

DRAFT

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 USC, 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 USC 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 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 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 USC 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.

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 can provide additional assistance to the White House staff on determining Presidential personal records, including workshops and training for White House staff. ~~Please contact Dr. Lewis J. Bellardo, Deputy Archivist of the United States and Acting Assistant Archivist for Presidential Libraries, 301-713-6410 or 202-501-5700.~~

*Suzanne Fawcett
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PRESIDENTIAL RECORDS

92 Stat. 2523 (44 U.S.C. § 2201, Chapter 22)*

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§ 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, audio-visual, 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

*Codified as positive law.

(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) 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 the 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) 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.

* Correct Citation
for 2204(2)(A)

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 im-

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posed 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 Service of the General Services 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 Service of the General Services 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 Pres-

ident 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 establishment of separate archival depositories for such Vice-Presidential records.