

## Comment on Digitizing Permanent Records and Reviewing Records Schedules

February 15, 2021

The Honorable David S. Ferriero  
Archivist of the United States  
National Archives and Records Administration  
700 Pennsylvania Avenue, NW  
Washington, DC 20408

SENT VIA EMAIL

RE: The National Archives and Records Administration proposed rule concerning Federal Records Management: Digitizing Permanent Records and Reviewing Records Schedules Agency/Docket Numbers: FDMS No. NARA-20-0006, NARA-2021-001<sup>1</sup>

Dear Mr. Ferriero:

We are NARA researchers—academics, historians, librarians, and advocates—who regularly use federal records in our scholarly, historical, legal, and advocacy work. The signatories to this letter, and other members of the public, depend on government records for decision making, oversight, and research.

Digitization and preservation of the records covered by the proposed rule are critically important to the work we do. In our roles as NARA researchers, we welcome the opportunity to comment on the proposed rule, published in the Federal Register on December 1, 2020, “Federal Records Management: Digitizing Permanent Records and Review Records Schedules” (RIN 3095-AB99).

We appreciate your efforts to undertake the monumental task of ensuring that agencies’ practices comply with digital records preservation requirements. This regulation is a huge leap in the right direction. The goals of the regulation are ambitious and timely, but we are concerned that the proposed rule has several practical gaps. In particular, we are concerned that the proposed rule does not provide adequate NARA oversight of agencies’ digitization plans and their implementation. We are also concerned that inadequate resources will stymie agencies’ efforts, NARA’s oversight, and public access now and in the future.

This rule gives NARA an ideal opportunity to implement recommendations made by the Office of the Inspector General in the Office’s 2019 *Audit of NARA’s Oversight of Electronic Records Management in the Federal Government*.<sup>2</sup> Specifically, we suggest increased oversight of records schedule implementation, and of digitization project and quality management plans, and the allocation of more resources to overseeing records management in Federal agencies.

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<sup>1</sup> National Archives and Records Administration, *Federal Records Management: Digitizing Permanent Records and Reviewing Records Schedules* (Proposed Rule, Dec. 1, 2020), <https://www.federalregister.gov/documents/2020/12/01/2020-26239/federal-records-management-digitizing-permanent-records-and-reviewing-records-schedules>.

<sup>2</sup> Office of Inspector General, *Audit of NARA’s Oversight of Electronic Records Management in the Federal Government*, Audit Report No. 19-AUD-10, (Jun. 11, 2019), <https://www.archives.gov/files/oig/reports/audit-report-19-aud-10.pdf>.

## More NARA Oversight is Needed

### Plans to effectively digitize federal records could be thwarted by inadequate NARA oversight.

Documented issues with agency compliance with NARA records archiving guidelines demonstrate that we need substantial, substantive and direct NARA oversight to ensure compliance and success. In the past two years alone, a Federal Housing Finance Agency records audit to check its compliance with NARA requirements was unable to readily and reliably locate permanent records, finding many of them misplaced.<sup>3</sup> Separately, an Office of Inspector General's audit of the Department of Labor found that the Department lacked procedures for effectively managing its electronic messages as federal records.<sup>4</sup> Indeed, the Office of Attorney General has already warned that NARA must be more active in oversight and enforcement to fulfill its statutory role as records manager for the Federal Government. If NARA does not start effectively exercising its oversight authority, including providing and codifying specific best practices, permanent records will likely be lost and destroyed.

We share the National Security Archives' (hereafter NSA) concern that, given the inability or unwillingness of certain agencies to properly maintain their physical records, their ability or willingness to transfer these crucial documents into the appropriate digital format is in question. We share the concerns of NSA and the American Historical Association (hereafter AHA) that agencies will not properly complete digitization of paper records. There should be real-time oversight of the agencies' digitization projects pursuant to this regulation and to the 2019 "Transition to Electronic Records" memorandum. We are deeply concerned that NARA has informed agencies that it will not require agencies to share project management and quality management plans with NARA for approval.<sup>5</sup> This decision should be reversed before NARA and the agencies move forward.

We note and direct NARA's attention to the strong concern expressed by AHA: "Given the large volume of records that agencies must transfer by the 2022 deadline, the part of the directive ordering agencies to retroactively digitize their permanent analog records is tantamount to an unfunded mandate, which raises the possibilities that agencies will opt to retain, rather than digitize and transfer, many records, or that they will digitize them in ways that don't meet archival standards. However well-meaning, this directive could delay, interrupt, or jeopardize records digitization and retention goals."

Our concerns, moreover, go beyond the willingness of at least some agencies to comply with NARA's rule.

### Agency Records Managers are not Archivists.

Agencies generally do not have archiving expertise in their ranks. We join AHA's support of the requirement to ensure that associated records remain in relation to each other, so that the context of each

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<sup>3</sup> Federal Housing Finance Agency Office of Inspector General, FHFA Needs to Strengthen Controls Over its Records Management Program to Comply with OMB and NARA Requirements, Audit Report No. 2020-AUD-008 (Mar. 26, 2020) <https://www.fhfa.ig.gov/sites/default/files/AUD-2020-008%20Records%20Management.pdf>.

<sup>4</sup> Office of Inspector General, *Audit of NARA's Oversight of Electronic Records Management in the Federal Government*, Audit Report No. 19-AUD-10, (Jun. 11, 2019), <https://www.archives.gov/files/oig/reports/audit-report-19-aud-10.pdf>.

<sup>5</sup> National Archives and Records Administration, BRIDG Meeting 12/16/2020, <https://www.youtube.com/watch?t=1453&v=t11HdxK4TY&feature=youtu.be>.

individual record remains clear to future researchers. To guarantee this, however, NARA engagement and oversight is essential.

Further steps should be taken to ensure the quality and usefulness of digitized records to all researchers. We join the NSA in urging that NARA must ensure that agencies consult with archiving and topical experts as they draft and implement their project management and quality management plans. They suggest that it would be better if NARA tasks the National Academy of Sciences to work with a few representatives of historical organizations and archival experts to develop a plan of action and a budget proposal to put digitization on a sure footing.

Beyond a plan of action and a budget proposal for digitization, NARA needs to ensure that it and the agencies engage with subject matter experts in each records schedule review process undertaken with and within an agency. As AHA noted, this could be accomplished through deeper involvement of external, agency-specific records advisory boards in the reviews. We strongly urge that any such advisory boards go beyond historians and those NARA historically has considered its record stakeholders. As twenty-one organizational and twenty-eight individual signatories noted in our letter of 13 December 2019,<sup>6</sup> NARA has stated that “Records are the foundation of open government, supporting the principles of transparency, participation, and collaboration. Well-managed records can be used to assess the impact of programs, improve business processes, and share knowledge across the government.”<sup>7</sup> As we also noted,

NARA is required by federal records laws to preserve and provide access to records that may be of public interest. The Federal Records Act (44 U.S.C. §3301) defines “records” to include “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.” FOIA further requires that NARA provide access to all agency records in its control or possession.

As the recent records schedule issues at the Department of the Interior revealed, without more inclusive, public stakeholder designations, the government risks destroying and otherwise failing to maintain, records relevant, and sometimes critical, to the public.

With the effort, initiated and led by NARA, to move agencies to “big bucket & media neutral” scheduling, we are additionally concerned that scheduling authority will be removed from the agency offices where the subject area specialists (including records specialists) reside. Such specialists’ expertise in and understanding of the context for records needs to be regularly incorporated in records schedule reviews (as well as drawn on in the digitization process).

To fulfill these open government ends, NARA must account for a variety of stakeholders in government records who represent a wide range of professions, areas of expertise, and areas of interest. Federal

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<sup>6</sup> Letter to the National Archives and Records Administration Regarding Records Appraisal (Dec. 13, 2019), <https://govinfowatch.net/wp-content/uploads/2021/02/Letter-to-the-National-Archives-and-Records-Administration-Regarding-Records-Appraisal-13-Dec-2019.pdf>.

<sup>7</sup> National Archives and Records Administration, Overhaul of Federal Record-Keeping Ordered by NARA, Office of Management and Budget, August 24, 2012 (Quoting Archivist of the United States David S. Ferriero and Acting OMB Director Jeffrey D. Zients).

records in agencies' files are important to a diversity of NARA researchers. NARA should thus ensure that diversity of researchers are treated as record stakeholders and included in records disposition and preservation decisions. We support AHA's suggestion that NARA consider adding subject expert involvement to the record schedule development process (36 CFR part 1225.12) and agencies' processes for scheduling permanent records (36 CFR part 1225.14). NARA, in its work with agencies on federal records management, should proceed in a manner that enables all public stakeholders to become aware of and able to engage consequentially in decisions about records disposition.

As an example of the importance of outside stakeholders, a 2016 Department of Health and Human Services records retention schedule was recently revised. The revision delayed the destruction of temporary records from the Office of Refugee Resettlement regarding unaccompanied minors.<sup>8</sup> The delay will be important to both the legal counsel conducting ongoing litigation and the work of President Biden's task force on separated families. But the delay does not sufficiently preserve the records for use by future NARA researchers. As temporary records are never deposited in the Archives, the records schedule revision is inadequate for future researchers and historians of policies towards migrant children and family separation. Historians will undoubtedly identify this as a pivotal issue that defined the Trump presidency, about which comprehensive histories cannot begin to be written for 25 years. These records should not be destroyed in fifty years, but instead be deposited in the archives for researchers, legislators, and officials to consult there. Subsequent administrations may seek to review carefully or even restore these policies and related dimensions of President Trump's immigration policies. They will require a historical perspective. This requirement also supports the need to designate these records as permanent.

#### Acceptance of Permanent Records in Digital Format Only

We would request that NARA address the concern raised by AHA that NARA "exceeded the requirements of federal law by stating that records will be accepted ONLY in digital form." We share a concern that this represents a "fundamental change in NARA's mission from the identification and protection of the permanently valuable records to the protection of images of records, from protection of originals to protection of facsimiles."

We are additionally concerned that NARA's decision to only accept digital records, without providing agencies with the wherewithal to do the digitization, will lead to delays in the transferring of old paper records to NARA. We understand that such provision of funding and/or other assistance may require action by Congress. The concern is, however, urgent: in 2017, NARA had only received 6 percent of scheduled transfers from Federal agencies; and in 2018, NARA had over 18,000 overdue transfers of electronic records.<sup>9</sup> In the case of DHS, and likely other agencies, these records transfers have been delayed for many years. Immigration and Naturalization Service records from the 1970s and 1980s, that have been designated as permanent records, should have been transferred to NARA long ago. But, according to NARA archivists, the records have still not been transferred to the agency. Without

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<sup>8</sup> Administration for Children and Families, Records Request for Disposition Authority, DAA-0292-2016-0012 (Nov. 7, 2016) [https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-health-and-human-services/rg-0292/daa-0292-2016-0012\\_sf115.pdf](https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-health-and-human-services/rg-0292/daa-0292-2016-0012_sf115.pdf); Administration for Children and Families, Records Request for Disposition Authority, DAA-0292-2019-0009 (Dec. 10, 2020), <https://beta.regulations.gov/document/NARA-21-0001-0008>.

<sup>9</sup> Office of Inspector General, *Audit of NARA's Oversight of Electronic Records Management in the Federal Government*, Audit Report No. 19-AUD-10, p. 23 (Jun. 11, 2019), <https://www.archives.gov/files/oig/reports/audit-report-19-aud-10.pdf>.

resources, it is unlikely that the agency will prioritize these records for digitization. Thus, the records will remain inaccessible to researchers even longer.<sup>10</sup>

### Staffing

NARA's lack of funding and staff are primary reasons for records transfers delays. Due to staffing reductions after fiscal year 2013, NARA had to cut its outreach program to seek overdue records transfers. Staffing reductions left remaining NARA employees focused on processing the thousands of records that were transferred to the agency.<sup>11</sup>

### Outdated Technology

Even with more staff, NARA is hampered by its outdated technology. The Office of Inspector General called NARA's tools for tracking records transfers "antiquated," saying that they have to be modernized in order to properly oversee agencies' records digitization and transfer programs. Not only should NARA better track transfers of records, but this information should be made known to the public and to researchers. Right now, researchers have no way to know from posted records schedules if the records have, in fact, been transferred to the archives at the time designated.

### Lack of Centralized Tracking Database

NARA doesn't even have a centralized database to track permanent electronic records and accessions. According to the Office of Inspector General's 2019 audit, NARA faces "constraints in identifying gaps" in records schedules because it is using outdated systems and methodology, trying to identify gaps in records accession manually and with two systems (CASPER and AMIS) that do not interface. NARA does not have a single, centralized database to track the progress of records transfers.

NARA's change to a "big bucket & media neutral" scheduling system compounds the tracking problems. This system has led agencies to draw up broad records schedules with less granular information about electronic records. For example, an Executive Office of Immigration Review record schedule provides only the most general description of a Masterfile database it has designated for transfer to NARA.<sup>12</sup> Further, the universe of records NARA must track is both unwieldy (large) and not well identified, and "a large percentage of legacy permanent disposition authorities are not entered into the ERA for tracking."<sup>13</sup>

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<sup>10</sup> Department of Justice, Immigration and Naturalization Service, Job No. N1-85-01-1 (Oct. 30, 2001), [https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0085/n1-085-01-001\\_sf115.pdf](https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0085/n1-085-01-001_sf115.pdf).

<sup>11</sup> Office of Inspector General, *Audit of NARA's Oversight of Electronic Records Management in the Federal Government*, Audit Report No. 19-AUD-10, (Jun. 11, 2019), p. 23 <https://www.archives.gov/files/oig/reports/audit-report-19-aud-10.pdf>.

<sup>12</sup> Department of Justice, Executive Office for Immigration Review, Job No. N1-60-08-7 (October 30, 2009) [https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0060/n1-060-08-007\\_sf115.pdf](https://www.archives.gov/files/records-mgmt/rcs/schedules/departments/department-of-justice/rg-0060/n1-060-08-007_sf115.pdf)

<sup>13</sup> Office of Inspector General, *Audit of NARA's Oversight of Electronic Records Management in the Federal Government*, Audit Report No. 19-AUD-10, (Jun. 11, 2019), p. 23 <https://www.archives.gov/files/oig/reports/audit-report-19-aud-10.pdf>.

## Agencies' Resources to Undertake Transition

With NSA, we are concerned that the lack of funding for the mandates in this regulation would produce unintended consequences. This proposed rule closely follows the 2019 "Transition to Electronic Records" memorandum that requires agencies to manage all of their permanent records electronically by December 31, 2022. Transitioning to electronic records management is a huge administrative undertaking, even without the burdens added by this regulation. We support AHA's recommendation that the directive must include both a cost-sharing formula to lessen the financial burden on the agencies, and the imposition of penalties for delaying the digitization and transfer processes.

We share AHA's concern that NARA will be unable to effectively implement the standards of reproduction or to preserve access to digitized records, once they are transferred to NARA. As AHA notes, NARA has inadequate infrastructure and staffing to take, preserve, and then make available such huge volumes of electronic records.

## Suggestions for Implementation

We would like to highlight two of the previously discussed recommendations to ensure the records management standards and goals described in the proposed regulation are turned into realities:

1. Sufficient resources should be set aside to ensure that the agencies will faithfully follow through on requirements to review records schedules every five years. We support NARA's addition of a defined requirement that, every five years, agencies review records schedules which are ten or more years old.
2. When record schedules are reviewed, subject matter experts both inside and outside NARA should be consulted as part of the process.

We believe that this proposed regulation has the potential to improve federal records preservation as well as improve digital access to federal records. As researchers, we applaud the spirit of this proposed rule.

Thank you for hearing our concerns. We hope that you consider amending the rule to include more in-depth NARA oversight of agencies' archiving plans and practices, and that you consider and account for the administrative burdens these requirements place on agencies already tasked with ambitious digitization requirements.

If you have any questions and comments, please contact Patrice McDermott, Director, Government Information Watch ([pmcdermott@govinfowatch.net](mailto:pmcdermott@govinfowatch.net)). Sarah Lamdan, Professor of Law, CUNY School of Law ([Sarah.lamdan@law.cuny.edu](mailto:Sarah.lamdan@law.cuny.edu)), and Yael Schacher, Senior U.S. Advocate, Refugees International Yael Schacher ([yael@refugeesinternational.org](mailto:yael@refugeesinternational.org))

Sincerely,

Defending Rights and Dissent

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In the Public Interest

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