

## **WHAT LESSONS CAN BE LEARNED FROM THE US ARCHIVIST'S DIGITAL MANDATE FOR 2019 AND IS THERE POTENTIAL FOR APPLYING THEM IN LOWER RESOURCE COUNTRIES?**

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*Note: This paper represents a high-level summary of material aspects of the US Archivist's digital mandate for 2019, embodied in the publication "Managing Government Records," issued on August 24, 2012. The paper is structured in a way to facilitate the conference presentation by Anne Thurston,\* on how the lessons coming out of the recent US e-recordkeeping initiative may be applied on an international basis, with a focus on lower resource countries. What follows then is a summary of US policy, with open-ended questions ("Discussion Points") aimed at facilitating additional dialogue.*

### **Introduction**

The year 2014 is the 25<sup>th</sup> anniversary year of a litigation event in the United States that changed the way the U.S. government thought about electronic recordkeeping as a matter of public policy. The lawsuit known as the "PROFS" case, *Armstrong v. Executive Office of the President*, established that e-mail communications meeting the definition of what constitutes a federal "record," 44 U.S.C. 3301, should be preserved along with other more traditional forms of hard-copy government documents constituting records. The lawsuit, originally filed in 1989, blossomed into a decade-long lawsuit encompassing every e-mail system at the White House, and led to subsequent litigation challenging the e-mail recordkeeping practices of the entire federal government (Baron, 2003).

In the ensuing quarter-century, successive U.S. archivists increasingly have been forced to confront how best to preserve not only e-mail communications, but all federal records (i.e., public records) in electronic or digital form. Although specific regulations were enacted in 1995 covering the duty to preserve e-mail records in either paper or electronic form with accompanying sender and recipient metadata, it has come to be recognized that e-mail is a particularly difficult form of government record to regulate by way of recordkeeping rules and procedures. Compliance with the regulatory schema, which relied on an agency's choice of "print to paper" policies, or preservation of e-mail in an electronic recordkeeping system, came to be seen as altogether to great a burden on end-users, given the volume of e-mail communications that the typical federal employee creates and receives on a daily basis (Baron & Attfield, 2012). With respect to the broader public obligation to preserve electronic or digital records, one commentator went so far as to say that U.S. recordkeeping was "chaotic" at best (CREW, 2008).

Against this backdrop, President Barack Obama, and the 10<sup>th</sup> Archivist of the United States, David Ferriero, have provided a mandate to the government at large to reform its approach to electronic recordkeeping. In particular, Archivist Ferriero, acting for the US National Archives and Records Administration (NARA), has initiated a series of policies responding to the perceived material weaknesses in government recordkeeping policies in the digital age. Given that the Archivist's mandates have deadlines at the end of 2016 and 2019, this is a story that is very much in progress. Nevertheless, the central tenets

of the Archivist's Directive, and the leadership exhibited by the U.S. Archivist in charting a path forward, are arguably very worthy topics of study for countries around the world, as governments increasingly confront the reality of accumulating electronic or digital records being preserved on public sector and governmental computers and servers.

### **The President's Memorandum**

On November 28, 2011, President Obama issued a memorandum to the heads of all Executive branch agencies in the U.S. government, titled "Managing Government Records"<sup>1</sup> (Memorandum, 2011). The memorandum, the first of its kind since President Harry Truman issued a memorandum accompanying passage of the Federal Records Act of 1950, recognized that:

Decades of technological advances have transformed agency operations, creating challenges and opportunities for agency records management.

Greater reliance on electronic communication and systems has radically increased the volume and diversity of information that agencies must manage. With proper planning, technology can make these records less burdensome to manage and easier to use and share. But if records management policies and practices are not updated for a digital age, the surge in information could overwhelm agency systems, leading to higher costs and lost records.

As part of his communication to Executive branch agencies, President Obama made clear that "records management is the backbone of open government."<sup>2</sup> He therefore directed that the Archivist of the United States, working in connection with the Office of Management and Budget and the US Department of Justice, develop appropriate policies that take into account modern-day records challenges, including especially e-mail communications, social media, and cloud-based technologies. The President gave the Archivist of the U.S. and other senior officials 240 days to put into place government-wide policies that accomplished these aims, a daunting challenge.

Discussion Points: Are governmental recordkeeping systems in less resource countries sufficiently mature enough so as to prompt high-level attention with respect to the need to preserve records in electronic or digital form?

What obstacles exist to getting the attention of officials at the highest levels of government in lesser resource countries for confronting the challenge of public sector recordkeeping in the digital age?

### **The Archivist's Digital Mandate for 2019**

In response to the President's direction, on August 24, 2012, the Archivist of the US issued the "Managing Government Records Directive" (Directive, 2012), containing a

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comprehensive set of policy initiatives aimed at advancing the cause of federal sector e-recordkeeping.

The primary stated goal of the Directive is to “Require Electronic Recordkeeping to Ensure Transparency, Efficiency, and Accountability.” To this end, the Goal goes on to state that “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.” The boldest mandate in the Directive directly follows, namely:

*Section 1.1. By 2019, Federal agencies will manage all permanent electronic records in an electronic format.*

The December 31, 2019 mandate requires that agencies are to meet that target date by ensuring that all permanent electronic records “will be managed electronically to the fullest extent possible for eventual transfer and accessioning by NARA in an electronic format.” The same section also encourages agencies to “consider the benefits of digitizing permanent records created in hard-copy format or other analog formats . . . .”

In other sections of the Directive, the Archivist provides interim milestones for agencies to report how they will achieve success in meeting the mandate. The Archivist also commits NARA to issuing more detailed policy guidance providing a roadmap for agencies to follow in meeting their obligations, including regarding what will constitute acceptable transfer formats for accessioning archival materials in digital form.

The boldness of the Directive is apparent on its face. Certainly, since the 1980s, NARA has been accessioning from various agencies at least some of their records in electronic form, mostly from structured databases (Ambacher, 2003). White House email records also have arrived in increasingly vast numbers (Baron & Attfield, 2012). However, for the vast majority of federal agencies, the Directive represents a watershed moment, in that current policies are primarily based on the “official” recordkeeping copy of electronic records being preserved in hard-copy form.

Moreover, to successfully meet the 2019 digital mandate, agencies will need to revise current policies and practices in at least two major respects. First, agencies will need to invest in “capture” technologies that preserve electronic records (with metadata) in a format that preserves the trustworthiness of the records, taking into considerations of authenticity, integrity, and reliability. Second, agencies will need to implement software that adequately categorizes or classifies records in a manner consistent with the Directive. This in turn means that agencies need to segregate the “permanent” from the “temporary,” as records are appraised under existing records schedules. This is a non-trivial task, requiring a multi-year plan of action for software deployment.

Discussion Points: What percentage of records in electronic form held by governmental institutions in lesser resource countries either are or should be appraised as “permanent,” worthy of long-term preservation in an archival repository?

What capability exists to continue to preserve such records in electronic or digital form?

### **The Separate 2016 Mandate for E-mail**

Also contained within the Archivist’s Directive is a requirement that “By [December 31,] 2016, Federal agencies will manage both permanent and temporary email records in an accessible format” (underlining in original). In other words, email records “must be retained in an appropriate electronic system that supports records management” and other legal requirements, including “the capability to identify, retrieve, and retain the records for as long as they are needed.”

The implications of this separate “sub-mandate” for e-mail are profound and far-reaching. First, by an even earlier deadline, federal agencies no longer may rely on “print to paper” strategies as their official recordkeeping policy for e-mail communications. This requirement has been 20+ years in the making, given that the US Archivist has been on notice since the 1990s both that paper printouts of e-mail may not preserve metadata deemed to be important by the courts (including in the PROFS case for White House e-mail), and that employee compliance levels with “print-to-paper” policies are generally found wanting (leading to potentially major gaps in the historical record).

Second, the requirement to capture e-mail records in electronic form by the earlier 2016 date “front-end” the internal dialogue that agencies will need to have on the subject of meeting the 2019 mandate for the wider world of electronic records appraised as worthy of permanent preservation in an archives. Whether these discussions are in fact occurring and are sufficiently tied to requests for appropriations from the US Congress is an open question (IGI Letter, 2014).

And third, the 2016 e-mail sub-mandate necessarily triggers a separate dialogue on how the US government should best meet its obligations for more immediate transparency and access to federal records, consistent not only with the goal of the Directive, but also under the US Freedom of Information Act, 5 U.S.C. 552(b). Under the FOIA laws, e-mail records preserved in electronic format should be available to the public in electronic format, upon the filing of a reasonable request, and subject to nine exemption categories which the government may invoke to withhold some or all of individual records. Past practice with respect to responding to legitimate FOIA requests suggests that the government has an opportunity in light of the 2016 mandate to improve and update its policies with respect to searching for and releasing at least e-mail records in electronic form.

The Archivist has followed up on the Directive with further policy guidance aimed at pointing agencies towards successful implementation of the Directive's requirements. Most prominently, in late 2013 NARA issued a Bulletin describing a new, voluntary approach to the management of e-mail, known as "Capstone" (Bulletin, 2013). As described in NARA's Bulletin:

Capstone offers agencies the option of using a more simplified and automated approach to managing email, as opposed to using either print and file systems or records management applications that require staff to file email records individually. Using this approach, an agency can categorize and schedule email based on the work and/or position of the email account owner. The Capstone approach 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. An agency may designate email accounts of additional employees as Capstone when they are in positions that are likely to create or receive permanent email records. Following this approach, an agency can schedule all of the email in Capstone accounts as permanent records. The agency could then schedule the remaining email accounts in the agency or organizational unit, which are not captured as permanent, as temporary and preserve all of them for a set period of time based on the agency's needs. Alternatively, approved existing or new disposition authorities may be used for assigning disposition to email not captured as permanent.

While this approach has significant benefits, there are also risks that the agency must consider, including choosing the appropriate Capstone accounts, the possible need to meet other records management responsibilities, and the possibility of incidentally collecting personal and other non-record email. Agencies must determine whether end users may delete non-record, transitory, or personal email from their accounts. This will depend on agency technology and policy requirements.

In other words, senior executives in government agencies under Capstone will have their e-mail records reserved permanently (subject to limited exceptions for personal records); everyone else will have e-mail records automatically captured for a short or medium term years (3 to 7, or longer as an agency designates), with the ability for manual tagging schemes overriding the default automated rule to ensure continued preservation of those e-mail records created or received by lower-level staff that are appropriate for long-term or permanent preservation.

The Capstone policy didn't arise in a vacuum: it is a response to two decades of policies that failed to reliably capture large volumes of e-mail records that otherwise met the federal definition of a "record" appropriate for long-term or permanent preservation. While there are risks and inefficiencies inherent in capturing "everything" in the short term, the advantage of Capstone is that it is aimed at embedding records management considerations in the email archiving process, at least with respect to the "wheat and chaff," i.e., broadly separating records of a permanent nature from the greater volume of the temporary, transitory, and ephemeral.

NARA recently announced that it will be proposing a General Records Schedule for agencies adopting the Capstone approach, to alleviate the burden on each agency

records officer of coming up with new Capstone-specific records schedules. This should in turn hasten more widespread adoption and implementation.

Discussion Points: To what extent in lesser resource countries do e-mail records qualify as important public records worthy of long-term or permanent archival preservation?

Should Freedom of Information and Right to Information laws cover public sector e-mail records, and how should access be afforded (i.e., a right to request electronic versions rather than paper print outs)?

### **The Spectre of A Digital Dark Age**

Due to the US Archivist's 2019 Digital Mandate, U.S. public sector recordkeeping policies are moving towards a digital preservation model that ensures greater capture of the historical record of the U.S. government in digital form. At the same time, however, increasing attention needs to be paid to the current reality of U.S. archives held in electronic or digital formats which, for the most part, will remain *less* accessible to the citizens of the U.S. for an indeterminate time to come. That is, the burgeoning volume of e-mail and other forms of electronic communications disrupt traditional reference methods employed by generations of archivists, who no longer have the ability to perform manual review even over the next few decades of all ingested records into a digital archives for the purpose of sheltering or filtering protected categories of information (e.g., records with personally identifiable information such as social security numbers, medical information, criminal records, as well as records that are confidential, proprietary, or are otherwise exempt from disclosure for other legal reasons).

The term "dark archives" has been coined to convey the notion that present and future volumes of digital information stored in archives will not constitute open and available records any time in the near term future, without new, more advanced techniques being employed by archivists to extract out bodies of records unencumbered by the privacy and privilege considerations referenced above. The digital archivist of the future needs to confront the fact that new methods highly reliant on automated methods of coding and classification, employing machine learning technologies, will be needed to search electronic content for the purpose of systematically opening public archives.

Along these lines, in a paper presented in 2012 at the UNESCO Memory of the World conference, we stated:

[What is] the implication of automated electronic archiving for future records managers and archivists? What role do they have to play when retention environments are 'fully automated'? Records managers and archivists hold the potential to exercise enormous influence on how electronic records are managed and preserved, including ensuring that electronic archiving systems with recordkeeping functionality are sufficiently in place to allow for contemporaneous capture of permanent records in electronic formats, for immediate copying and

eventual migration to the archival institution itself. This is an idea whose time has come.

(Baron & Attfield, 2012).

Where and when advanced technologies will be routinely employed both in and outside the U.S., for the purpose of opening records that should otherwise be available to the citizens of all nations with digital archives, is an important question of public policy that should be subject to open and considered dialogue.

Discussion Points: What ways exist to embed records management functionality into public sector digital archives?

What educational training do public sector records managers and archivists need to succeed in preserving electronic records that are appropriate for long-term or permanent preservation?

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