc)
- Defines communication (all conversation between two or more persons through an application interface)
- Defines original content vs. copies of content

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Records Scheduling

- The process of developing and documenting the specific and mandatory instructions for what to do with records no longer needed for current Government business
- Also called:
  - Records disposition schedule
  - Records control schedule
  - Records retention schedule
  - Schedule

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Legal Foundation

**36 CFR 1225 is the primary source for information about how to schedule records.**

- 36 CFR 1225.1–1225.26—Scheduling Records
- 1225.1: Authorities for scheduling records
- 1225.12: Developing records schedules
- 1225.14: Scheduling permanent records
- 1225.16: Scheduling temporary records

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Legal Foundation

- 1225.18: Request for records disposition authority
- 1225.24: Apply previously approved schedules to electronic records
- 1225.26: Request to change disposition authority

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Oversight Agencies—NARA and GSA




- NARA is responsible for adequacy of documentation and records disposition.
- GSA is responsible for economy and efficiency in records management.
- Federal agency records management programs must comply with regulations from NARA and GSA.

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Oversight Agencies—OMB



- Agencies may create or collect information “only after planning for its ...use, storage, and disposition.”
- Agencies must plan in an integrated manner for managing information throughout its lifecycle and must:
  - Incorporate records management and archival functions into the design, development, and implementation of information systems
  - Provide for public access to records where required or appropriate

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Scheduling Records

**Role of legal counsel**

- Determining legal value of records
- How long do agencies need to maintain records for legal purposes?
- Is there continuing legal value to records that would make the records permanent?

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Scheduling Records

**Benefits to legal counsel**

- Source to locate records to respond to subpoena, discovery, or FOIA
- NARA approval if there are questions on why records have been destroyed

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Scheduling Records

- Authorizations granted under lists and schedules submitted to the Archivist under section 3303 of this title, and schedules promulgated by the Archivist under subsection (d) of this section, shall be **mandatory**.

(44 USC Chapter 3303a(d))

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Scheduling Records

- Records schedules:
  - Describe all records created or received by an agency
  - Provide for the permanent or temporary disposition of the records
  - Establish mandatory retention periods for records
  - Provide mandatory disposition instructions

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Scheduling Records Common to Most Agencies

### General Records Schedule

- The Archivist shall promulgate schedules authorizing the disposal, after the lapse of specified periods of time, of records of a specified form or character common to several or all agencies if such records will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their further preservation by the United States Government.

(44 USC Chapter 3303a(d))

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## General Records Schedules

Of particular interest to agency counsel:

- EEO Case Files
- ADR Case Files
- FOIA records
- Privacy Act records
- Erroneous release records
- Ethics records
- Federal Advisory Committee Act records

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Unscheduled Records

- Not covered by the GRS or an agency specific schedule
- Must not be destroyed or deleted

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Legal Counsel Records

- **Subject Files:** The records are maintained for the General Counsel and the Deputy General Counsel. The files consist of briefing books and files on specific topics, issues or projects. Arranged alphabetically by subject or bureau, with subcategories under the subject or bureau. The subjects relate to specific topics under the purview of the official, including policy and general information, particular problems and resolutions.
- **Disposition: Permanent. Transfer to the National Archives 15 years after change in administration.**

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Legal Counsel Records

- Legal opinions files which contain significant or precedential legal analysis, conclusions, advise or interpretations pertaining to significant policy-making decisions, documenting major activities.
- **Disposition: Permanent. Transfer to the National Archives 15 years after change in administration.**

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Legal Counsel Records

- Legal opinions files which do not contain significant or precedential legal analysis, conclusions, advice or interpretations and pertain to routine matters in such subjects as procurement, personnel, labor, travel, transportation, and to routine review and clearance of documents originating in other offices.
- Disposition: Temporary. Destroy when 3 years old.**

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Legal Counsel Records

- Litigation files that contain significant or precedential legal analysis, decisions or interpretations and pertain to significant policy-making decisions or documents major activities.
- Disposition: Permanent. Transfer to the National Archives 15 years final judgment.**

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Legal Counsel Records

- Litigation files which do not contain significant or precedential legal analysis, conclusions, advice or interpretations and pertain to routine matters in such subjects as procurement, personnel, labor, travel, transportation
- Disposition: Temporary. Destroy 3 years after final judgment.**

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### Legal Counsel Records

- **Attorney Working Files:** Includes drafts, notes, background material, routine electronic mail and reference copies of documents. The files also include preliminary draft of Executive Orders, regulations, letters and memoranda, and reports. The record copies of documents prepared or received by attorneys are placed in the official files as appropriate.
- **Disposition: Temporary. Destroy onsite when 2 years old or when no longer needed for reference, whichever is later. Screen attorney working papers before destruction and transfer any record material to appropriate official file.**

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### Benefit of Scheduling

- Establishes baseline of reasonableness in agency disposition programs
  - How long is it reasonable to retain business information?
    - Many agencies retain temporary records too long
    - Many agencies fail to transfer permanent records
      - This can create expectations amongst the public that information lives forever... or can be restored by backup tapes

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### Benefit of Scheduling

- Also establishes continuity and good faith of disposition operations
  - If your agency follows existing records schedules, correctly disposes of records and nonrecords, routinely updates schedules as necessary, and maintains good inventory control, your records management program is defensible in litigation, responsive to FOIPA, and less likely to experience records loss through accidental and unauthorized destruction

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Case Study: Benefits of Scheduling

- NARA receives allegation of unauthorized destruction of records from seven years prior
- According to the General Records Schedule and the agency's records schedules, the records should have been destroyed six years ago
- The agency consults inventories, records destruction records, and backup tapes policies
- NARA is able to definitively respond to the allegation that the records were legally destroyed in accordance with an approved disposition, clearing the agency of responsibility

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Sources: NARA Bulletins

<http://www.archives.gov/records-mgmt/bulletins/>

- 2014-02: Guidance on Managing Social Media Records
- 2013-03: Guidance for Agency Employees on the Management of Federal Records, Including Email Accounts, and the Protection of Federal Records from Unauthorized Removal
- 2013-02: Guidance on a New Approach to Managing Email Records
- 2012-02: Guidance on Managing Content on Shared Drives
- 2009-02: Guidance on Managing Records in Multi-Agency Environments

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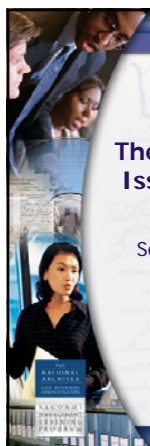
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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION



The Case for Records Management:  
Issues for Federal Agency Counsel

Section 2: E-recordkeeping and E-Discovery:  
Hot Topics & Current Case Law

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Topics

- Statutory updates from 2014
- The role of legal counsel in an agency's recordkeeping program
- E-Recordkeeping and E-Discovery
- Special Issues
- Legal Holds on Records and the Duty of Agency Counsel
- Takeaways
- Supplemental Resources/Handouts

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Presidential Records Act and Federal Records Act Amendments of 2014

- Signed November 26, 2014
- Updates the Federal Records Act (FRA) of 1950 and Presidential Records Act (PRA) of 1978
- [PL 113-187](#)

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Summary of Major Updates

- Strengthening the Federal Records Act by expanding the definition of Federal records to clearly include electronic records. This is the first change to the definition of a Federal record since the enactment of the act in 1950.
- Confirming that Federal electronic records will be transferred to the National Archives in electronic form.
- Granting the Archivist of the United States final determination as to what constitutes a federal record.
- Authorizing the early transfer of permanent electronic federal and Presidential records to the National Archives, while legal custody remains with the agency or the President.
- Clarifying the responsibilities of federal government officials when using non-government email systems.
- Empowering the National Archives to safeguard original and classified records from unauthorized removal.
- Codifying procedures by which former and incumbent Presidents review Presidential records for constitutional privileges. Formerly, this process was controlled by an Executive Order subject to change by different administrations.

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Section-by-Section Summary

Sec. 2. Presidential records.

- Codifies the notification and review process for Presidential records by the incumbent and former Presidents, supplanting E.O. 13489
  - NARA is revising regs at 36 CFR 1270
- Authorizes courtesy storage of incumbent Presidential records, making the President the exclusive access point for records in NARA's physical custody
- Restricts access of original Presidential records from anyone convicted of a crime related to NARA records – e.g., Sandy Berger
- Establishes requirements for PRA employees when using non-official email accounts (similar provision for FRA employees in section 10)

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Section-by-Section Summary

Sec. 3. National Archives and Records Administration.

- Authorizes pre-accessioning of federal records
  - NARA may revise regulations at 36 CFR 1226
- Modernizes chapter 21 of the FRA to address digital records and conform to new definition of federal records in chapter 33 (per section 5)
  - NARA may revise regulations at 36 CFR 1236, 1237, 1238
- Updates language in section 2114 to apply to “audio and visual records”

Sec. 4. Records management by Federal agencies.

- Modernizes section 3106 re unauthorized removal, destruction of records
  - NARA may revise regulations at 36 CFR 1230

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Section-by-Section Summary

Sec. 10. Disclosure requirement for official business conducted using non-official electronic messaging account.

- Establishes requirements for FRA employees when using non-official email accounts
  - Will need to review NARA 2013-03 (Guidance for Agency Employees on the Management of Federal Records, Including Email Accounts, and the Protection of Federal Records from Unauthorized Removal) and may need to write regulations

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Section-by-Section Summary

Sec. 5. Disposal of records.

- Modernizes the definition of federal records, including giving the Archivist final authority on determining whether or not something is a federal record
  - Will need to revise regulations at 36 CFR 1220, 1222
- Updates other provisions to include digitized records

Sec. 6. Procedures to prevent unauthorized removal of classified records from National Archives.

- Requires NARA to issue internal procedures addressing access to classified records by non-governmental or contractor employees – e.g., Sandy Berger (NARA already has such procedures in place)

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Section-by-Section Summary

Sec. 7. Repeal of provisions related to the National Study Commission on Records and Documents of Federal Officials.

- A purely housekeeping provision to repeal expired provisions

Sec. 8. Pronoun amendments.

- Removes the male pronoun from NARA’s statutes

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

New Definition of Federal records

RECORDS

includes 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 United States Government or because of the informational value of data in them

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## New Definition of Federal records

### RECORDED INFORMATION:

- Includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form.
- Does not include:
  - library and museum material made or acquired and preserved solely for reference or exhibition purposes
  - duplicate copies of records preserved only for convenience

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## Determining Records

DETERMINATION OF DEFINITION: The Archivist's determination whether recorded information (regardless of whether it exists in physical, digital, or electronic form) is a record . . . shall be binding on all Federal agencies.

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## Electronic Messaging Accounts

- Federal employees may not use non-official electronic messaging accounts unless they forward or copy that message to an official account. Must occur within 20 days.
- Intentional violation shall be a basis for disciplinary actions

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Electronic Messaging Accounts

ELECTRONIC MESSAGES.—The term ‘electronic messages’ means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.

- Electronic messages is intentionally broad. This includes email, text, chat, and other messages sent via electronic messaging accounts.

ELECTRONIC MESSAGING ACCOUNT.—The term ‘electronic messaging account’ means any account that sends electronic messages.

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## What should be happening in your agency?

Implementation of the President's Records Management Directive

Goal One:

**Require Electronic Recordkeeping to Ensure Transparency, Efficiency, and Accountability**

To promote openness and accountability and reduce costs in the long term, the Federal Government should commit immediately to the transition to a digital government

Goal Two:

**Demonstrate Compliance with Federal Records Management Statutes and Regulations**

The Federal Government should commit to manage more effectively all records consistent with Federal statutes and regulations and professional standards.

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Latest guidance on what that means ....

Joint memo from the Archivist and OMB, M-14-16

- Following troubles at EPA and IRS regarding email management, this memo recommit agencies to:
  - meet the 2016 deadline to manage email electronically, and
  - meet the 2019 goal to manage all permanent electronic records electronically.
- Agencies are encouraged to establish annual records management training requirements.

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Capstone email management policy

Capstone is NARA's answer on how you can meet the 2016 requirement. Capstone is based on identifying email accounts according to the work of the user.

Example Capstone implementation at a Department with two sub-agencies



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Capstone GRS

- Permanent
  - Email of Capstone Officials. Capstone Officials are senior officials designated by account level or by email addresses, whether the addresses are based on an individual's name, title, a group, or a specific program function. Capstone officials include all those listed on an approved NARA form XXXX (NA-XXXX). Verification for Implementing GRS 6.1, and must include, when applicable:
    - The head of the agency, such as Secretary, Commissioner, Administrator, Chairman or equivalent;
    - Principal assistants to the head of the agency (second tier of management), such as Under Secretaries, Assistant Secretaries, Assistant Commissioners, and/or their equivalents; this includes officers of the Armed Forces serving in comparable position(s);
    - Deputies of all positions in categories 1 and 2, and/or their equivalent(s);
    - Staff assistants to those in categories 1 and 2, such as special assistants, confidential assistants, military assistants, and/or aides;
    - Principal management positions, such as Chief Operating Officer, Chief Information Officer, Chief Knowledge Officer, Chief Technology Officer, and Chief Financial Officer, and/or their equivalent(s);
    - Directors of significant program offices, and/or their equivalent(s);
    - Principal regional officials, such as Regional Administrators, and/or their equivalent(s);
    - Roles or positions that routinely provide advice and oversight to the agency, including those positions in categories 1 through 3 and 5 through 7, including, General Counsels, Chiefs of Staff, Inspectors General, etc.; and
    - Roles and positions not represented above and filled by Presidential Appointment with Senate Confirmation (PAS positions).

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Capstone GRS

- Temporary
  - Support and/or Administrative Positions. Includes non-supervisory positions carrying out routine and/or administrative duties. These duties comprise general office or program support activities and frequently facilitate the work of Federal agencies and their programs. This includes, but is not limited to, roles and positions that: process routine transactions; provide customer service; involve mechanical crafts, or unskilled, semi-skilled, or skilled manual labor; respond to general requests for information; involve routine clerical work; and/or primarily receive nonrecord and/or duplicative email
    - 3 years
  - All others except those in Item 012. Includes positions and email not covered by items 010 or 012 of this schedule.
    - This item will apply to the majority of email accounts / users within an agency adopting a Capstone approach.
    - Item may include transitory email, personal email, and/or email filed with other records but not removed from the email repository.
    - 7 years

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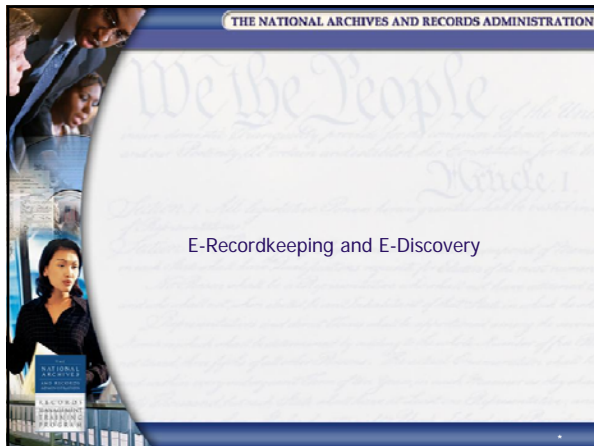
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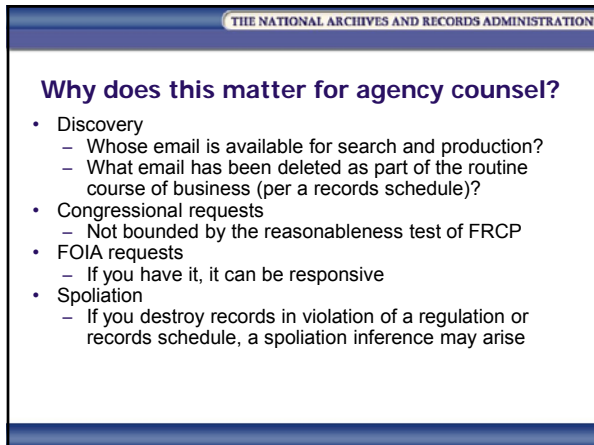
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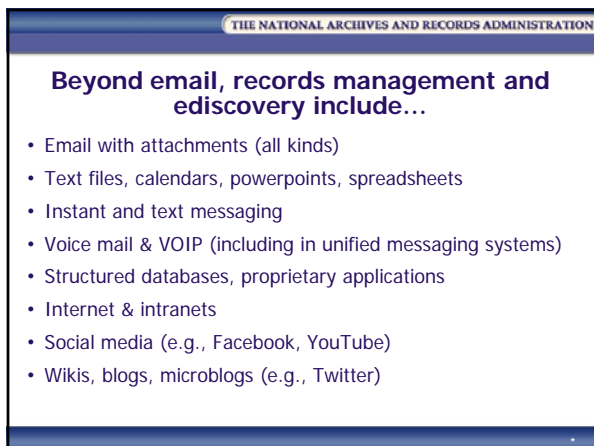
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### For good measure...

- RSS feeds
- Cache files, slack space data, cookies
- Networking activity logs and audit information
- Data on PDAs, cellphones
- Videoconferencing & webcasting
- Metadata
- Etc.

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### Common Sources of ESI

- Mainframes, network servers, local drives on desktop
- DVDs, CD ROMs, floppy disks
- Laptops & netbooks
- Other mobile devices (iPhones, Android devices, Blackberries)
- Disaster recovery backup tapes
- External hard drives
- Third party storage (including in the "cloud")

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### The Supreme Court on Record Retention

- " 'Document retention policies,' which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business...It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."
  - *Arthur Andersen LLP v. U.S.*, 544 U.S. 696 (2005)

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### Lifespan of Federal Records

- The definition of what constitutes a federal record (44 USC 3301) allows for tremendous flexibility in what is considered to be "record" material, spanning from ephemeral records (retained for hours/days) thru to short term temporary (weeks/months), long term temporary (years or decades) to permanent records (life of the republic).
- Challenge: how the retention span of various e-records matches up with the working life of existing information technology platforms.

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### Why foundational elements of recordkeeping in government have become important in litigation

- An agency's file plans and records schedules are helpful sources of information on where discoverable evidence -- including legacy records -- may be found.
- Unscheduled records may not be deleted until a record schedule has been appraised and signed off on by the Archivist through the public notice & comment process (44 USC 3303a).
- Past deletion pursuant to an authorized records schedule may well constitute a sufficient affirmative defense against would-be charges of spoliation.

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### The Intersection of E-Discovery and Records Retention Under the FRA

- As a baseline obligation, the FRA requires appropriate preservation of all ESI that falls within the definition of a Federal "record" (44 USC 3301)
- Additionally, all agencies must preserve ESI that either is relevant or is reasonably anticipated to be relevant to litigation
- The existence of reasonable records retention policies is a factor used by courts in considering whether to impose sanctions based on spoliation/destruction of evidence.
- *Gerlich v. DOJ, D.C. Circuit*

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Gerlich v. DOJ holding

...we conclude in light of the destruction of appellants' records, that a permissive spoliation inference was warranted because the senior Department officials had a duty to preserve the annotated applications and internet printouts given that Department investigation and future litigation were reasonably foreseeable. On remand, the district court shall construe the evidence in light of this negative spoliation inference, which would permit a reasonable trier of fact to find that two of the appellants were harmed by creation and use of the destroyed records.

Gerlich v. U.S. Dep't of Justice, 711 F.3d 161, 163 (D.C. Cir. 2013)

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Gerlich relies on *Talavera v. Shah*, 638 F.3d 303, 311 (D.C.Cir.2011)

In *Talavera*, a Title VII case, a selecting official's negligent destruction of relevant records violated regulatory obligations to preserve his records: for two years under OPM regulations, 5 C.F.R. § 335.103(b)(5) (2004), and for one year under EEOC regulations, 29 C.F.R. § 1602.14 (2003). 638 F.3d at 312.

The court concluded that a negative spoliation inference instruction to the jury was warranted because the regulations were designed to protect the party moving for the sanction and the destroyed records "represented [the plaintiff's] best chance to present direct evidence" proving her claim. *Id.*

The fact that the records were destroyed as part of the defendant's "typical" practice" was insufficient to overcome the duty to preserve them. *Id.* The court noted that other circuits had similarly concluded a written policy requiring document preservation sufficed. *Id.* at 311 (citing *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 108–09 (2d Cir.2001); *Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir.1994); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1419 (10th Cir.1987)).

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Criminal context, destruction

U.S. v. Suarez, Crim. Act. 09-932 (D. N.J. 2010)

- FBI failed to capture text messages needed for successful prosecution

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## Accommodation for Routine Deletion of ESI

- Rule 37(e): Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.
- Advisory notes: Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. "Litigation hold" concept referenced.

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## The pending Rule 37

~~Failure to Provide-Preserve Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:~~

~~(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or~~

~~(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:~~

~~(A) presume that the lost information was unfavorable to the party;~~

~~(B) instruct the jury that it may or must presume the information was unfavorable to the party; or~~

~~(C) dismiss the action or enter a default judgment.~~

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## More info at:

<http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf>

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### Unauthorized destruction reports to NARA

44 USC 3106

- "The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention..."

36 CFR Part 1230

- Implements statute
- Typical notification: Letter from Agency Records Officer to NARA, Office of the Chief Records Officer of the United States

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Impact of Technology on E-Records Management Applications for E-mail

- A universe of proprietary products exists in the marketplace: document management and RMAs
  - DoD 5015.2 (version 3) compliant products
  - However, scalability and usability issues exist
- NARA's Goal: records management with a minimum of extra keystrokes, as transparent to end-users as possible on daily basis
- Agencies must prepare to confront significant front-end process issues when transitioning to electronic recordkeeping
- Records schedule simplification (i.e., fewer series, broader bands of retention periods) is key to successful roll-out of new software with end-user acceptance

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Legal issues with Electronic Archiving of E-mail

- What are the legal implications of an agency moving towards automating the capture of e-mail records from all or a subset of agency staff?
- How can agency counsel be of assistance to IT and records management staff when agencies consider moving to electronic archiving?
- Emerging issues and best practices

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Backup Tapes (Who still has these?)

Before

- General Record Schedule 24, Item 4 treats backups as temporary records that may be recycled in the ordinary course of business.

Now

- GRS 3.2, item 40 and 41
- Does the same

Applies to:

**System backups and tape library records.**  
Backup files maintained for potential system restoration in the event of a system failure or other unintentional loss of data.

**Incremental backup files.**  
**Temporary.** Destroy when superseded by a full backup, or when no longer needed for system restoration, whichever is later.

**Full backup files.**  
**Temporary.** Destroy when second subsequent backup is verified as successful or when no longer needed for system restoration, whichever is later.

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Backup Tapes (Who still has these?)

- Backup tapes are not an appropriate medium for recordkeeping.  
–See 36 CFR 1236.20(c):  
•“System and file backup processes and media do not provide the appropriate recordkeeping functionalities and must not be used as the agency electronic recordkeeping system.”

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### Backup Tapes

- A legal hold may require IT staff taking a range of additional actions (e.g. from pulling one day's worth of backups to shutting down recycling)
- Key case: In re Fannie Mae Litigation, 552 F.3d 814 (D.C. Cir. 2009)
- Knickerbocker v. Corinthian Colleges, 298 F.R.D. 670 (W.D. Wash. 2014) (sanctions for party who tried to say “backup tape” was not the same as “backup server”)

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### Cloud Backups (No tapes!)

- What will the cloud provider do to implement your litigation hold?
  - Do you have to do anything to make this happen?
- What are the cloud provider's data-retention and back-up policies? Can they be suspended? How?
- Where are the back-ups? Are they just mirrored storage?
  - Is your back-up co-mingled with other back-ups?
- Format?
- Subpoenas directly to the cloud provider
  - Will you get notified? Does your contract address this?

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### Metadata

- *Metadata* consists of preserved contextual information describing the history, tracking, and/or management of an electronic document.
  - See 36 CFR 1236.2
- Common examples:
  - Email header information (possibly hidden)
  - Proprietary features of word processing (e.g. summary fields)
  - Embedded & shadow data
  - Deleted keystrokes
  - Tracking info
  - Spreadsheet formulas

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### Metadata

- Format issues and metadata
  - (e.g., producing ESI in native vs. PDF or Word)
- Metadata ethics: "inadvertent" production under local Bar rules
- *Key case: Aguilar v. ICE, US Dept of Homeland Security*, 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008)

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Current OMB policy on metadata

OMB memo M-13-13

Agencies must describe information using common core metadata, in consultation with the best practices found in Project Open Data, as it is collected and created. Metadata should also include information about origin, linked data, geographic location, time series continuations, data quality, and other relevant indices that reveal relationships between datasets and allow the public to determine the fitness of the data source. Agencies may expand upon the basic common metadata based on standards, specifications, or formats developed within different communities (e.g., financial, health, geospatial, law enforcement). Groups that develop and promulgate these metadata specifications must review them for compliance with the common core metadata standard, specifications, and formats.

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Common Core Metadata Schema

OMB policy requires agencies to use this standard when creating data sets  
<https://project-open-data.cio.gov/v1.1/schema/>

NARA is also working on metadata standards for transfers

Long term questions

- recordness of metadata elements
- obligation to produce in response to
  - litigation (NDLON v. ICE)
  - FOIA
  - Congressional requests

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION



Legal Holds on Records and The Duty of Agency Counsel

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### Preservation Order

- "Documents, data, and tangible things" is to be interpreted broadly to include writings; records; files; correspondence; reports; memoranda; calendars; diaries; minutes; electronic messages; voicemail; E-mail; telephone message records or logs; computer and network activity logs; hard drives; backup data; removable computer storage media such as tapes, disks, and cards; printouts; document image files; Web pages; databases; spreadsheets; software; books; ledgers; journals; orders; invoices; bills; vouchers; checks; statements; worksheets; summaries; compilations; computations; charts; diagrams; graphic presentations; drawings; films; charts; digital or chemical process photographs; video; phonographic tape; or digital recordings or transcripts thereof; drafts; jottings; and notes. Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition.
- *Pueblo of Laguna v. U.S.* 60 Fed. Cl. 133 (Fed. Cir. 2004).

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### Lessons of *Zubulake V*

- Title VII lawsuit (not involving Federal agency)
  - Allegations of sex discrimination in form of glass ceiling
- Defendant displayed multiple difficulties in tracking electronic information in response to discovery, including loss of e-mails and key backup tapes.
- Court set out general obligations of lawyers that are readily applicable to the typical agency context ("what we have here is a failure to communicate")
  - Need for written legal hold
  - Special attention to email and backup tapes
  - Continuous monitoring of compliance with preservation duty.
- See *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (SDNY 2004)

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### Legal Holds: Beyond the Basics

- Accounting for records otherwise subject to possible disposition under the agency's existing records schedules.
- Involving the agency records officer in issuance of generic or specific legal holds guidance.
- Accounting for the records of retiring or exiting staff and providing notice to newly entering staff of a hold.
- Contacting NARA to request a freeze on any inactive agency records that may be housed in a NARA Federal Records Center.

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### What's an Agency to do?

- Best practices at the erecords/ediscovery nexus:
  - Inventorying for the purpose of obtaining intellectual control over your Agency's electronic systems (network applications, backups & legacy media)
  - Understanding existing records schedules & retention periods (and updating & simplifying schedules in anticipation of transition to electronic recordkeeping)
  - Consider appointing "Knowledge Counsel" in General Counsel and Solicitor offices to act as agents of change, working with CIOs, IT staff, and records officers

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### What's an Agency to do?

- Best practices at the erecords/ediscovery nexus:
  - Formulating explicit e-records guidance on what constitute records, including guidance on how legal holds will be implemented
  - Incorporating records mgmt & e-discovery issues in end-user training
  - Contacting NARA counsel and/or NARA archivists when Federal records Act questions arise.

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### Takeaways

IT, records management, and general counsel offices need to work together to move forward.

The management of records in electronic form under FRA guidelines is foundational to responding to litigation demands.

Establishing good recordkeeping procedures in advance of the next lawsuit helps to minimize e-discovery risk. E-discovery case law is rapidly evolving and it pays to stay current.

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### Supplemental Resources/Handouts

- Handout 3.1 – Selected E-Records/E-Discovery Case Law Summaries Involving Federal Agencies
- Commentaries from The Sedona Conference® at <http://www.thesedonaconference.org>

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THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

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