Statement
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Senate Homeland Security and Government Affairs Committee's Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security
On
"National Archives Oversight Hearing: Protecting Our Nation's History for Future Generations."
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Room 342 Dirksen Senate Office Building
3:00 P.M.

Thank you, Chairman Carper, Senator Coburn, and Members of the Subcommittee, for the opportunity to speak today on the role of the National Archives and Records Administration in protecting our nation's history.

My name is Patrice McDermott. I am the Director of OpenTheGovernment.org, a coalition of consumer and good government groups, library associations, journalists, environmentalists, labor organizations and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

In my testimony today I want to discuss a number of roles that NARA has traditionally held and new ones it is being called upon to take on. It is critical, I think, that the Subcommittee fully realize that NARA is probably the only agency in the Executive Branch that has – and is seen by the public to have – access to government information as its primary mission. While that mission has been understood to encompass primarily historically significant – for a variety of reasons – information, NARA is increasingly being looked to as the site to locate new initiatives and offices pertaining to public access to contemporaneous government information. These include the newly mandated Office of Government Information Services, created by the OPEN Government Act, and an office that will have responsibility for implementing the Memorandum on Designation and Sharing of Controlled Unclassified Information, better known as "Sensitive But Unclassified" information. This latter office will have the task of bringing order to the multiplicity of control markings – such as SBU, FOUO – across the government that are meant to safeguard information that is not classifiable, but that is arguably not for immediate public disclosure.

I will briefly address these new responsibilities and then address the concerns of many in the public access community related to NARA's more traditional roles for records, and especially, e-records, management and provision of access to the records of our nation.

Office of Government Information Services

The OPEN Government Act (P.L. 110-175) established OGIS specifically at NARA. It did so as a result of congressional findings that interests promoted by the Freedom of Information Act (FOIA), as well as American traditions and ideals regarding the value of an informed citizenry and the legitimacy of representative government, were being insufficiently served by the existing system of agency practices and implementation, in which DOJ has been the lead agency for 30 years. Congress specifically directed the creation of an ombudsman office apart from the Department of Justice for mediation of contested requests. The new office, established with strong bipartisan support in both Houses of Congress, also has the critical mandate to evaluate agency implementation of FOIA with a disinterested eye. While appropriations are not the purview of this Committee and Subcommittee, we urge your support of NARA's ability to create and sustain this new office and to make it function for the benefit of public access to federal records within a contemporaneous timeframe.

Controlled Unclassified Information (CUI) Implementation Office

The proliferation of disparate and open ended control designations, such as “Sensitive But Unclassified,” “For Official Use Only,” and “Sensitive Security Information,” restricts public access to disclosable information and makes more difficult sharing of information among governmental entities and others that the federal government recognizes as having a “legitimate need to know.” Moreover, many of these labels exist without congressional sanction, leading to confusion as to whether the records are releasable under the Freedom of Information Act (FOIA), including undermining the FOIA’s presumption of openness and its requirement that Congress, and only Congress, should create new categories of withheld records. Although such designations do not describe any category of records that may be properly withheld under the law, they are often treated as a basis for withholding records requested under FOIA. The new CUI framework will continue to affect the media’s ability to keep the public informed and the public’s ability to press government action to improve safety and security.

The plan is for the implementing office is to be at NARA. For those of us who care about ensuring limitations on control markings that foreclose public access to unknown volumes of government information, NARA is seen as a good home. It will need both the necessary funds to make it work and ongoing Congressional oversight to make sure it is working properly to the benefit of the public.

Records and E-Records Management

In 1982, the Committee on the Records of Government proclaimed that "the United States is in danger of losing its memory."[1] They were talking about paper records. Our memory is at much greater risk now. And, of course, this is not just the loss of our family photos, as it were, but of that information necessary for accountability. Across the federal

1 Committee on the Records of the Government 1985:9, 86-87.

government, we do not know with any certainty that all of the documents and information that we need to write our history, to understand policy development and implementation, to trace who knew what, read and edited what document, are being preserved.

Why is our memory in danger? Because the vast majority – if not all – of our documentary and information history is being created electronically but not necessarily well-managed and preserved electronically. Those of us outside government understand that the common policy is to only preserve the final policy document, for instance. That is important, but not sufficient. Some of us who have been around for more than a few years remember the days of carbon copies and complete paper files. In the government, the paper copies were annotated and initialed by those who saw and commented on them. It was not just the final version of the policy or memo that was filed away, but a documentary history of that policy's development.

This is the stuff of "what did you know and when did you know it"; it is the stuff of history and accountability. The various reasons given for not preserving it all are ones that we have heard before – the volume is too great; we don't have the resources to manage all this; it is not of importance to the leadership of our agency. Another reason is that Congress has been lax in holding agencies accountable and for ensuring that records management is seen as part of the mission-critical components of every department and agency. While Congress is rightfully alarmed at the loss of documents and information through a system breach, it and the Executive Branch have turned a blind eye to their loss through indifference.. The end result is the same except with indifference – or intentional failure to preserve – we will not necessarily know what has been taken from us and will not be able to restore our history to its previous status.

The National Archives and Records Administration (NARA) is supposed to be the leader in this area. The Federal Records Act gives NARA clear authority (44 USC 2904) including for promulgating standards, procedures, and guidelines, and conducting inspections or surveys of the records and the records management programs and practices within and between Federal agencies. As far back as 1996, NARA committed to working "with agencies on the design of recordkeeping systems for creating and maintaining records of value." While a procurement standard developed by the Department of Defense was accepted many years ago by NARA, very little progress has been made government-wide toward electronic records management systems. Records are stored on servers and, in some cases, on individual PCs, but they are not managed in the sense of being easily retrievable by subject or creator or, I would guess, disposition schedule. We repeatedly have to relearn the lesson, apparently, that servers and backup tapes are not appropriate records management systems.

A report, "*Record Chaos: The Deplorable State of Electronic Record Keeping in the Federal Government*," issued in late April by Citizens for Responsibility and Ethics in Washington (CREW) (http://www.citizensforethics.org/recordchaos), in which OpenTheGovernment.org offered some assistance, gives us a good indication of the state we are in with electronic records generally and electronic communications in particular.

The report focuses on email records due to their ubiquitous nature in the federal government and in the modern office. A 1999 Department of Justice memo speculated that, in aggregate, federal agencies created at least 36.5 billion messages per year, a number that most certainly has increased exponentially in nine years. More recently, a respondent to our online survey posited that about 90% of the business of the federal government was conducted by email. And while electronic records include a variety of records (e.g., spreadsheets, maps, pictures), the widespread usage of email records makes them a top priority for agency record keeping policies. A key finding for this hearing is that no agency looked at used an agency-wide electronic record keeping system. Previously published reports document that most agencies do not use electronic systems for any records management.

The survey confirmed what CREW's research into agency policy had shown, namely that the most popular method of email records management is to print email records and file them with paper records. It is important to note that this was an option made available to the agencies by NARA in its General Records Schedule (GRS) 20. Survey results also pointed to the fact that some agencies seem to have multiple policies governing email records or no policy at all, something that the FOIA releases from agencies hinted at. Worse than multiple policies, is a lack of any method to manage email records. When asked how emails are preserved at their agency one person responded, "We have not gotten to that phase of records management." Not every electronic communication is worthy of permanent preservation, but GRS 20 has given agencies permission to treat all e-mail according to a common schedule for disposition; the policy of "print and destroy the electronic copy" derives from it.

Only six respondent to our survey said that their agency exclusively used some type of electronic system to manage its email records. Eighty-three percent of respondents (but only five individuals) who used an electronic system to manage their emails said that their system was searchable for email records. By contrast, of those using paper or some other system, 61% found it difficult to impossible to search for and find specific email records. This is, of course, the sort of difficulty over which NARA was sued[2] when GRS 20 was issued.

Lack of compliance and lack of penalties for non-compliance emerged as major problems. One respondent commented, "I do know that less than 80% of the agency complies." Overall, 30% of respondents did not think their co-workers complied with email record policies; 34% were not aware of any monitoring of employee record keeping practices; and 56% said there was no penalty for non-compliance (at least on the agency level). This is an area where agencies and NARA can make quick and meaningful changes.

In general, our admittedly unscientific survey exposed a number of major problems.

- First, there is a lack of consistent policies, as evidenced by the fact that so many respondents use multiple techniques to preserve email records at their agencies.

2 Public Citizen, et al v. Carlin 6 August 1999. 184 F.3d 900. 910-11 (D.C. Cir. 1999)

- Second, movement towards electronic record systems has been unacceptably slow.

- Third, agencies are exposing themselves to legal problem and litigation sanctions, particularly in regard to the lack of care for metadata, if not corrected. Indeed, the failure of the federal government to adequately meet its electronic record keeping obligations has exposed it to potential liability in a host of other contexts. Inadequate electronic record keeping also means inadequate compliance with the FOIA and other information access statutes. Agencies' ability to meet their litigation obligations are seriously hampered by their inability to deal effectively with electronic records.

- Fourth, agencies lack training and compliance monitoring, two problems that would be easily cured by reforming agency policy and increased NARA involvement. Even knowledgeable agency employees lack a basic understanding of their record keeping obligations and how they can be satisfied. Written policies and guidelines within individual agencies are often inconsistent, confusing or outright misleading. This lack of understanding correlates directly to a lack of compliance with record keeping obligations.

The blame in terms of compliance falls most squarely on NARA, which, as I noted earlier, has a statutory obligation to promulgate standards, procedures, and guidelines, and conduct inspections or surveys of the records and the records management programs and practices within and between Federal agencies. NARA has elected, however, to limit its role to providing guidance only with little or no agency follow-through. Most significantly, NARA has abandoned its previous practice of conducting annual audits of agency compliance and proclaimed publicly that the responsibility rests first and last with individual federal agencies. At a symposium last fall, NARA was told by agency personnel that the failure to audit meant a failure of records management.

- Fifth, senior-level agency management needs to realize the serious problems with their agencies' electronic records management and take steps to correct them.

Snapshot of Executive Branch Web Pages

Many of the partners in OpenTheGovernment.org and others have serious concerns about the National Archives and Record Administration's decision to not capture and preserve a "snapshot" of government web pages at the end of the current Administration. Federal websites are federal records and, therefore, must be treated as such and preserved appropriately. As the site for the 2004 Presidential Term Web Harvest indicates, the first such snapshot was "intended to document Federal agencies' presence on the World Wide Web at the time that the Presidential Administration term ended in early 2005."

In a March 27, 2008 memo (NWM 13.2008), NARA stated that the reasons for this decision include:

- Existing, private entities such as the Internet Archive (www.archive.org) already record federal web pages; and

- NARA does not consider such a snapshot to possess enough historical value to warrant conducting and preserving a government-wide web snapshot.

While the work of organizations like the Internet Archive is valuable and meriting support, it does not supplant the responsibility of our national government to protect and document its own history and the NARA snapshot is the critical component of the Nation's historical record. No other agency has both the public mandate and the public accountability necessary for protecting historical records.

A NARA snapshot of federal agency web sites at the end of an Administration is as critically important as the snapshot of the White House and Congressional web sites, which NARA intends to continue. These agency snapshots provide the public with an image and understanding of the government at a particular point in time that can be then compared and contrasted with other such images over Administrations and allow the public direct access to federal digital records at a given time in history. While ongoing records management -- to the extent that it is usefully occurring -- and eventual transfer of permanently valuable records to NARA are both essential to the historical record, they do not fulfill the same purpose that end-of-Administration web harvests do to create a point-in-time record of our political and policy history.

Moreover, depending on private, non-profit organizations to keep our Nation’s digital history poses serious risks. How do we ensure that these records will be and remain accessible and freely available without limitations on their use? While it is clear that entities such as the Internet Archive plan to continue such services, it remains the responsibility of government to ensure such access through its own records.

Digitization

Finally, in terms of public access to the records of our government, I want to both commend NARA for seeking to provide digital access to non-digital records and to raise some cautions. NARA has been a leader in looking for private sector providers for digitization of records that were created and preserved in a non-digital format. Their practice in this area has gradually improved, in some cases as the result of pressure from members of the public access community. NARA is, though, an example of a more general problem across the federal government: the government is not willing to pay for the digitization of its non-digital records, or willing to explore non-commercial models – such as consortia of libraries and others – for the provision of this service. Thus, in NARA's case and in others, the records of our government are indeed made available electronically – but, for 5 or 7 years, only at a price or only by physically visiting a NARA facility. In most cases, in what seems to the public access community to be a violation of the Paperwork Reduction Act, the private companies are given exclusive access to the records and no other entity is allowed access to do comparable digitization either in the near- or long-term. And often, initially at NARA and in other agencies, these projects are conducted under a Memorandum of Understanding (MOU) rather than a

public contract. I want to emphasize that the private, commercial sector has a key role to play in providing useful access to government information, but my community believes that the responsibility for ensuring ongoing, equitable, no-fee access to the public's information is the responsibility of government – and it is the responsibility of Congress to ensure it by adequate funding and oversight.

Congress has paid almost no attention to the proliferation of these projects across the government. In August 2006, OMB asked agencies to inform them of discussions or MOUs in existence. We understand there were a significant number of these, but OMB has refused to release even the number, much less what agencies were engaged or the entities with which they were engaging. We urge this Subcommittee to specifically ask OMB for that information and to conduct oversight of these proliferating initiatives.

Thank you for the opportunity to speak to you on these important issues. I am happy to answer any questions you might have