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Guidance on Presidential Records by the National Archives and Records Administration

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United States National Archives

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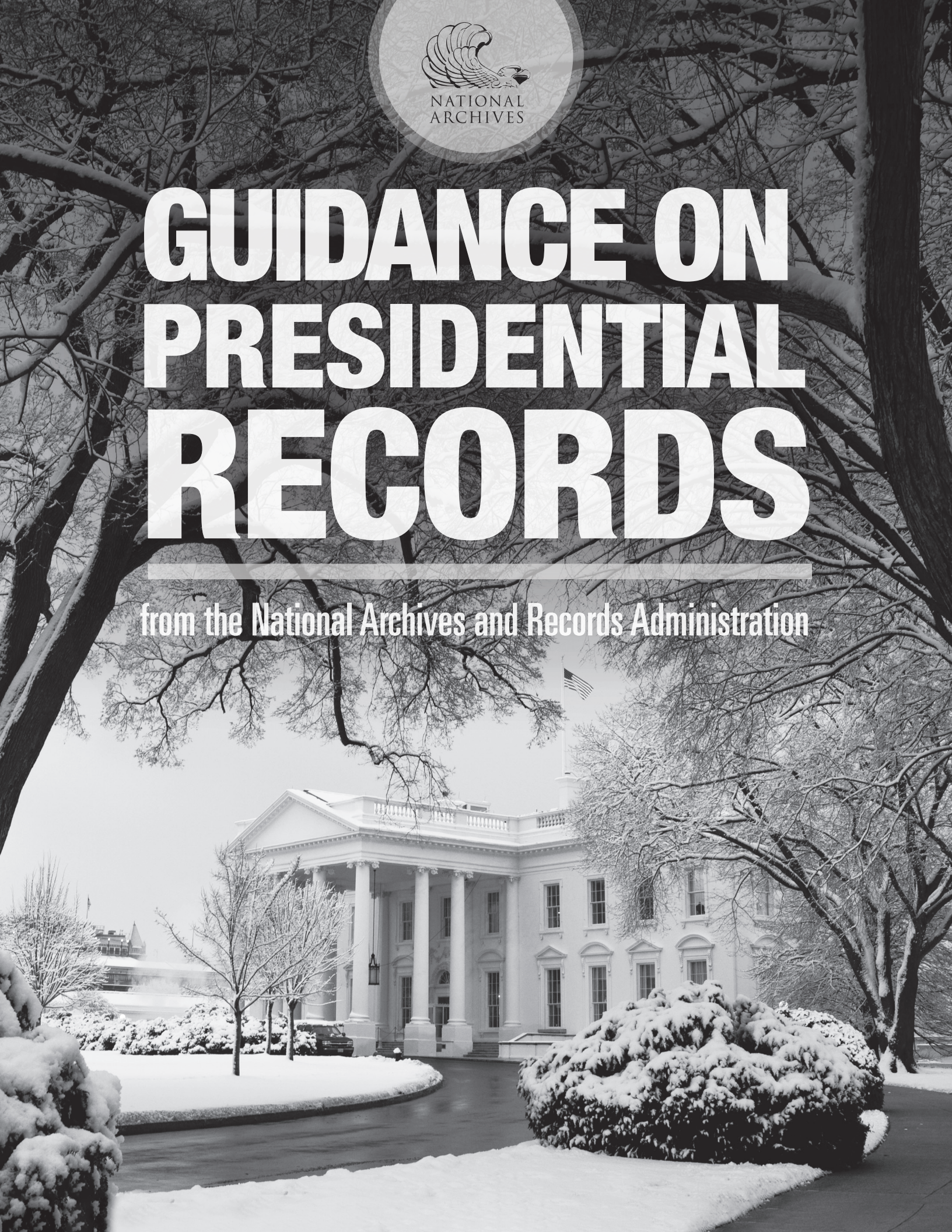
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GUIDANCE ON PRESIDENTIAL RECORDS

from the National Archives and Records Administration



Letter from the Archivist

The National Archives and Records Administration (NARA) has long had a special relationship with the incoming Presidential Administration, including providing archival and records management guidance and support to the White House upon request. This relationship continues throughout the Administration, until the Presidential records are transferred into the National Archives for permanent preservation in our President Library system.

As a member of the President's White House staff, you will be creating Presidential records governed by the Presidential Records Act of 1978. The PRA places a number of recordkeeping requirements and responsibilities on the President and his staff for maintaining, preserving, and disposing of Presidential records. The information in this guidance will help you to carry out your day-to-day responsibilities, as well as to correctly fulfill obligations mandated by the PRA and to ensure that posterity has a full documentation of your Presidential Administration. This guidance also illustrates how NARA can assist the President and the White House staff in a variety of ways to fully document this Presidential Administration's unique history.

I would like to welcome you on behalf of NARA as you begin a new Presidential Administration. We hope this guidance serves as a starting point for a long and productive relationship between the National Archives and the White House, and we look forward to working with you.



DAVID S. FERRIERO
Archivist of the United States

How the Presidential Records Act Affects the President, Vice President, and White House Staff During the Administration

Overview

The Presidential Records Act (PRA) of 1978, as amended, 44 U.S.C. §§ 2201-2209, governs the official records of Presidents and Vice Presidents created on or received after January 20, 1981. The PRA changed the legal ownership of the official records of the President from private to public.

The PRA established a new statutory structure under which Presidents must manage their records. The Presidential Records Act:

- Defines and states public ownership of the records;
- Places the responsibility for the custody and management of incumbent Presidential records with the President;
- Allows the incumbent President to dispose of records that no longer have administrative, historical, informational, or evidentiary value, once the Archivist of the United States has provided his written views on the proposed disposal;
- Requires that the President and the President's staff take all practical steps to file personal records separately from Presidential records;
- Establishes a process for public access to and restriction of Presidential records. Specifically, the PRA allows for public access to Presidential records, including through the Freedom of Information Act (FOIA), beginning five years after the end of the Administration, but allows the President to invoke as many as six specific restrictions to public access for up to twelve years. The PRA also establishes procedures for Congress, courts, and subsequent Administrations to obtain “special” access to records that remain closed to the public. (A chart describing these access provisions and restrictions is attached.) The procedures for privilege review by the incumbent and former Presidents are established by the PRA, Executive order 13489 and NARA’s regulations;
- Requires that Vice Presidential records are to be treated in the same way as Presidential records.

Presidential records are defined as:

“documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.” [44 U.S.C. § 2201(2)].

These records can be in any media, including textual, audiovisual, and electronic.

Personal records are defined as:

“documentary materials or any reasonably segregable portion thereof, of a purely private or nonpublic character, which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President” and which include “diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business,” “private political associations” and “materials relating exclusively to the President’s own election to the office of the Presidency” [44 U.S.C. § 2201(3)].

Personal records remain the personal property of the President or the record creator.

Records created by the President-elect and the transition team are also considered personal records. To the extent that these records are received and used after the inauguration by the incoming Presidential Administration, they may become Presidential or Federal records. Former Presidents have traditionally donated these personal transition records to the National Archives and Records Administration for deposit in their Presidential Library.

Who creates Presidential records?

The PRA applies to records created by components of the Executive Office of the President (EOP) that solely advise and assist the President. These components are not covered by the Federal Records Act. Even within the EOP, some components generate Federal records, while others generate Presidential records. Among the components of the Executive Office of the President that create Presidential records are:

- The White House Office
- The Office of the Vice President
- The Office of Policy Development
- The Council of Economic Advisors
- The National Security Council
- The President’s Foreign Intelligence Advisory Board
- The President’s Intelligence Oversight Board
- The National Economic Council
- The Office of Administration

Other EOP components generate Federal records that are governed by the Federal Records Act. Among the EOP offices that generate Federal records are:

- The Office of Management and Budget
- The Office of the United States Trade Representative
- The Council on Environmental Quality
- The Office of Science and Technology Policy
- The Office of National Drug Control Policy

NARA also works with those offices that create Federal records to ensure their proper maintenance and preservation. More information on managing Federal records can be found at NARA's web site www.archives.gov/records-mgmt.

Records management requirements

The Presidential Records Act gives records management authority for incumbent Presidential records to the President, and states that personal records should be kept separate upon their creation or receipt from the Presidential record files [44 U.S.C. § 2203(b)]. The Office of the White House Counsel generally provides PRA policy guidance. Although NARA has limited records management authority over incumbent Presidential records, NARA routinely provides records management guidance based on its institutional knowledge and expertise to the incumbent Administration upon request.

White House staff responsible for maintaining file systems must be trained to keep personal records separate from Presidential records at the point of creation. Once items have been mixed, it becomes difficult to determine record status. Since the President has the discretion to determine what is personal material, this determination should be made during the incumbent's term of office rather than after the records are transferred to NARA.

Disposal authority

The PRA states that the incumbent President must obtain the views in writing of the Archivist before disposing of any Presidential records. This authority is routinely used to dispose of the extremely large volumes of public mail that the President and Vice President receive on a daily basis. Under certain circumstances, the Archivist must inform Congress of the proposed disposal. In these cases, the President must wait at least sixty legislative days before disposing of them. After the President's term, the Archivist has authority to dispose of Presidential records, following a public notice and comment period [44 U.S.C. 2203(c)-(f)].

Notice and review before opening or accessing records of former Presidents

NARA notifies the White House Counsel's Office of requests for records of former Presidents (1) that are not currently opened to the public or are being requested under one of the categories of exceptions to restrictions provided by the Presidential Records Act ("special access requests") and (2) that are being proposed for opening to the public. NARA also notifies the representatives of the former President and Vice President who created these records.

The notification procedures for public release are found at 44 U.S.C. § 2208 and described in NARA's implementing regulations (36 CFR Part 1270). Notification procedures for special access requests are outlined in Executive Order 13489 and in 36 CFR Part 1270. The purpose of the notification is to give Counsel, on behalf of the incumbent President, the right to assert applicable constitutionally based privileges to prohibit access to or release of Presidential or Vice Presidential records. Although these records were

created by a prior President, the incumbent President may believe that it is appropriate to assert Executive Privilege to bar the release of these records.

How the National Archives and Records Administration Implements the PRA

NARA reviews disposal requests of the incumbent President

The Archivist must provide his views in writing before the President and Vice President may dispose of any incumbent Presidential records. Because Presidential records document the highest level of activities in the Government, the PRA establishes a presumption that such records will be preserved permanently for eventual public access. As Presidential records increase in volume across all media and formats, however, certain types of administrative or high-volume records may be appropriate for disposal.

Under the PRA, the Archivist may state that he does not intend to take any action under subsection (e) of section 2203 [requesting the advice of Congress] or he must “request the advice of [the appropriate House and Senate Committees]...whenever he considers that (1) these particular records may be of special interest to the Congress; or (2) consultation with the Congress regarding the disposal of these particular records is in the public interest.” Neither “special interest” nor “public interest” is further defined. There is no public notice or judicial review of an incumbent disposal request by the President.

Presidents Reagan, George H.W. Bush, Clinton, George W. Bush, Obama and Trump, and their Vice Presidents, have used this authority to dispose of incoming bulk mail. Bulk mail is defined as certain categories of routine and high-volume public mail including anonymous correspondence, correspondence with incomplete addresses, mail from prolific writers, and public opinion mail. Bulk mail also includes enclosures in public mail, such as brochures and clippings, when there is no historical importance to the materials. The bulk mail disposal program has been instituted with the assistance of NARA’s White House Liaison Division. Staff sample the mail on a routine basis, and retain a small selected sample for permanent preservation. This program has resulted in the disposal of a large amount of Presidential records that have very little value.

With the tremendous increase in the use of electronic systems to create records, NARA worked collaboratively with the George W. Bush, Obama, and Trump Administrations to also authorize the disposal of bulk electronic records and certain low-level administrative files. NARA believes that additional disposal authority may be appropriate in other circumstances, including when records may exist in more than one media, or when there are electronic copies of records that are maintained in either an electronic or paper recordkeeping system.

NARA takes legal custody of records at the end of the President’s term

On January 20th at the end of the President’s final term, the Presidential records of the Administration are automatically transferred to the legal custody of the Archivist of the United States and the National Archives and Records Administration. The records are eventually housed in a Presidential Library maintained by NARA. The National Archives and Records Administration preserves, reviews, arranges, describes, and makes available these records in its role as legal custodian.

NARA notifies current and former Presidents of both requests for and proposed disclosure of records of former Presidents

NARA is responsible for providing notice to the incumbent and former Presidents before any outside access to the former President's records can be provided. NARA also provides a copy of the notice to the Office of Legal Counsel in the Department of Justice. The procedures for privilege review by the incumbent and former Presidents are established by 44 U.S.C. § 2208, Executive order 13489 and NARA's regulations.

NARA disposes of Presidential records after the end of the Administration

44 U.S.C. 2203(f)(3) authorizes the Archivist of the United States to dispose of those records which he has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value, following publication of a notice of the proposed disposal in the *Federal Register*. This action is subject to judicial review.

Critical Steps for the Incoming President and Administration

Provide a briefing for White House staff members on their responsibilities under the PRA

At the start of a new Administration, NARA recommends that White House Counsel provide the President's staff with guidance on the Presidential Records Act and its applicability to everyday work. Previous Presidential Administrations have provided this type of guidance and it has proved to be very helpful. NARA is able to assist with the drafting of this guidance and can assist with any briefings as well. Such briefings should include a summary of PRA requirements, an outline of the types of records covered by the Act, a listing of units in the EOP covered by the Act, instructions for maintaining Presidential records, and guidance for departing staff members.

Designate the President's and Vice President's personal representatives in case of death or disability

44 U.S.C. § 2204 (d) states that “upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist.” Unless the President designates a representative, any authority with regard to the President's or former President's records would be exercised by the Archivist of the United States in the event of the President's death or disability. This also applies to the Vice President. Former Presidents and Vice Presidents have usually designated their representatives within the first year of their Administrations. NARA recommends that the President and Vice President designate their representative or representatives as early as possible at the beginning of the Administration. The representatives can play a valuable role in interacting with NARA on a variety of records issues during the Administration. After the end of the Administration, these representatives serve as liaisons with NARA in reviewing access requests and public openings. (A sample letter designating representatives is attached.)

Consider whether to apply the PRA restrictive categories

It is important that the President consider and decide whether to apply the six restrictive categories of the Presidential Records Act early in the Administration, because this action must be taken before the end of the Administration. (“Prior to the conclusion of a President's term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record” [44 U.S.C. § 2204(a)]. The Vice President must also apply these restrictions before the conclusion of the term of office. These restrictions expire twelve years after the President leaves office. NARA recommends that the President and Vice President consider the Presidential restrictions and decide whether they need to invoke these additional restrictions in addition to the eight applicable FOIA exemptions (the PRA specifically exempts Presidential records from FOIA exemption (b)(5)). If the decision is made to apply these restrictions, we recommend that the

President and Vice President invoke them as soon as possible at the beginning of the Administration to avoid any confusion at the close of the Administration. (A sample letter applying these restrictions is attached.) NARA can work with the President and Vice President to ease these restrictions later in the term or after they leave office.

Designate a White House Counsel attorney to serve as contact with NARA on all PRA issues, including access requests to NARA for Presidential records of former Presidents

Because the Administration faces an ongoing array of PRA issues, it is essential for NARA to have a primary point of contact in the White House Counsel's Office as soon as possible. This is particularly important for responding to special access requests that NARA receives from Congress and the Courts for the Presidential records of former Presidents. The Clinton, George W. Bush, and Obama, and Trump Administrations have followed this approach to good effect. NARA can provide training and guidance to such counsel on all requirements of the PRA.

Involve NARA at design stage of electronic records systems to ensure that records management and transition issues are addressed

The vast and growing use of electronic systems to create and manage Presidential records requires special attention. Because so many of the most important policy records may exist only in electronic form, it is imperative that these records be identified, maintained, and protected from loss or change. Most of these systems will have to be transferred to NARA at the end of the Administration so that the records can be preserved and accessed. Accordingly, it is essential that records management requirements are designed directly into such systems from the very beginning, particularly when using proprietary systems, which can include capabilities to archive in place in coordination with NARA. This will help avoid complicated and expensive problems that can occur in transferring these records into NARA's archival systems at the end of a Presidential Administration.

NARA has significant expertise in the development and management of electronic records systems and strongly encourages the White House to include NARA in the development and maintenance of these systems. NARA looks forward to continuing to work closely with the White House, including the White House Office of Records Management and the Office of Administration, in developing ways to recognize, preserve, and manage electronic records at the earliest point in the new Administration.

Establish separate files for personal records

Personal documents and files should be identified by the records creator and filed separately from those containing Presidential records. Clearly defined filing systems will ensure that questions concerning record status do not arise.

Send forward a request for the disposal of routine, high-volume Presidential records, such as bulk mail (including bulk email).

NARA strongly encourages the new Administration to send forward a request to establish authority for the routine disposal of certain high-volume Presidential records, such as those that meet the definition of bulk mail in both textual and electronic formats.

How the National Archives and Records Administration Assists the White House

NARA has had a special relationship with Presidents and their staffs since the agency's establishment in 1934. NARA provides a variety of archival and records management assistance to the President, First Lady, Vice President and their staffs. This special relationship has included the following services:

Providing, at White House request, archival and records management guidance on Presidential records and the requirements of the Presidential Records Act, personal papers and gifts

NARA has long played an important role in providing archival and records management guidance to the White House staff upon request. This role has increased dramatically since the passage of the Presidential Records Act. In the Carter, Reagan, and George H.W. Bush Presidential Administrations, NARA had an office in the White House, or a NARA White House liaison based in the White House. This archival function is now performed by NARA's White House Liaison Division in coordination with other offices in NARA.

In recent Administrations, guidance and requests dealing with Presidential records that have legal implications have been coordinated through the White House Counsel's Office. For requests from White House Counsel's Office, NARA's General Counsel and White House Liaison Division work jointly with the White House Counsel staff on these requests.

Providing courtesy storage for incumbent Presidential and Vice Presidential records and gifts

The records, gifts, and historical materials of the President and Vice President are held on courtesy storage by NARA. These records are in the physical custody of NARA, while the White House maintains legal custody. The White House Liaison Division provides reference service and, upon request, quickly returns these records back to the White House. These records, gifts, and historical materials are made available only to the incumbent Administration as requested for reference. Unless designated as open, boxes of textual records in courtesy storage remain sealed while in NARA custody. No archival processing takes place, and no one but designated Administration personnel can see the material. In 2014, the PRA was amended to make clear that when NARA provides courtesy storage to records, including in digital and electronic form, the President remains exclusively responsible for custody, control, and access to such Presidential records [44 U.S.C. § 2203(f)].

Providing guidance and approving schedules for Executive Office of the President staff who create Federal records

Several of the units of the EOP are considered to be Federal agencies, which create Federal records. NARA's Chief Records Officer and General Counsel work in cooperation with the Office of Administration and with records officers and program staff in these units to provide records management guidance, training for staff, targeted assistance with particularly difficult recordkeeping problems or issues, and the review of records retention schedules.

Assisting in planning for and later managing the Presidential Library

Throughout the Presidential Administration, NARA provides guidance on planning for the Presidential Library and the selection of the Library site. The point of contact on any Library issues is the Executive for Legislative Archives, Presidential Libraries, and Museum Services. Traditionally, as the Administration draws to a close, NARA identifies appropriate space to temporarily house materials until the permanent Library is built.

Planning and executing the move of Presidential materials at the end of the Administration to a location close to where the President will build the Presidential Library

NARA is responsible for the planning and moving of all Presidential records and gifts, and any personal papers that are planned for donation to the government. NARA ensures physical and intellectual control over the records during their move from the White House complex to a NARA facility. On January 20th, NARA assumes legal custody of the Presidential records and gifts. NARA staffs and operates the temporary facility and later the Library.

Maintaining the Presidential Diary by providing the Presidential Diarist

The Presidential Diary, similar in nature to a daily log, is a chronological record of the President's movements, phone calls, trips, briefings, meetings, and activities. The Diarist compiles information from a wide array of Presidential records, manages the paper record and a computer database system, and assists the incumbent Administration with information requests regarding the official schedule of the President. Traditionally, the Diarist is based in the Office of Scheduling and Advance and works with Oval Office Operations. This organizational structure assists the Diarist in receiving the most complete scheduling information. As a NARA employee, the Diarist position is non-political in nature and the work is non-interpretive. The Diarist's objectivity and non-partisanship is an important factor in maintaining consistency, completeness, and accuracy of the record.

Editing and publishing the Daily Compilation of Presidential Documents and the Public Papers of the Presidents

NARA's Office of the Federal Register produces the Daily Compilation of Presidential Documents, a non-political, publicly available, daily journal of the public actions and words of the President, for use by Administration officials, Members of Congress, journalists, and others interested in the contemporary Presidency. The publication contains the public messages, statements, and remarks of the President. Operating under the auspices of the Staff Secretary, the Federal Register editors work with the Staff Secretary and the Office of the Press Secretary to collect the full range of the President's public documents, and then edit and publish the materials, verifying spoken materials against audio tapes provided by the White House Communications Agency and written material against signed originals from the Executive Clerk. The Public Papers of the Presidents, which are based on the Daily Compilation of Presidential Documents, serve as the major historical documentary source on the public record of the President. Volumes are currently published approximately twice a year, and each volume covers approximately a six-month period.

The Daily Compilation is an online only publication. The Public Papers of the Presidents is available both in print and online.

ATTACHMENTS

Presidential Records Act of 1978, 44 U.S.C. 2201-2209

How Do Its Access Provisions Work? How Does It Intersect With FOIA?

Incumbent President	President Leaves Office	Years 1 To 5	Years 5 To 12	After 12 Years
<p>Specifies up to 6 restriction categories</p> <p>Specifies duration of restrictions, up to 12 years after term (s) end</p> <p>During incumbency, no right of public access</p> <p>President to segregate Presidential from personal records</p> <p>Same provisions for Vice Presidential records</p>	<p>Presidential records transfer to legal custody of the Archivist of the U.S.</p> <p>Archivist responsible for custody, control, preservation and access</p> <p>Archivist has “affirmative duty” to make records available to public “as rapidly and completely as possible”</p>	<p>Presidential records, even unrestricted, are exempt from FOIA access until <i>earlier</i> of:</p> <ul style="list-style-type: none"> • 5 years after Archivist takes custody <i>or</i> • Archivist completes processing <p>Only access is “special access”: Congress, judicial process, or incumbent President (“current business”)</p>	<p>Access through FOIA</p> <p>Both PRA restrictions and FOIA exemptions apply</p> <p>Archivist determines PRA restrictions in consultation w/ former President</p> <p>No judicial review of PRA restrictions</p> <p>All disclosures: prior notice to current and former President</p>	<p>Access through FOIA</p> <p>Only FOIA exemptions apply</p> <p>But FOIA Ex. (b)5 is “not available” to withhold Presidential records</p> <p>All other provisions of FOIA apply</p> <p>All disclosures: prior notice to current and former President</p>

PRA restriction categories [44 U.S.C. § 2204(a)]:

1. National security information properly classified under Executive Order [FOIA Ex. 1]
2. Information relating to appointments to Federal Office
3. Exempted from disclosure by statute [FOIA Ex. 3]
4. Trade secrets and confidential business information [FOIA Ex. 4]
5. Confidential communications requesting or submitting advice, between the President and his advisors or between such advisors
6. Information which if disclosed would cause a clearly unwarranted invasion of personal privacy [FOIA Ex. 6]

SAMPLE LETTER ASSERTING PRA RESTRICTIONS

January 21, 2021

Dear Mr. Ferriero:

Pursuant to the provisions of the Presidential Records Act of 1978, 44 USC 2204(a), I specify [**can specify all six Presidential restriction categories for a maximum of twelve (12) years**] for which the Act permits me to apply to the official records of my tenure as President of the United States.

Under the conditions set forth in section 2204(d) of the Act, as well as 36 C.F.R. 1270.20 implementing the Act, I hereby designate XXX and XXX as my representatives with authority to exercise all discretion or authority granted to me under the Act upon my death or disability.

Sincerely,

PRESIDENT OF THE UNITED STATES

The Honorable David S. Ferriero
Archivist of the United States
Washington, DC 20408

January 21, 2021

Dear Mr. Ferriero:

Under the conditions set forth in Section 2204(d) of the Presidential Records Act of 1978, as well as Section 1270.20 of the regulations implementing that Act (36 C.F.R. 1270.20), I hereby designate the following individuals to be my representatives with authority with respect to all my Presidential records:

[Specified individual or individuals]

Sincerely,

PRESIDENT OF THE UNITED STATES

The Honorable David S. Ferriero
Archivist of the United States
Washington, DC 20408