

OGC REVIEW
COMPLETED

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OGC 75-0811
6 March 1975

MEMORANDUM FOR: Deputy Director for Administration

SUBJECT: Agency Records

Jack --

1. On several recent occasions I have been asked questions about how long we should keep records and what records can be disposed of. Accordingly, I asked [redacted] to look at the law on records retention and disposal, its applicability to the Agency and our compliance therewith. A copy of his memorandum is attached.

2. Generally, he found that legally the Agency is subject to the same law on this subject as other agencies, Title 44, Chapter 33 U.S. Code. He also suggests our peculiar interests, such as classification and protection of intelligence sources and methods, should be realized through secure, classified arrangements with the responsible officers of GAO and the National Archives. We do not believe these interests or charges have the effect of exempting the Agency from the law.

3. During his inquiry Gary dealt with the CIA Records Management Officer and found the people in that office exceptionally well-versed on the GAO records procedures and regulations. He also found that this Office acts more in the nature of giving guidance to the directorate records offices than in actually controlling Agency records and that our records program was a diffused one with each directorate operating pretty much independently. He was told for example, that, within the directorates, decisions to destroy records may be made without recourse to the Agency Records Officer. In short, it appears the Agency may not be in full compliance with the law.

4. I bring this to your attention for whatever action you deem necessary.

[redacted signature box]

JOHN S. WARNER
General Counsel

Att
GMB: sc
Distribution:

Original - Addressee w/att *ogc 75-0756*
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OGC 75-0756
3 March 1975

MEMORANDUM FOR: General Counsel

SUBJECT: Records Retention and Disposal

1. The following is in response to your request for a memorandum concerning the law applicable to the Agency in the area of records retention and disposal. My general conclusion is that the Agency is bound to follow and not exempt from the general law applicable to retention and disposal of records as contained in Title 44, Chapter 33, and the regulations issued by the Administrator of the General Services Administration. The Director's responsibility to protect intelligence sources and methods must be viewed as working in consonance with, and not as amendatory to, the provisions thereof. Two recent opinions of this Office have arrived at essentially the same conclusion. OGC 73-1170, dtd 19 June 1973, and OGC 73-2006, dtd 24 October 1973.

2. This conclusion means that Agency records can only be destroyed pursuant to GSA General Records Schedules or by virtue of special schedules or lists submitted by the Director to GSA for approval and the approval of the Congress. In practice, the approval of GSA is given by the Archivist of the United States (one copy of an approval is attached). The Agency has a staff of people who work on such matters and I have visited with them generally in this regard. In doing so, I discovered a few things which caused concern. For example, the Agency's record program is a decentralized one and some directorates, particularly the DDO, may operate their disposal program without recourse to the Agency-wide staff. In addition, I am advised the Agency does not submit its own disposal schedules to GSA for approval, presumably on the theory of protecting intelligence sources and methods. The only submissions to GSA involve shortening an established GSA schedule on a particular type of record, i. e., an insurance record, and for special approval on certain other records. Thus, the Agency may not be complying fully with the law.

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3. At the time the Agency was created the records disposal law applicable to all agencies was a 1943 statute (57 Stat. 380) which established a procedure for records disposal, vested the regulatory authority in a National Archives Council (subject to the approval of the President), and provided the same, very broad definition of records which is codified at 44 U.S.C.A. 3301. The procedure established directed the head of an agency to provide the Archivist of the United States lists of records to be destroyed as well as proposed schedules for destroying certain specific types of records. The Archivist was then, if he agreed, to submit the lists or schedules to Congress for the approval of a joint committee. Section 15 of the act provided, "(t)he procedures herein prescribed are exclusive and no records of the United States Government shall be alienated or destroyed except in accordance with the provisions of this Act. ©©© 25X1

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6. A 1950 amendment to the Federal Property and Administrative Services Act (P.L. 81-754) specifically preserved the earlier provision barring impairment of the Agency's authority. However, just five years later, the proviso appears to have been eroded by a supplemental appropriations act:

**SURVEY OF GOVERNMENT RECORDS, RECORDS
MANAGEMENT, AND DISPOSAL PRACTICES**

For necessary expenses, including not to exceed \$25,000 for administrative expenses, in connection with conducting surveys of Government records, and records creation, maintenance, management and disposal practices in Federal agencies, pursuant to sections 505 and 506 of the Federal Property and Administrative Services Act of 1949, as amended, \$300,000: Provided, That notwithstanding any other provision of said Act, the Administrator shall have final authority in all matters involving the conduct of surveys and the implementation of recommendations based on such surveys (Emphasis added.)

Thus, because there has been no direct statutory repeal of the saving provision it apparently remains valid and stands as good law with respect to those matters within the 1949 Federal Property and Administrative Services Act which are not related to records. This is borne out by fact that a part of the present codification of the 1949 Act as it relates to "Management and Disposal of Government Property" (Title 40 U.S.C.A., Chapter 10) retains the saving provision. 40 U.S.C.A. 474(17). However, by its terms that codified portion does not pertain to records: "The term 'property' means any interest in property except . . . (3) the records of the Federal Government." 40 U.S.C.A. 471(d). In addition, the present code chapter on records disposal (Title 44, Chapter 33) contains the same exclusive statement as contained in the 1943 Act -- "(t)he procedures prescribed by this chapter are exclusive, and records of the United States Government may not be alienated or destroyed except under this chapter." 44 U.S.C.A. 3314. Neither this chapter nor regulations issued thereunder contains an exemption for the Agency.

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7. What is a Record? The statutory definition of records for disposal purposes is couched both in terms of what is, and what is not, a record and its breadth appears all-inclusive. Within Title 44 U.S. Code, Chapter 33, is the following description of a record.

As used in this chapter, 'records' includes all books, papers, maps, photographs, 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 data in them. 44 U.S.C.A. 3301.

The regulation based on this section is found at 41 C.F.R. 101-11.101-3 wherein the statutory definition is simply quoted and then followed by a paragraph stating that the definition pertains to records generally, not just to records for disposal purposes.

8. Nonrecords are defined by Section 3301 as:

Library and museum material made or required and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included... (within the definition of records).

Further amplification is contained within the regulation:

Nonrecord materials, such as extra copies of documents preserved for convenience of reference, stocks of processed documents, preliminary worksheets, and similar papers that need not be made a matter of record, shall not be incorporated in the official files of the agency. To the maximum extent possible, material not required for record purposes shall be disposed of; it should not be sent to file. In cases where transitory files of such materials are established and maintained in filing equipment, such files shall be controlled by means of instructions in the records control schedule. 41 C.F.R. 101-11.401-3(d).

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9. Although not specifically applicable to the question of records retention and disposal there are, within 41 C.F.R., other definitions which assist in understanding "records."

a. ADP Records Management -

ADP records management includes the documentation of computer programs, machine readable records, functional and operational flow charts, job specifications, records showing the basic coding structure, record layouts, printout plans (formats), and basic run instructions (run books). 101-11.210-2.

b. Correspondence -

Correspondence is a generic term including letters, form letters, telegrams, memorandums, endorsements, summary sheets, postal cards, memo routing slips, and other written communications. 101-11.206-2.

c. Directives -

i. A directive is a written communication which initiates or governs action, conduct, or procedure. Directives are usually printed as circulars, notices, regulations, orders, and handbooks, and include material for insertion in policy, administrative, and operations manuals.

ii. Certain materials normally are exempted from agency directives management programs. These include public information materials such as professional publications, news releases and announcements of programs, catalogs, and pricelists.

iii. Both internal and external directives are included in a directives management program. 101-11.209-2.

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d. Files -

A file is basically a paper or folder of papers, but the term is used to denote papers, photographs, photographic copies, maps, or other recorded information regardless of physical form or characteristics, accumulated or maintained in filing equipment, boxes, or on shelves, and occupying office or storage space. Stocks of publications and blank forms are excluded. 101-11.305-2.

e. Forms -

A form is any document, including letters, post cards, and memorandums, printed or otherwise reproduced with space for filling in information, descriptive material, or addresses. Certain printed items without fill-in-space, such as contract provisions, instruction sheets, notices, tags, labels, and posters, may be considered as forms when it is advantageous to identify and control them as forms for purposes of reference, printing, stocking, distribution, and use with other forms. 101-11.208-2.

f. Mail -

Mail consist of letters, telecommunications, memorandums, post cards, documents, packages, publications, and other communications received for distribution or dispatch. 101-11.304-2.

g. Reports -

i. A report is data or information, generally summarized, transmitted for use in determining policy; planning, controlling, and evaluating operations and performance; and preparing other reports. The data or information may be in narrative, statistical, graphic, or other form.

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ii. Most reports of an agency can be classified as belonging to one of several well defined families or groups of reports. Each group of related reports is generally the product of an information system serving a specific administrative or operational area, such as personnel, budget, or procurement. Consequently, the analysis of reports on a systems basis provides the best means of establishing reports relationships and evaluating information need and adequacy.

iii. Certain categories of reports normally are exempted from review and clearance in an agency reports management program. These usually include: inspection and audit reports; security classified documents; copies of operating documents such as individual supply and procurement transactions; and information presentations such as research findings, technical summaries, special studies, and surveys. Reports to be exempted should be determined by an analysis of agency information requirements.

iv. Reports to and from other agencies, as well as those for internal management, are included in agency review and clearance procedures. 101-11.207-2.

Under a regulatory subpart relating to microfilming is a definition of a "permanent record."

Permanent record. Any record (see 44 U.S.C. 3301) that has been determined by the Archivist of the United States to have sufficient historical or other value to warrant its continued preservation by the Government. Such determinations take the form of approved agency records retention plans or an approved offer to transfer records to the National Archives. A determination is not made merely by NARS approval of a comprehensive records disposal schedule that also lists records that are identified as 'permanent' or 'retain' by the agency but are not clearly certified as permanent by NARS. 101-11.502(a).

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10. Copies of OGC Opinions, the law and regulations, GSA General Schedules, CIA Schedules, and an approval by the Archivist are attached for your information or further review.



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Assistant General Counsel

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Original RECORDS

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