The Future of Access to Federal Records: How Should We Approach the Question of Providing Meaningful Public Access to a Vast and Growing Number of Federal Records in Digital Form?

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The Future of Access: Some Topics for Discussion

- Reading rooms, Open Data, and Dark Archives
- Leveraging the Archivist’s Directive to Advance FOIA’s mission
- Public Records on Private Networks
- What do eDiscovery lawyers know that FOIA officers (and requestors) might benefit from knowing?
Topic 1: Reading Rooms, Open Data and Dark Archives
Welcome to the National Archives
Open Access to National Archives records circa 1938
Tried and True Methods Need Updating
E-reading rooms
But how can we access billions of digital records?
Archives in the Cloud
Living in an exponential records world
Growth in Presidential and Federal Records in Electronic Form

- William (Bill) Clinton White House 32 million emails (presidential and federal)
- George W. Bush White House 200+ million
- Barack Obama ~ 300+ million expected by Jan. 2017
- Total: a half billion emails preserved at NARA from the White House alone
- And that’s the tip of the Iceberg: what is coming after 2019….
Yesterday’s Vast Collections
Tomorrow’s Vaster Collections
We have entered the era where Big Data is ....
For FOIA access purposes, most responsive electronic records are hiding in broad daylight
Somewhere in a vast collection of digital objects are important records relevant to FOIA requestors ... How can we efficiently search for them?
A New Era of Government

“[P]roper records management is the backbone of open Government.”

President Obama’s Memorandum dated November 28, 2011
re “Managing Government Records”
NARA’s Mission

- Providing public access to the Federal government’s records in NARA’s custody and control.

- “Strengthen[ing] democracy by allowing Americans to claim their rights of citizenship, hold their government accountable, and understand their history so that they can participate more effectively in their government.”

Presidential Memorandum 1950
From President Obama’s Memorandum on Managing Government Records, dated 11/28/11:

“Decades of technological advances have transformed agency operations, creating challenges and opportunities for agency records management. Greater reliance on electronic communication and systems has radically increased the volume and diversity of information that agencies must manage. With proper planning, technology can make these records less burdensome to manage and easier to use and share. But if records management policies and practices are not updated for a digital age, the surge in information could overwhelm agency systems, leading to higher costs and lost records.”
M-12-18, Managing Government Records Directive, dated 8/24/12:

1.1 By 2019, Federal agencies will manage all permanent records in an electronic format.

1.2 By 2016, Federal agencies will manage both permanent and temporary email records in an accessible electronic format.

15 Days to Go til Dec. 31, 2016……
Failed paths to email management

- Print to paper strategies
- Reliance on backup media
- Deployment of complicated software schemes dependent on manual tagging of messages (burdening end-users in making recordkeeping decisions)
Capstone officials may include:

- Officials at or near the top of an agency or an organizational subcomponent

- Key staff members that may be in positions that create or receive presumptively permanent email records
Leveraging the Archivist’s Directive to obtain more meaningful access under FOIA

- The 2016 and 2019 directives mean electronic mail and permanent electronic records of all forms will be preserved in searchable formats
- Capstone & The GRS for Capstone mean that a repository of emails and attachments from senior officials can easily be made subject to a “reasonable search”
  - With all other substantive emails preserved for at least 7 years
- FOIA need not be a siloed process: end to end integration of e-recordkeeping and access
Now That Our Agency Has Complied With the 2016 Email Mandate, What Comes Next?
How to Avoid a Train Wreck
A paradox: in the age of Big Data, we are so unable to provide meaningful access to records in digital form . . . .
Emerging New Strategies:
“Predictive Analytics”

Improving review thru use of software with minimal human intervention – relying on software to generate clusters of related documents, and training the software thru multiple iterations.

This opinion appears to be the first in which a Court has approved of the use of computer-assisted review. . . . What the Bar should take away from this Opinion is that computer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review. Counsel no longer have to worry about being the ‘first’ or ‘guinea pig’ for judicial acceptance of computer-assisted review . . . Computer-assisted review can now be considered judicially-approved for use in appropriate cases.
Strategy 2: Automated Categorization of Records into Records Schedule Categories
Problems with current auto categorization
Strategy 3: Anticipating the need to filter sensitive content of all types (including content within the scope of a FOIA exemption)
NARA 1601 on Screening Records (2002)

- Screen records if there is a reasonable chance that they may contain information about a living individual that reveals details of a highly personal nature, which if released would constitute a clearly unwarranted invasion of privacy. Withhold such information from files before disclosure if it has not been officially released previously or if it relates to individuals less than 75 years old or events that occurred less than 75 years before the date of screening.

Ensuring a complete record of governmental activities

- Proposition 1: using capture and filter technologies are the best way to ensure that there will be a complete historical record, and access to it
- Proposition 2: Using advanced search techniques to find and open public records as soon as possible
Topic 2: Private Networks, Public Records
FRA Amendments of 2014 – Disclosure of official business conducted on non-official electronic messaging account

44 USC §2911. Disclosure requirement for official business conducted using non-official electronic messaging accounts

(a) In General.-An officer or employee of an executive agency may not create or send a record using a non-official electronic messaging account unless such officer or employee-

(1) copies an official electronic messaging account of the officer or employee in the original creation or transmission of the record; or

(2) forwards a complete copy of the record to an official electronic messaging account of the officer or employee not later than 20 days after the original creation or transmission of the record.

(b) Adverse Actions.-The intentional violation of subsection (a) (including any rules, regulations, or other implementing guidelines), as determined by the appropriate supervisor, shall be a basis for disciplinary action in accordance with subchapter I, II, or V of chapter 75 of title 5, as the case may be.

(c) Definitions.-In this section:

(1) Electronic messages.-The term "electronic messages" means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.

(2) Electronic messaging account.-The term "electronic messaging account" means any account that sends electronic messages.

(3) Executive agency.-The term "executive agency" has the meaning given that term in section 105 of title 5.

One issue: Bring Your Own Device policies
Beyond BYOD: We Have A Shadow IT Problem
Dropbox works the way you do

Get to all your files from anywhere, on any device.
Google Drive

A safe place for all your files.

Go to Google Drive
Best Practices in Confronting the Reality of Shadow IT

1) Develop a robust information governance policy that covers the emergence of shadow IT in the workplace

2) Educate employees

3) Employ IT solutions to protect information
   • Allowing remote access thru directed means (e.g., Citrix)
   • Require passwords and screen timeouts
   • Make it easy to copy or forward messages to official recordkeeping systems

4) Make agency systems and devices easier and more attractive to use than alternatives (good luck)
Best Practices in Confronting the Reality of Shadow IT

- 5) Periodically reevaluate employee practices and company policies
- 6) Practice what you preach
  - To executives in the C-suite reading this: If you won’t do it, they won’t do it. Use your own shadow IT practices as a bellweather for what will work best with your agency’s culture

If the CIO allows it, the lawyers will come
Topic 3: Information Governance Strategies
Information Governance Initiative
Annual Report 2015-2016 Infographics
Information Governance is:
The activities and technologies that organizations employ to maximize the value of their information while minimizing associated risks and costs.

93% of respondents agreed

96% of practitioners agreed
95% of providers agreed
85% of analysts agreed
THE FACETS OF IG: IG SERVES A COORDINATING FUNCTION

Our community told us these activities are included in their concept of IG (listed as a percentage of respondents). A strong majority (83%) said this list is a complete list.

Data derived from the Information Governance Initiative Annual Report 2015-2016. More info at www.iginitiative.com. © 2015 Information Governance Initiative. Licensed under the Creative Commons Attribution-NonCommercial 4.0 International License. This license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to the Information Governance Initiative.
To Advance the Cause of IG, Lawyers & RM & IT & Others Need To Cross Intellectual Boundaries
Important Issues To Consider and Address in Thinking About the Archivist’s Directive

- Ensuring that Capstone and other preserved e-records are maintained in formats acceptable to NARA for future transfer and accessioning
- Filtering federal record data sets in a way that flags sensitive material (PII, PHI, privileged and proprietary info)
- Consideration of employing advanced means to search large collections of electronically stored records
- Pre-accessioning e-records to protect against future technical issues including risk of loss
Additional Important Issues to Confront

- Capstone does not solve e-records management generally
- Agencies must pay attention to electronic messaging and new forms of communications
- Federal record email messages sent from non-official accounts need to be preserved in an official recordkeeping system (44 USC 2911)
- Shadow IT considerations
- New platforms, new apps, new forms of records
Most important lesson to be learned about confronting the shadow IT challenge.....

Don’t practice Black Swan information governance: be proactive!
Career Paths: Will You Get a Chance to Use Analytics in Your Present FOIA Position?
Black boxes
Culture change is possible (even for government)
FOIA and Open Data

- Former OSTP CTO Beth Noveck writing in the *Yale Law Journal*: “Is Open Data the Death of FOIA?”

“Those responsible for the implementation of open data stand to learn from fifty years of FOIA practice about the urgency of responsive information disclosures for achieving good government and greater value to society. Evolving our legal and policy framework for public information collection and publication will engage the legal profession, technologists, and policymakers—as well as the general public that has benefitted from the open data movement and from FOIA.”
...And it includes the FOIA!
KEEP CALM
THE ARCHIVIST’S Dec 31, 2019 DEADLINE
COUNTDOWN IS ON
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Further Reading


- www.iginitiative.com