

***Suggested Questions for the First Lady's Staff
on the Records They Create***

1. How did you come to work on the First Lady's Staff?

How long have you worked for the First Lady?

2. What are your current duties and responsibilities?

Have you worked for the First Lady in other capacities?

How do you relate administratively to other components of the First Lady's Staff?

3. What issues have you been involved with during the Clinton Presidency?

4. What types of files have you created?

Do you treat handwriting in any special way? Do you have a special file for close friends to the Clintons?

5. What is the arrangement of your filing system? ie. chronological, alphabetical or subject files

Do you have an approximate volume of your office files or can you show us your files?

6. Do you work on any issues for the President, ie. the Domestic Policy Staff?

If so, are these records kept together or separately from the First Lady's?

7. Do you have a concern that personal items of the First Lady or President are intermixed with your records?

8. Have you created any records solely in electronic form?

If so, what is the software used?

9. Do you have any other types of records such as photographs, video or other unique items?

10. Does your filing system work for you?

In what ways can we best assist you?

National Archives



Washington, DC 20408

Date : January 5, 1996

Reply to

Attn of : NL (Nancy Kegan Smith) and GC (Amy E. Krupsky) ^{NKS/mk} ^{AEK}

Subject : The ABCs of the FRA & PRA

To : N

This is in response to your request for a brief comparison of the basic provisions of the Federal Records Act and the Presidential Records Act.

I. Definitions

Federal: Documentary materials regardless of physical form that are made or received by an agency of the U.S. Government under Federal law or in connection with the transaction of public business, and preserved or appropriate for preservation as evidence of agency activities or because of the value of the information they contain.

Presidential: Documentary materials regardless of physical form that are created or received by the President, his 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 ceremonial or official duties of the President. Applies only to records created after January 20, 1981.

II. What's not included in the definitions above?

Federal: Personal papers and materials not used in the transaction of government business, also non-record material such as exhibits, stocks of publications and extra copies for convenience of reference.

Presidential: Personal papers, as defined in the statute, include materials of purely private character such as diaries, journals, not used in government business, materials relating to private political associations, and materials relating to the election of President and others.

III. What entities create these records?

Federal: Federal agencies including agencies in the executive branch, the courts (except the Supreme Court) and some establishments in the legislative branch except the

Senate, House of Representatives and Architect of the Capitol.

Presidential: President, members of his immediate staff who advise and assist, includes NSC and other components of the Executive Office of the President who solely advise and assist the President.

Vice Presidential: Vice President and members of his staff create Vice Presidential records which are treated in the same way as Presidential records.

IV. Who determines record status?

Federal: The head of the agency determines federal record status.

Presidential: The President determines Presidential record status.

V. Who maintains the records?

Federal: The agencies maintain their own records until they are transferred to NARA if they are permanent, usually when they are 30 years old, or the agencies dispose of them in accordance with NARA-approved disposition schedules. Agencies maintain their records in accordance with agency guidelines and NARA guidance.

President: Presidential records are maintained by the President during his term of office and transferred to NARA at the end of the administration. The Executive Office of the President maintains its Presidential records in accordance with EOP guidelines and, when requested, NARA guidance.

VI. Who has authority to dispose of these records?

Federal: The Archivist must approve the destruction of all federal records, either through the promulgation of general records schedules, which apply to records common to many agencies, or through the approval of specific requests for disposition.

Presidential: The Archivist must provide his views in writing in response to a proposed destruction of Presidential records by an incumbent President. The Archivist may also dispose of Presidential records once transferred to NARA when he has determined that they do not warrant continued preservation. 60 days advance notice must be published in the Federal Register.

VII. What responsibilities does the Archivist have with regard to these records?

Federal: The Archivist must maintain the permanently valuable records of the Government, appraise and approve the disposition of all non-permanent federal records, advise the agencies on proper records management practices and advise the Attorney General and Congress of possible destruction of federal records.

Presidential: The only statutory responsibility that the Archivist has for records of an incumbent President is the responsibility for providing his views in writing in response to a proposed destruction of Presidential records and for requesting the advice of the appropriate committees of the House and Senate if he thinks that the destruction raises concerns or is of particular interest to Congress.

At the end of the Administration the Archivist assumes additional responsibilities with regard to maintenance and access to Presidential records, see below.

VIII. How does the public gain access to essential evidence?

Federal: The public may request access, at any time, to executive branch agency records under The Freedom of Information Act. NARA will process these request under the statute and may withhold some information under one or more of the nine FOIA exemptions. These exemptions include, for example, national security and invasion of privacy.

Presidential: Presidential records are not available for public access during the term of the incumbent. While in office the President has the right to chose to apply up to six restrictive categories that will be applied to his records once he leaves office. These restrictions may not exceed 12 years after he leaves office and are applied by the Archivist, in consultation with the former President, during the 12 years only. Thereafter only the FOIA applies.

For a period of five years after the end of the term or until the Archivist has processed an integral file segment (if sooner), the records are not available to public access requests. After the five year period, any records that do not fall within the six restrictive categories are available under FOIA, subject to eight FOIA exemptions. Exemption 5, encompassing the deliberative process privilege, is not available. The Archivist must notify the incumbent and former President before release of any Presidential records in accordance with E.O.12667 for possible claims of privilege.

SUBCHAPTER E—PRESIDENTIAL RECORDS

PART 1270—PRESIDENTIAL RECORDS

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AUTHORITY: The Presidential Records Act of 1978, Pub. L. 95-591, 92 Stat. 2523-27, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07).

SOURCE: 53 FR 50404, Dec. 15, 1988, unless otherwise noted.

Subpart A—General Provisions

§ 1270.10 Scope of part.

These regulations implement the provisions of the Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523-27, as amended by Pub. L. No. 98-497, sec. 107(b)(7), 98 Stat. 2287 (1984) (codified at 44 U.S.C. 2201-07), by setting forth the policies and procedures governing preservation, protection, and disposal of, and access to Presidential and Vice-Presidential records created during a term of office

of the President or Vice President beginning on or after January 20, 1981. Nothing in these regulations is intended to govern procedures for assertion of, or response to, any constitutionally based privilege which may be available to an incumbent or former President.

§ 1270.12 Application.

(a) These regulations apply to all Presidential records created during a term of office of the President beginning on or after January 20, 1981.

(b) Vice-Presidential records shall be subject to the provisions of this part in the same manner as Presidential records. The Vice President's duties and responsibilities, with respect to Vice-Presidential records, shall be the same as the President's duties and responsibilities with respect to Presidential records. The Archivist's authority with respect to Vice-Presidential records shall be the same as the Archivist's authority with respect to Presidential records, except that the Archivist may, when he determines it to be in the public interest, enter into an agreement with a non-Federal archival repository for the deposit of Vice-Presidential records.

§ 1270.14 Definitions.

For the purposes of this part—

(a) The terms *documentary material*, *Presidential records*, *personal records*, *Archivist*, and *former President* have the meanings given them by 44 U.S.C. 2201 (1)-(5), respectively.

(b) The term *agency* has the meaning given it by 5 U.S.C. 551(1) (A)-(D) and 552(f).

(c) The term *Presidential archival depository* has the meaning given it by 44 U.S.C. 2101(1).

(d) The term *Vice-Presidential records* means documentary materials, or any reasonably segregable portion thereof, created or received by the Vice President, his immediate staff, or a unit or individual of the Office of the Vice President whose function is to advise and assist the Vice 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 Vice President. The term includes documentary materials of the kind included under the term *Presidential records*.

(e) The term *filed* means the date something is received in the office of the official to whom it is addressed.

Subpart B—Actions Taken on Behalf of Former Presidents

§ 1270.20 Designation of person or persons to act for former President.

(a) A President or former President may designate some person or persons to exercise, upon death or disability of the President or former President, any or all of the discretion or authority granted to the President or former President by chapter 22 of title 44 U.S.C.

(b) When a President or former President designates a person or persons to act for him pursuant to paragraph (a) of this section, this designation shall be effective only if the Archivist has received notice of the designation before the President or former President dies or is disabled.

(c) The notice required by paragraph (b) of this section shall be in writing, and shall include the following information:

(1) Name(s) of the person or persons designated to act for the President or former President;

(2) The current addresses of the person or persons designated; and

(3) The records, identified with reasonable specificity, over which the designee(s) will exercise discretion or authority.

§ 1270.22 When Archivist may act for former President.

In those instances where a President has specified, in accordance with 44 U.S.C. 2204(a), restrictions on access to Presidential records, but has not made a designation under § 1270.20 of this subpart, the Archivist shall, upon the death or disability of a President or former President, exercise the discretion or authority granted to a President or former President by 44 U.S.C. 2204.

Subpart C—Disposal of Presidential Records

§ 1270.30 Disposal of Presidential records by incumbent President.

A President may, while in office, dispose of any Presidential records which in his opinion lack administrative, historical, informational, or evidentiary value if one of the following two sets of requirements is satisfied:

(a)(1) The President has obtained the written views of the Archivist concerning the proposed disposal; and

(2) The Archivist states in his written views to the President that he does not intend to request, with respect to the President's proposed disposal of Presidential records, the advice of the Committees on Rules and Administration and Governmental Affairs of the Senate, and the Committees on House Administration and Government Operations of the House of Representatives because he does not consider—

(i) The records proposed for disposal to be of special interest to the Congress; or

(ii) Consultation with the Congress concerning the proposed disposal to be in the public interest; or

(b)(1) The President has obtained the written views of the Archivist concerning the proposed disposal;

(2) The Archivist states in his written views either—

(i) That the records proposed for disposal may be of special interest to the Congress; or

(ii) That consultation with the Congress concerning the proposed disposal is in the public interest; and

(3) The President submits copies of the proposed disposal schedule to the Committees on Rules and Administration and Governmental Affairs of the Senate and the Committees on House Administration and Government Operations of the House of Representatives at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress *sine die*, and the days on which either House is not in session because of an adjournment of

more than 3 days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

§ 1270.32 Disposal of Presidential Records in the custody of the Archivist.

(a) The Archivist may dispose of Presidential records which he has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation.

(b) When Presidential records are scheduled for disposal pursuant to paragraph (a) of this section, the Archivist shall publish a notice of this disposal in the *FEDERAL REGISTER* at least 60 days before the proposed disposal date.

(c) The notice required by paragraph (b) of this section, shall include the following:

(1) A reasonably specific description of the records scheduled for disposal; and

(2) A concise statement of the reason for disposal of the records.

(d) Publication in the *FEDERAL REGISTER* of the notice required by paragraph (b) of this section shall constitute a final agency action for purposes of review under chapter 7 of title 5 U.S.C. (5 U.S.C. 701-706).

Subpart D—Access to Presidential Records

§ 1270.40 Identification of restricted records.

(a) If a President, prior to the conclusion of his term of office or last consecutive term of office, as the case may be, specifies durations, not to exceed 12 years, for which access to certain information contained in Presidential records shall be restricted, in accordance with 44 U.S.C. 2204, the Archivist or his designee shall identify the Presidential records affected, or any reasonably segregable portion thereof, in consultation with that President or his designated representative(s).

(b) The Archivist shall restrict public access to the information contained in those records identified as affected until—

(1) The date on which the former President waives the restriction on disclosure of the record or information contained within;

(2) The expiration of the period of restriction specified under 44 U.S.C. 2204(a) for the category of information under which a certain record, or a portion thereof, was restricted; or

(3) The Archivist has determined that the former President or an agent of the former President has placed in the public domain through publication a restricted record or a reasonably segregable portion thereof, if this date is earlier than either of the dates specified in paragraph (b)(1) or (2) of this section.

§ 1270.42 Denial of access to public; right to appeal.

(a) Any person denied access to a Presidential record (hereinafter *the requester*) because of a determination that the record or a reasonably segregable portion thereof was (1) properly restricted under 44 U.S.C. 2204(a), and (2) not placed in the public domain by the former President or his agent, may file an administrative appeal with the Assistant Archivist for Presidential Libraries (NL), Washington, DC 20408.

(b) Appeals shall be filed no later than 10 working days after the requester receives written notification that access to Presidential records has been denied.

(c) Appeals shall be in writing and shall set forth the reason(s) why the requester believes access to the records sought should be allowed. The requester shall identify the specific records sought.

(d) Upon receipt of an appeal, the Assistant Archivist for Presidential Libraries shall have 30 working days from the date an appeal is filed to consider the appeal and to respond in writing to the requester. The Assistant Archivist's response shall state whether or not the Presidential records requested are to be released and the basis for this determination. The decision of the Assistant Archivist to withhold release of Presidential records is final and not subject to judicial review.

§ 1270.44 Exceptions to restricted access.

(a) Notwithstanding any restrictions on access imposed pursuant to section 2204 or these regulations, and subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available in the following instances:

(1) Pursuant to subpoena or other judicial process properly issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(2) To an incumbent President if the records sought contain information which is needed for the conduct of current business of his office and is not otherwise available;

(3) To either House of Congress, or, to the extent of matter within its jurisdiction, to a Congressional committee or subcommittee if the records sought contain information which is needed for the conduct of business within its jurisdiction and is not otherwise available.

(b) Requests by an incumbent President, a House of Congress, or a Congressional committee or subcommittee pursuant to paragraph (a) of this section shall be addressed to the Archivist. All requests shall be in writing and, where practicable, identify the records sought with reasonable specificity.

(c) Presidential records of a former President shall be available to the former President or his designated representative upon request.

§ 1270.46 Notice of intent to disclose Presidential records.

(a) The Archivist or his designee shall notify a former President or his designated representative(s) before any Presidential records of his Administration are disclosed.

(b)(1) The notice given by the Archivist or his designee shall:

(i) Be in writing;

(ii) Identify the particular records with reasonable specificity;

(iii) State the reason for the disclosure; and

(iv) Specify the date on which the record will be disclosed.

(2) In the case of records to be disclosed in accordance with § 1270.44, the notice shall also:

(i) Identify the requester and the nature of the request;

(ii) Specify whether the requested records contain materials to which access would otherwise be restricted pursuant to 44 U.S.C. 2204(a) and identify the category of restriction within which the record to be disclosed falls; and

(iii) Specify the date of the request.

(c) If, after receiving the notice required by paragraph (a) of this section, a former President raises rights or privileges which he believes should preclude the disclosure of a Presidential record, and the Archivist nevertheless determines that the record in question should be disclosed, in whole or in part, the Archivist shall notify the former President or his representative of this determination. The notice given by the Archivist or his designee shall:

(1) Be in writing;

(2) State the basis upon which the determination to disclose the record is made; and

(3) Specify the date on which the record will be disclosed.

(d) The Archivist shall not disclose any records covered by any notice required by paragraph (a) or (c) of this section for at least 30 calendar days from receipt of the notice by the former President, unless a shorter time period is required by a demand for Presidential records under § 1270.44.

(e) Copies of all notices provided to former Presidents under this section shall be provided at the same time to the incumbent President.

Subpart E—Presidential Records Compiled for Law Enforcement Purposes

§ 1270.50 Consultation with law enforcement agencies.

(a) For the processing of Presidential records compiled for law enforcement purposes that may be subject to 5 U.S.C. 552(b)(7), the Archivist shall request specific guidance from the appropriate Federal agency on the

proper treatment of a record if there is no general guidance applicable, if the record is particularly sensitive, or if the type of record or information is widespread throughout the files.

(b) When specific agency guidance is requested under paragraph (a) of this section, the Archivist shall notify the appropriate Federal agency of the decision regarding disclosure of the specific documents. Notice shall include the following:

(1) A description of the records in question;

(2) Statements that the records described contain information compiled for law enforcement purposes and may be subject to the exemption provided by 5 U.S.C. 552(b)(7) for records of this type; and,

(3) The name of a contact person at NARA.

(c) Agency guidance under this section is not binding on the Archivist. The final determination on whether Presidential records may be subject to the exemption in 5 U.S.C. 552(b)(7) is the Archivist's responsibility.

Presidential Documents

Executive Order 12667 of January 18, 1989

Presidential Records

By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and in order to establish policies and procedures governing the assertion of Executive privilege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration pursuant to the Presidential Records Act of 1978, it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this Order:

- (a) "Archivist" refers to the Archivist of the United States or his designee.
- (b) "NARA" refers to the National Archives and Records Administration.
- (c) "Presidential Records Act" refers to the Presidential Records Act of 1978 (Pub. L. No. 95-591, 92 Stat. 2523-27, as amended by Pub. L. No. 98-407, 98 Stat. 2287), codified at 44 U.S.C. 2201-2207.
- (d) "NARA regulations" refers to the NARA regulations implementing the Presidential Records Act, 53 Fed. Reg. 50404 (1988), codified at 36 C.F.R. Part 1270.
- (e) "Presidential records" refers to those documentary materials maintained by NARA pursuant to the Presidential Records Act and the NARA regulations.
- (f) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.
- (g) A "substantial question of Executive privilege" exists if NARA's disclosure of Presidential records might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch.
- (h) A "final court order" is a court order from which no appeal may be taken.

Sec. 2. *Notice of Intent to Disclose Presidential Records.*

(a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, utilizing any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of Executive privilege. However, nothing in this Order is intended to affect the right of the incumbent or former Presidents to invoke Executive privilege with respect to materials not identified by the Archivist. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

(b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose Presidential records, the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of Executive privilege by the incumbent or former President or the Archivist has been instructed by the incumbent President or his designee to extend the time period. If a shorter time period is required under the circumstances set forth in section 1270.44 of the NARA

Sec. 3. Claim of Executive Privilege by Incumbent President.

(a) Upon receipt of a notice of intent to disclose Presidential records, the Attorney General (directly or through the Assistant Attorney General for the Office of Legal Counsel) and the Counsel to the President shall review as they deem appropriate the records covered by the notice and consult with each other, the Archivist, and such other Federal agencies as they deem appropriate concerning whether invocation of Executive privilege is justified.

(b) The Attorney General and the Counsel to the President, in the exercise of their discretion and after appropriate review and consultation under subsection (a) of this section, may jointly determine that invocation of Executive privilege is not justified. The Archivist shall be promptly notified of any such determination.

(c) If after appropriate review and consultation under subsection (a) of this section, either the Attorney General or the Counsel to the President believes that the circumstances justify invocation of Executive privilege, the issue shall be presented to the President by the Counsel to the President and the Attorney General.

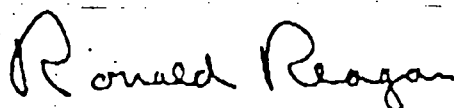
(d) If the President decides to invoke Executive privilege, the Counsel to the President shall notify the former President, the Archivist, and the Attorney General in writing of the claim of privilege and the specific Presidential records to which it relates. After receiving such notice, the Archivist shall not disclose the privileged records unless directed to do so by an incumbent President or by a final court order.

Sec. 4. Claim of Executive Privilege by Former President.

(a) Upon receipt of a claim of Executive privilege by a former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other Federal agencies as he deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege. Any determination under section 3 of this Order that Executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.

(b) In making the determination referred to in subsection (a) of this section, the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order. The Archivist shall notify the incumbent and former Presidents of his determination at least 30 days prior to disclosure of the Presidential records, unless a shorter time period is required in the circumstances set forth in section 1270.44 of the NARA regulations. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

Sec. 5. Judicial Review. This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.



THE WHITE HOUSE,
January 18, 1989.

PRESIDENTIAL RECORDS ¹

(44 U.S.C. Chapter 22)

- Sec.
2201. Definitions.
2202. Ownership of Presidential records.
2203. Management and custody of Presidential records.
2204. Restrictions on access to Presidential records.
2205. Exceptions to restriction on access.²
2206. Regulations.
2207. Vice-Presidential records.

§ 2201. Definitions

As used in this chapter—

(1) The term "documentary material" means all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including but not limited to, audio, audiovisual, or other electronic or mechanical recordings.

(2) The term "Presidential records" means documentary materials, or any reasonably segregable portion thereof, created or received by the President, his 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. Such term—

(A) includes any documentary materials relating to the political activities of the President or members of his staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e)³ of title 5, United States Code); (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

(3) The term "personal records" means all 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. Such term includes—

(A) 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;

(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

(C) materials relating exclusively to the President's own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

(4) The term "Archivist" means the Archivist of the United States.

(5) The term "former President," when used with respect to Presidential records, means the former President during whose term or terms of office such Presidential records were created.

§ 2202. Ownership of Presidential records

The United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.

§ 2203. Management and custody of Presidential records

(a) Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records pursuant to the requirements of this section and other provisions of law.

(b) Documentary materials produced or received by the President, his staff, or units or individuals in the Executive Office of the President the function of which is to advise and assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

(c) During his term of office, the President may dispose of those of his Presidential records that no longer have administrative, historical, informational, or evidentiary value if—

¹ Section 3 of Pub. L. 95-591 (Nov. 4, 1978, 92 Stat. 2523) provided that this chapter applies to any Presidential records created on or after January 20, 1981.

² So in original. Does not conform to section catch line.

³ Section 552(e) of title 5 was redesignated section 552(f) of title 5 by section 1802(b) of Pub. L. 99-570.

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that he does not intend to take any action under subsection (e) of this section.

(d) In the event the Archivist notifies the President under subsection (c) that he does intend to take action under subsection (e), the President may dispose of such Presidential records if copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

(e) The Archivist shall request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Administration and the Committee on Government Operations of the House of Representatives with respect to any proposed disposal of Presidential records 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.

(f) (1) Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act.

(2) The Archivist shall deposit all such Presidential records in a Presidential archival depository or another archival facility operated by the United States. The Archivist is authorized to designate, after consultation with the former President, a director at each depository or facility, who shall be responsible for the care and preservation of such records.

(3) The Archivist is authorized to dispose of such Presidential records which he has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States Code.

§ 2204. Restrictions on access to Presidential records

(a) Prior to the conclusion of his 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, within one or more of the following categories:

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relating to appointments to Federal office;

(3) specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code), provided that such statute (A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of material to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers; or

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(b)(1) Any Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of—

(A)(i) the date on which the former President waives the restriction on disclosure of such record, or

(ii) the expiration of the duration specified under subsection (a) for the category of information on the basis of which access to such record has been restricted; or

(B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in the public domain through publication by the former President, or his agents.

(2) Any such record which does not contain information within a category restricted by the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall be

exempt from the provisions of subsection (c) until the earlier of—

(A) the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(d)(1); or

(B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof.

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in his discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or his designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

(c)(1) Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. Access to such records shall be granted on nondiscriminatory terms.

(2) Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.

(d) 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.

(e) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

§ 2205. Exceptions to restricted access

Notwithstanding any restrictions on access imposed pursuant to section 2204—

(1) the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to Presidential records in the custody of the Archivist;

(2) subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available—

(A) pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(B) to an incumbent President if such records contain information that is needed for conduct of current business of his office and that is not otherwise available; and

(C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available; and

(3) the Presidential records of a former President shall be available to such former President or his designated representative.

§ 2206. Regulations

The Archivist shall promulgate in accordance with section 553 of title 5, United States Code, regulations necessary to carry out the provisions of this chapter. Such regulations shall include—

(1) provisions for advance public notice and description of any Presidential records scheduled for disposal pursuant to section 2203(f)(3);

(2) provisions for providing notice to the former President when materials to which access would otherwise be restricted pursuant to section 2204(a) are to be made available in accordance with section 2205(2);

(3) provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have; and

(4) provisions for establishing procedures for consultation between the Archivist and appropriate Federal agencies regarding materials which may be subject to section 552(b)(7) of title 5, United States Code.

§ 2207. Vice-Presidential records

Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records. The duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of the President under this chapter with respect to Presidential records. The authority of the Archivist with respect to Vice-Presidential records shall be the same as the authority of the Archivist under this chapter with respect to Presidential records, except that the Archivist may, when the Archivist determines that it is in the public interest, enter into an agreement for the deposit of Vice-Presidential records in a

non-Federal archival depository. Nothing in this chapter shall be construed to authorize the estab-

lishment of separate archival depositories for such Vice-Presidential records.

NATIONAL ARCHIVES TRUST FUND BOARD

(44 U.S.C. Chapter 23)

Sec.

- 2301. Establishment of Board; membership.
- 2302. Authority of the Board; seal; services; bylaws; rules; regulations; employees.
- 2303. Powers and obligations of Board; liability of members.
- 2304. Compensation of members; availability of trust funds for expenses of Board.
- 2305. Acceptance of gifts.
- 2306. Investment of funds.
- 2307. Trust Fund account; disbursements; sales of publications and releases.
- 2308. Tax exemption for gifts.

§ 2301. Establishment of Board; membership

The National Archives Trust Fund Board shall consist of the Archivist of the United States, as Chairman, and the Secretary of the Treasury and the Chairman of the National Endowment for the Humanities. Membership on the Board is not an office within the meaning of the statutes of the United States.

§ 2302. Authority of the Board; seal; services; bylaws; rules; regulations; employees

In carrying out the purposes of this chapter, the Board—

- (1) may adopt an official seal, which shall be judicially noticed;
- (2) may utilize on a reimbursable basis the services and personnel of the National Archives and Records Administration necessary (as determined by the Archivist) to assist the Board in the administration of the trust fund, and in the preparation and publication of special works and collections of sources and preparation, duplication, editing, and release of historical photographic materials and sound recordings, and may utilize on a reimbursable basis the services and personnel of other Federal agencies for such purposes;
- (3) may adopt bylaws, rules, and regulations necessary for the administration of its functions under this chapter; and
- (4) may, subject to the laws and regulations governing appointments in the civil service, appoint and fix the compensation of such personnel as may be necessary to carry out its functions.

§ 2303. Powers and obligations of the Board; liability of members

Except as otherwise provided by this chapter, the Board shall have all the usual powers and obligations of a trustee with respect to property and funds administered by it, but the members of the Board are not personally liable, except for malfeasance.

§ 2304. Compensation of members; availability of trust funds for expenses of the Board

Compensation may not be paid to the members of the Board for their services as members. Costs incurred by the Board in carrying out its duties under this chapter, including the obligations necessarily incurred by the members of the Board in the performance of their duties and the compensation of persons employed by the Board, shall be paid by the Archivist of the United States from trust funds available to the Board for this purpose. The Board, by resolution, may authorize the transfer of funds (including the principal or interest of a gift or bequest) to the National Archives and Records Administration to be expended on an archival or records activity approved by the Board or to accomplish the purpose of a gift or bequest.

§ 2305. Acceptance of gifts

The Board may solicit and accept gifts or bequests of money, securities, or other personal property, for the benefit of or in connection with the national archival and records activities administered by the National Archives and Records Administration. Moneys that are for deposit into the trust fund shall be deposited within 10 working days of the receipt thereof.

§ 2306. Investment of funds

The Secretary of the Treasury shall receipt for moneys or securities composing trust funds given or bequeathed to the Board and shall invest, reinvest, and retain the moneys or securities as the Board from time to time determines. The Board may not engage in business or exercise a voting privilege which may be incidental to securities in such trust funds, nor may the Secretary of the Treasury make investments for the account of the Board which could not lawfully be made by a trust company in the District of Columbia, unless directly authorized by the instrument of gift or bequest under which the funds to be invested are derived, and may retain investments accepted by the Board.

§ 2307. Trust fund account; disbursements; sales of publications and releases

The income from trust funds held by the Board and the proceeds from the sale of securities and other personal property, as and when collected, shall be covered into the Treasury of the United States in a trust fund account to be known as the National Archives Trust Fund, subject to disbursement on the basis of certified vouchers of the Ar-

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**GUIDANCE ON DEFINING PRESIDENTIAL PERSONAL
RECORDS**

Under the Presidential Records Act, the President is the one who has the responsibility for management and custody of incumbent Presidential records, 44 U.S.C., 2203. This guidance is an attempt to give some guidance on the issue of what could be defined as "personal records" of the President.

For guidance on Presidential "personal records," the definitions in the Presidential Records Act (44 U.S.C. 2201) for Presidential records and Presidential personal records provide a logical starting point.

1. STATUTORY DEFINITIONS:

"Presidential records" means documentary materials...created or received by the President, his immediate staff, or a unit or individual of the Executive Office of 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.

*This definition includes all **official records** generated by the President and his office. It does not include personal files.

"Personal records" are defined as:

...all documentary materials...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. Such term includes -

(A) diaries, journals, or other personal notes...which are not prepared or utilized for or circulated or

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communicated in the course of transacting Government business;

(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

© materials relating exclusively to the President's own election to the office of the Presidency, and materials directly relating to the election for a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

Congress added two amendments to the Presidential Records Act which clarified which documentary materials involving political activities of the President or his staff should be considered "Presidential records." These two amendments inserted the words "a direct effect" in lieu of "an effect" in the definition of what political files should be kept as an official record. The Congressional Report which explained these changes states:

These changes were made so that the act would not impinge on the President's first amendment right to free speech or political association by including as government property records that might have a tangential effect upon his or his staff's official or ceremonial responsibilities, but consist of purely personal political communications.

*This change more narrowly defined the category of political materials that should be considered part of the Presidential record file.

The most precise definition for Presidential personal records is in the House Report on the Presidential Records Act, which defines Personal records "as those materials which are neither developed in connection with nor utilized during the transaction of government business." (Rept. 95-1487 Part 1, page 3.)

2. WHO IS COVERED BY THE ACT?

The Executive Office of the President includes the following components which create Presidential records under the Presidential Records Act:

- *The White House Office
- *The Office of the Vice President
- *Office of Policy Development
- *Council of Economic Advisors
- *The President's Intelligence Oversight Board
- *The National Security Council (The record status of NSC records is currently in litigation.)
- *The President's Foreign Intelligence Advisory Board
- *National Space Council

*Records generated by the Office of Management and Budget, the Office of the United States Trade Representative, the Council on Environmental Quality, the Office of Administration, the Office of Science and Technology Policy, and the Office of National Drug Control Policy are covered by the Federal Records Act.

3. FILING PRACTICES FOR PRESIDENTIAL PERSONAL RECORDS:

The Presidential Records Act states that Presidential personal records should be kept separate upon their creation or receipt from the Presidential record file, 44 U.S.C. 2203 (b). Therefore, it is extremely important to train those responsible for maintaining filing systems to keep separate files at the point of creation of the record. Once items have been mixed, it becomes difficult to determine record status. Since the President is the person who has the discretion to determine what is a Presidential personal record, this determination should be made during the incumbent's term of office - not after the records are transferred to the Archivist of the United States.

4. HOW ARE PRESIDENTIAL PERSONAL RECORDS DESIGNATED ON ELECTRONIC RECORDS?

Electronic systems can designate Presidential Personal records in one of two ways. The whole system may be designated as a personal record system, or if the system mixes records, personal entries should be identified at the point of entry.

5. FURTHER GUIDANCE ON THE DEFINITIONS:

Although broad in its scope, the definition of "Presidential records" does not include many of the most valuable materials for documenting a Presidency - diaries, personal correspondence, and notes that are not used in the course of conducting government business. These documents are traditionally among those of most interest to scholars. The key clause in defining Presidential records reads:

"Presidential records" means documentary materials...created or received..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.

The phrase "relates to" and "have an effect upon" must be read in conjunction with "the carrying out of the constitutional and statutory duties of the President. Many documents may relate to the President's duties, but have nothing to do with the action of "carrying out" such responsibilities. For example, a letter from the President to his daughter in which he reflects on some aspect of foreign policy would meet the test of relating to the President's constitutional duties, but would not meet the test of "carrying out" these constitutional duties. The same letter could meet the test of carrying out the President's constitutional and statutory duties if the President provides a copy of the letter to the Secretary of State with instructions to use this letter in discussing and/or implementing foreign policy.

This means that a significant category of materials that tangentially document the Presidency in a personal or political way may, at the President's discretion, be included in the Presidential personal record file.

6. WHAT RECORDS IN THE WHITE HOUSE, AT THE PRESIDENT'S DISCRETION, ARE MOST LIKELY TO BE PRESIDENTIAL PERSONAL RECORDS?

The following categories of papers, if they have not been used during the White House years in the course of transacting Presidential governmental business, are

Presidential personal records:

***Papers Created by the President Before Entering Government Service:** Examples of this category include previous work files, political materials, and reference files.

***Private Papers Brought Into, Created or Received in the Office:** This category includes family and personal correspondence and materials documenting professional activities and outside business or political pursuits.

***Campaign or Political Files:** This category includes materials relating to the President's election or re-election to office and his support of other political candidates.

***Diaries, Calendars, or Personal Notes:** This category includes a diary, calendar or notes that are created solely for the President's personal use and are not used in the course of carrying out his official duties.

7. WHAT FILES IN THE WHITE HOUSE ARE MOST LIKELY TO HAVE A MIX OF PRESIDENTIAL RECORD AND PERSONAL MATERIALS?

The following files have presented past problems in terms of intermingling Presidential record and personal items:

A. **Photographs:** Official Photos of the President and First Lady should be kept separately from personal family photos if there is a desire that the personal photographs be treated as personal records.

B. The following White House Office of Records Management Subject Categories could potentially intermix Presidential record and personal record items:

PL - Political Affairs - This is a subject category containing information pertaining to political matters which is further sub-divided.

PP - Presidential Personal - This is a subject category containing information pertaining to material of a personal or quasi-personal nature written to the President or his family which is further subdivided.

The question on both of these subject categories is whether the material that is being filed in this category is being designated as Presidential record or personal record in its entirety, or are items of both record status being intermixed in this file?

C. The following White House Office of Records Management Subject Categories could have specific subdivisions which could potentially intermix Presidential record and personal record items:

SP - Speeches - This a subject category with Presidential speeches, drafts and background materials pertaining to the speech. The question on this category is whether, when the President or a member of his staff makes a political speech, the background material is being treated in this folder as Presidential record or personal record material?

TR - Trips - This a subject category containing information pertaining to trips planned or made by the President. The question on this category is whether, when the trip is of a personal or political nature, the material on this trip is being treated as Presidential record or personal record material?

8. WHICH WHITE HOUSE STAFF* MAY CREATE PRESIDENTIAL PERSONAL RECORDS?

*The term White House staff is used in this context to include only those people in the White House who create Presidential records.

It is clear from the definitions that any White House staffers may create personal records. However, some staff, because of their duties, may be much more likely to create or receive Presidential personal records. Staff who hold dual responsibilities with the President and who work closely with the Democratic National Committee on the campaign, probably create Presidential personal records of a political nature. Some staff serve the President in both an

official and personal capacity and probably create Presidential personal records of a family or private nature.

9. THE STATUS OF THE FIRST LADIES PAPERS:

Before the passage of the Presidential Records Act, the First Ladies papers were always treated differently from those of the President, because the First Lady is not an elected official and has no statutory role. The Presidential Records Act does not mention the First Lady. However, the Act does say that Presidential records include material dealing with the President's staff carrying out official or ceremonial duties.

The White House Social Office Files are the official files that document the ceremonial and official functions of the First Lady's office. Traditionally, the Social Office Files have been composed of several series including: the Social Entertainment Files, the Social Secretary Files, the Press Secretary to the First Lady Files, and the Alpha File, containing correspondence of the First Lady's Office.

Some of the series in the Social Office Files document the ceremonial functions of the Presidency, including the social Entertainment Files which contain invitation lists, entertainment materials, seating charts, and background on guests at Head of State and other official dinners. Even these files, however, may mix Presidential and personal records when, for example, they contain documentation on a small private dinner given for or by the President or First Lady in the family quarters.

Other series, for example the Press Secretary's Files, traditionally have documented more of the policy role and activities of the First Lady - some of which are done on behalf of the President, and some of which are uniquely reflective of the First Lady's own interests and how she defines her role. Other files of the First Lady, such as her own correspondence files, also have been intermixed with the President's White House Subject Files.

Until the Reagan Administration, the Social Office Files were kept separate from the President's files. During the Reagan and Bush Administrations, these files were interfiled with the President's records, entered in the WHORM stairs

system, and treated as a White House Staff Office File. Because of the unique status of the First Lady and the intermixing of most of her papers with Presidential records, an ambiguous situation has developed in terms of the true record status of these files. In many cases, the simple intermixing of these papers will cause the First Lady to lose control over this material. Therefore, it is very important that clear guidance be given to the First Lady's staff on filing practices, and that personal items be clearly designated and separated from the Presidential record file. Additionally, files that already may contain mixed records should be checked. Items that are personal in these files should be clearly designated and, if possible, be put in a separate personal record file.

10. WHAT QUESTIONS SHOULD BE CONSIDERED WHEN MAKING A DETERMINATION OF THE RECORD STATUS OF A PRESIDENTIAL DOCUMENT?

The following guidance is based on factors the courts have developed in deciding Freedom OF Information Act cases. This FOIA case law does not deal with Presidential records, however, it is the most pertinent guidance available for making record determinations. These considerations were published in FOIA Update, Fall 1984 (Office of Information and Privacy, U.S. Department of Justice), and still presents the current law on this point. The questions have been re-phrased to make them more relevant to records created by the President.

***Creation** - Is the document created or received by a White House staff employee on official time, with government materials, at government expense?

***Content** - Does the document contain substantive information about governmental business? Does the document contain personal as well as official information?

***Purpose** - Is the document created solely for an individual employee's personal convenience? Or was the document created to facilitate governmental business?

***Distribution** - Was the document distributed to anyone else for official purposes?

***Use** - To what extent does the document's creator actually use the document to conduct governmental business? Did others use it?

***Maintenance** - Was the document kept in the author's possession, or was it placed in an official file?

***Disposition** - Is the document's retention required by White House or some other guidance or is the author free to dispose of the item?

***Control** - Has the White House attempted to exercise "institutional control" over the document?

***Segregation** - Is there any practical way to segregate personal information in the document from official business information?

***Revision** - Was the document revised or updated after the fact for record-keeping purposes?

Clearly some of this guidance is more applicable to Presidential personal records than others. However, no one question is determinative; rather, record status calls should be made on the totality of the circumstances discussed above.

11. WHO TO CALL AT THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION FOR ADDITIONAL GUIDANCE ON THIS ISSUE?

The National Archives and Records Administration can provide additional assistance to the White House staff on determining Presidential personal records, including workshops and training for White House staff. For archival advice please contact, Nancy Kegan Smith, Director of the Presidential Materials Staff, 202-501-5700. For legal advice and interpretations on the requirements of the Presidential Records Act, please contact Miriam Nisbet, Special Counsel for Information Policy or Nancy Kegan Smith.