

**U.S. House of Representatives
Committee on Science, Space, and Technology
Subcommittee on Oversight
Subcommittee on Environment**

HEARING CHARTER

Destruction of Records at EPA – When Records Must Be Kept

Thursday, March 26, 2015
10:00 a.m. – 12:00 p.m.
2318 Rayburn House Office Building

Purpose

On March 26, 2015, the Subcommittees on Oversight and Environment will hold a hearing titled, “Destruction of Records at EPA – When Records Must Be Kept.” The hearing will clarify when the Federal Records Act (FRA) applies to certain information and how the FRA has been implemented at the Environment Protection Agency (EPA). In particular, the hearing will review the safeguards that are in place to prevent both the inadvertent as well as intentional destruction of information that should be preserved as a federal record.

Witnesses

- **Mr. Paul M. Wester, Jr.**, Chief Records Officer, National Archives and Records Administration
- **Mr. Kevin Christensen**, Assistant Inspector General for Audit, Office of Inspector General, Environmental Protection Agency
- **Dr. David Schnare**, Former Senior Attorney, EPA Office of Enforcement and Compliance Assurance; Director, Free-Market Environmental Law Clinic; Director, Center for Environmental Stewardship, Thomas Jefferson Institute for Public Policy; and General Counsel, Energy & Environment Legal Institute

Background

Federal Records Act

Federal records are kept for a number of reasons, including institutional memory, ensuring effective and efficient administration of an organization, and to “make possible a proper scrutiny by the Congress...”¹ Agencies are required to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency...”² The Federal Records Act (FRA) of

¹ 36 C.F.R. § 1222.22

² 44 U.S.C. § 3101

1950 was most recently amended in September of 2014,³ which included the clarification that it is the information that is important to preserve and not the medium in which that information was created or received.⁴ This acknowledges that in the digital age, there are almost endless ways to create and receive information that would qualify as a federal record and, thus, must be preserved. In fact, the head of each Federal Agency must create a records management program that is both “economical and efficient.”⁵

Both the Administrator of the relevant Agency and the Archivist at the National Archives and Records Administration (NARA) are responsible for the management of Federal Agencies’ records.⁶ The FRA requires federal agencies to determine if information they create or receive is a federal record based on criteria set forth in the FRA, subsequent amendments, and clarifying regulations.⁷ Once the information is determined to be a federal record, the Act provides guidance, along with NARA, on how the federal record is to be destroyed or stored and then forwarded to NARA.⁸ Whether it is destroyed or forwarded to NARA is determined by whether the federal record is considered temporary.⁹ If it is temporary, it may be deleted. However, if it has “administrative, legal, research or other value” then it would warrant preservation.¹⁰ Agencies are supposed to work with NARA once it is determined that the information is a federal record under NARA guidelines.¹¹ Furthermore, when there is confusion or some doubt about whether information is a record, NARA requires that the information be presumed a record.¹²

EPA Policies and Compliance

According to the Administration in a January 21, 2009 “Transparency and Open Government” memorandum, all Federal Agencies are to “disclose information rapidly in forms that the public can readily find and use ... [and] harness new technologies...”¹³ The EPA has implemented a number of policies in accordance with the Federal Records Act that should provide the necessary safeguards to ensure that information created and received by the agency is properly collected. However, although the policies set certain guidelines and criteria to use in fulfilling their responsibility to uphold the requirements under the FRA, in the end, the agency relies on individual employees to determine what constitutes a federal record. It is therefore

³ 44 U.S.C. Chapters 21, 22, 29, 31, and 33.

⁴ CRS Report R43072, *Common Questions About Federal Records and Related Agency Requirements* by Wendy Davis (February, 2015). (Referencing U.S. Congress, Senate Committee on Homeland Security and Government Affairs, *Presidential and Federal Records Act Amendments of 2014*, 113th Cong., 2nd see., July 23, 2014, S.Rept. 113-218 (Washington: GPO, 2014), p.5.)

⁵ 44 U.S.C. § 3102

⁶ See P.L. 98-497 (1984).

⁷ See *Supra* note 3; see also 36 C.F.R. §1222.22

⁸ *Id.*

⁹ 36 C.F.R. § 1220.18

¹⁰ 44 U.S.C. § 3303a(a).

¹¹ See U.S.C. § 3302

¹² 36 C.F.R. § 1222.16(b)(1).

¹³ The White House, *Transparency and Open Government*, Presidential Memorandum to heads of executives departments and agencies, Washington, DC, January 21, 2009, at https://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/

incumbent upon each employee to analyze the information against the backdrop of criminal prosecution.¹⁴

Committee Inquiries

Given that Administrator Gina McCarthy has deleted thousands of text messages that the Committee believes may have been required to be preserved under the FRA, this Committee wants to know what safeguards the EPA has implemented to ensure that information, worthy of capture under the FRA, is in fact collected and not inadvertently or intentionally destroyed. Furthermore, are there technologies available that could automatically capture electronic information and store it for future review as a safeguard against destruction?

To find out more information about text message preservation at the EPA, the Committee sent a letter to the EPA's Office of Inspector General (OIG) in November 2014 to review EPA's compliance with its records management policies and how text messages used for official business are being preserved for federal record keeping. The OIG's report on this matter is expected later this year.

In addition, the Committee sent letters to the EPA in January and March of 2015 to conduct its own investigation of EPA's policies and procedures for preserving electronic records as federal records and its compliance with such policies and procedures.

Further, back in 2012, the Committee requested that the OIG review EPA's use of private and alias email accounts to conduct official business in an apparent subversion of the FRA.¹⁵ The OIG released their findings in a September 2013 Report.¹⁶ Given the recent allegations that thousands of texts messages have been and continue to be deleted, the Committee would like to discuss the finding of that report and whether the policy recommendations have not only been implemented, but whether they are in fact effective at preserving information that should be preserved under the FRA.

¹⁴ See 18 U.S.C. §§ 1519 and 2071

¹⁵ Committee on Science, Space, and Technology's November 15, 2012 letter to the EPA OIG, at <http://science.house.gov/letter/letters-questioning-administration-officials%E2%80%99-use-secret-email-accounts>

¹⁶ EPA OIG Report No. 13-P-0433, *Congressionally Requested Inquiry Into the EPA's Use of Private and Alias Email Accounts*, at <http://www.epa.gov/oig/reports/2013/20130926-13-P-0433.pdf>