NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 12-5201

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL SECURITY ARCHIVE,
PLAINTIFF-APPELLANT,

v.

CENTRAL INTELLIGENCE AGENCY,
DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No. 11-cv-00724-GK (Hon. Gladys Kessler)

AMICUS BRIEF OF THE NATIONAL COALITION FOR HISTORY IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Amicus Curiae The National Coalition for History ("Coalition") submits the following:

(A) Parties and Amici.

All parties, intervenors, and amici that appeared before the district court are listed in the Certificate As To Parties, Rulings, and Related Cases filed in this Court by Plaintiff-Appellant National Security Archive ("Archive"). All parties, intervenors, and amici that are currently appearing before this Court are listed in the Brief of Plaintiff-Appellant National Security Archive ("Archive's Brief").

(B) Rulings Under Review.

References to the rulings at issue appear in the Archive's Brief.

(C) Related Cases.

As stated in the Archive's Brief, there are no related cases.

/s/ Gregory G. Katsas
Gregory G. Katsas

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rules 26.1 and 29(b), the Coalition makes the following disclosures:

1. The Coalition is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code and supported solely by contributions from its member organizations and the general public.

2. The Coalition does not have a parent corporation. No publicly held corporation owns any portion of the Coalition, and the Coalition is not a subsidiary or an affiliate of any publicly owned corporation. The Coalition has not issued any shares or debt securities to the public or any publicly traded company.

/s/ Gregory G. Katsas
Gregory G. Katsas

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STATUTES AND REGULATIONS

All pertinent statutes and regulations are reproduced in the Addendum.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE AS AMICUS CURIAE

The Coalition, a consortium of over 50 history-related organizations, is a 501(c)(3) non-profit educational organization based in Washington, D.C. The Coalition represents tens of thousands of historians, archivists, political scientists, educators and researchers, both in the United States and abroad. Since 1982, the Coalition has provided leadership in history-related advocacy on federal legislative, legal and regulatory issues affecting these constituencies. The Coalition also performs an educational function, in acting as a clearinghouse of news and information for the history profession.

The Coalition believes that without access to government records, historians cannot create accurate accounts of our Nation's past. Accordingly, the Coalition and its stakeholder groups work with Congress and the Executive Branch to reduce the over-classification of government records, increase public access to unclassified records, expedite the declassification process, and establish standards for the preservation and retrieval of federal and presidential electronic records. Of particular interest to the Coalition is the prioritization and expedited processing, declassification, and release of "historically significant records," which relate to events of major public interest such as the terrorist attacks of September 11, 2001, the assassination of President Kennedy, and the Cuban missile crisis. Records

related to the Bay of Pigs invasion are a perfect example of such historically significant records.

This case directly impacts the Coalition's transparency and disclosure efforts: if Exemption 5 is stretched to encompass Volume V of the CIA's draft Bay of Pigs history, historians could lose access not only to that historically significant record, but also to a host of other historically significant government records as well. The Coalition thus respectfully submits this amicus brief in support of the Archive. All parties consent to the filing of this brief.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No party's counsel authored this brief in whole or in part; no party or party's counsel, or any person other than the Coalition or its counsel, contributed money intended to fund the preparation or submission of this brief. The Archive is one of the Coalition's member organizations, but it did not in any way participate in the Coalition's decision to participate as amicus in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

An old adage says that "time heals all wounds." This case involves a thirty-year-old history of a fifty-year-old event—an account produced by a Central Intelligence Agency ("CIA" or "Agency") official in 1981 about the notorious Bay of Pigs invasion in 1961. The CIA does not contend that this history contains any still-classified information; accordingly, this appeal presents no question about the applicability of Exemption 1. Instead, the CIA contends only that this 1981 history was—and still is—covered by the deliberative process privilege, and thus properly protected from disclosure under Exemption 5. That argument suffers from one fundamental and overarching flaw: the passage of time, measured in decades, has eradicated any possible harm from disclosure. The CIA thus has no valid basis to continue withholding Volume V of its 1981 history, even assuming that it may have had such a basis at some time in the distant past. Moreover, the contrary holding of the district court, by extending Exemption 5 to decades-old records addressing decades-prior events, would shield a massive number of historically significant government records from public disclosure through FOIA, seemingly indefinitely. As explained more fully below, FOIA does not permit such wholesale and nearly-perpetual government secrecy.

First, as a general matter, the passage of time diminishes the government interests supporting application of the deliberative process privilege. Accordingly,

there must come a time by which application of the privilege is no longer justified. In various analogous areas, both Congress and the courts have recognized this basic point.

Second, in this particular case, which involves a document written more than thiry years ago about events that occurred more than fifty years ago by an official who died sixteen years ago, any potential harm from disclosure has been eliminated by the passage of decades.

Finally, allowing the government to withhold documents indefinitely under Exemption 5 threatens to exclude enormous amounts of critical information from the annals of history. Indeed, history is rife with examples of records like Volume V providing invaluable insight into the past. Exemption 5 does not and should not extend so broadly as to deny historians access to these precious documents.

ARGUMENT

The Freedom of Information Act ("FOIA") starts from the "premise that government will function best if its warts as well as its wonders are available for public view." *Army Times Publ'g Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1072 (D.C. Cir. 1993). Consistent with that premise, FOIA's exemptions are construed narrowly to ensure that "disclosure, not secrecy" remains the hallmark of the Act. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (internal quotation marks and citations omitted). The Executive Branch

itself acknowledges these basic principles: President Obama and Attorney General Holder both "have issued memoranda to all agencies stressing that the FOIA reflects a profound national commitment to ensuring an open Government and directing agencies to adopt a presumption in favor of disclosure." Department of Justice Guide to the Freedom of Information Act 24 (2009) ("DOJ FOIA Guide") (internal quotation marks omitted), *available at* http://www.justice.gov/oip/foia_guide09/procedural-requirements.pdf.[1]

Despite these basic principles and the declassification and release of the first four volumes of its 1981 history, the CIA seeks to withhold all of Volume V under the deliberative process privilege incorporated into Exemption 5. It may not do so. Disclosing Volume V after more than thirty years would threaten none of the interests protected by the deliberative process privilege, and allowing the Agency to withhold it forever would jeopardize public access to a wide range of essential historical records.

[1] On January 21, 2009, as one of his first official acts as the Chief Executive, President Obama instructed all federal agencies—including the CIA—to "administer the FOIA so as to achieve an unprecedented level of openness and transparency in the work of the Executive Branch" and to "administer the FOIA with a clear presumption: in the face of doubt, openness prevails." DOJ FOIA Guide, *supra*, at 24 (internal quotation marks omitted). Further, "[t]he President directed agencies not to withhold information merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." *Id.* (internal quotation marks omitted).

I. IN ASSESSING PRIVILEGE CLAIMS UNDER EXEMPTION 5, COURTS SHOULD CONSIDER THE PASSAGE OF TIME.

It is settled law that certain privileges are "limited and subject to erosion over time." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 451 (1977). Consistent with that principle, this Court has suggested that the passage of time should be considered when analyzing an asserted privilege under Exemption 5. *See Fisher v. Renegotiation Bd.*, 473 F.2d 109, 115 (D.C. Cir. 1972) (noting that "[t]here might be exceptions due to the passage of time" to the applicability of Exemption 5). In this case, the Court should confirm that the deliberative process privilege, as incorporated into Exemption 5, is limited by the passage of time.

In this context, the passage of time is a critical consideration because (i) it greatly or completely diminishes the policy concerns underlying the deliberative process privilege; (ii) Congress recognized it as a limiting principle in other statutes designed to implement closely related privileges; and (iii) courts have recognized, in other contexts, that it can impact other FOIA exemptions.

A. The Interests Protected By The Deliberative Process Privilege Substantially Erode Over Time.

Exemption 5 allows an agency to withhold "intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency," 5 U.S.C. § 552(b)(5), including agency records that would be shielded from civil discovery by the deliberative process privilege. *See, e.g.*, *EPA v. Mink*,

410 U.S. 73, 85–89 (1973), *superseded in part on other grounds by statute*, Pub. L. No. 93-502, § 2(a), 88 Stat. 1563 (1973). To qualify for this exemption, the CIA must show that Volume V is "predecisional" and "deliberative"—in other words, that it "was generated before the adoption of an agency policy and [that it] reflects the give-and-take of the consultative process." *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010) (internal quotation marks and citation omitted).

As the Archive explains, Volume V was never predecisional and was never deliberative. *See* Archive Br. 18–31. But even if it were both, the CIA must do more in order to withhold the draft: to justify the *continuing* applicability of the deliberative process privilege and Exemption 5, it must show that the release of Volume V *today* would harm its history-writing efforts by "*actually* inhibit[ing] candor in the decision-making process." *Army Times*, 998 F.2d at 1072 (emphasis added); *see, e.g.*, *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) (noting that the "key question" in Exemption 5 cases is whether disclosure will "discourage candid discussion"); *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1435–36 (D.C. Cir. 1992) (same). If the agency has not shown or cannot show such harm, its Exemption 5 claim fails and the withheld documents must be disclosed. *See Army Times*, 998 F.2d at

1071–72 (remanding because the agency's affidavits made it impossible to tell whether disclosure would actually threaten agency decisionmaking).[2]

This Court has identified three distinct policy purposes underlying the deliberative process privilege: first, to "protect[] the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon," *Jordan v. DOJ*, 591 F.2d 753, 772–73 (D.C. Cir. 1978) (en banc), *overruled in part on other grounds by Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), *abrogated by Milner v. Dep't of the Navy*, 131 S. Ct. 1259 (2011); *see also Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); second, to protect the government by promoting "creative debate and candid consideration of

[2] As the Archive notes, other cases have suggested that agencies need not prove actual harm as a separate element in order to withhold materials under Exemption 5. *See* Archive Brief 31 n.12 (citing *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011)). *McKinley* does not help the CIA. First, the CIA waived any argument based on *McKinley* by accepting its burden to prove harm to its decisionmaking process. *See* Mot. for Summ. Affirmance 10. Second, regardless of whether the harm inquiry is characterized as an element of Exemption 5 or as an element of the underlying privilege, it must at least matter that disclosure would have no impact on the Agency's deliberative process. *See Fed. Open Market Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 359–60, 363 (1979) (holding that the confidential commercial information privilege under Exemption 5 expires once a contract is awarded because the rationale for the privilege no longer applies and remanding for the district court to determine whether disclosure of the documents in question would "significantly harm the Government's monetary functions or commercial interests").

alternatives," *Russell*, 682 F.2d at 1048; and third, to protect the integrity of the decisionmaking process, *see id.* As a general matter, the potential harm to each of these interests from disclosure greatly or completely diminishes with the passage of time.

First, the possibility of public confusion about an agency's position decreases as the time between the drafting and the release of the document increases. As this Court has explained, the concern is that the public may believe that *any* government document reflects the government's official view, and thus releasing draft documents could lead the public to attribute inaccurate positions to the Government. *See, e.g.*, *id.* at 1048–49. But, when a document is released decades after its drafting, the likelihood that the public would confuse the document with the current government view is diminished, as the document does not pertain to current events and was not likely written by current government officials.[3] Moreover, the confusion rationale should be applied narrowly because the whole point of FOIA is that ordinary citizens, "arm[ed] . . . with the power knowledge gives," are fully capable of governing themselves. S. Rep. No. 89-813, at 37–38 (1965) (quoting Letter from James Madison to W.T. Barry (Aug. 4,

[3] The various examples addressed below in Section III.B reinforce this point. The Coalition is unaware of any public confusion from the release of the draft documents outlined; to the contrary, release of these documents has greatly enriched the public's understanding of historical events.

1822)). FOIA itself thus presupposes that, as a general matter, the citizenry can fairly assess the import of government records.

Second, as the Archive explains, "the need for confidentiality of deliberations erodes over time." Archive Br. 37. Given the nature of their jobs, government officials likely presume that their work-related actions and advice will someday become public. To be sure, government employees concerned with their own job security or prospects for advancement may temper their advice if it were subject to *immediate* disclosure. But the likelihood of such caution based on possible disclosure *decades* in the future—after the official has retired or even died—is vanishingly small.

Third, the deliberative process privilege is intended to protect government decisionmaking by ensuring that observers cannot reveal the inner workings of government by comparing draft and final documents. This concern also fades with the passage of time: even if someone could reverse-engineer an agency's decisionmaking process by examining a decades-old draft document, that information would likely shed little light on the agency's *current* decisionmaking processes, as such processes are prone to change over time. More fundamentally, reconstructing important government decisions long after the fact is the very essence of history; neither Exemption 5, nor the deliberative process privilege, should be construed to undermine the development of our history years or decades

after the fact, long after the point at which disclosure could jeopardize real-time deliberations.

B. Congress Has Imposed Express Time Limits On Analogous Privileges.

Several statutes reflect Congress's own understanding that, because the passage of time diminishes the harms from releasing sensitive information, analogous privileges should be subject to strict time limits.

Most importantly, the Presidential Records Act, which protects "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers," allows covered communications to be withheld under Exemption 5 only for twelve years. 44 U.S.C. § 2204(a)(5); § 2204(c)(1). The Act thus imposes strict time limits on the continuing coverage of the presidential communications privilege—which, like the deliberative process privilege, is designed precisely to ensure that government decisionmakers receive candid advice. *See, e.g.*, *Loving v. Dep't of Defense*, 550 F.3d 22, 37 (D.C. Cir. 2008) ("The presidential communications privilege . . . preserves the President's ability to obtain candid and informed opinions from his advisors." (internal quotation marks and citation omitted)).

But although both privileges are species of a more general executive privilege, the presidential communications privilege is more protective than the deliberative process privilege, because it applies to the *most* sensitive deliberations

within the Executive Branch: those among the President and his immediate advisers. *See, e.g.*, *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1115 (D.C. Cir. 2004) ("[T]here is . . . a hierarchy of presidential advisers such that the demands of the privilege become more attenuated the further away the advisers are from the President operationally."). Thus, the presidential communications privilege applies regardless of whether the sought-after record is predecisional, and it covers entire documents whereas the deliberative process privilege requires the agency to segregate deliberative from other materials. *See Loving*, 550 F.3d at 37–38. And because of its greater importance, those seeking to overcome the presidential communications privilege must hurdle a higher barrier than those trying to get past the deliberative process privilege. *See In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (per curiam).

Given this legal structure, there is no conceivable justification for the judge-made deliberative process privilege to endure decades beyond the time limit imposed by Congress for the presidential communications privilege. If the Director of Central Intelligence, in advising the President about a sensitive national-security crisis, is entitled to have his advice remain confidential for only twelve years (absent classification issues not present here), it is unfathomable that an Agency staff historian, writing about the same crisis some two decades later,

should be entitled to have his views (assuming they constitute advice at all) remain confidential for some two decades longer.

Other statutes also limit the amount of time for which confidential or sensitive government information may be withheld. For example, Congress has required the State Department to publish a historical series that, subject to exceptions only for classified materials, includes "all records needed to provide a comprehensive documentation of the major foreign policy decisions and actions of the United States Government, including the facts which contributed to the formulation of policies and records providing *supporting and alternative views* to the policy position ultimately adopted." The Foreign Relations of the United States historical series, 22 U.S.C. § 4351. Moreover, for each event documented in the series, Congress has required publication of the pertinent records—including deliberative materials—"not more than 30 years after the events recorded." *Id.* Similarly, with no exception for deliberative materials, Congress has required the Executive Branch to publicly disclose by a date certain all records related to President Kennedy's assassination. *See* President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 note, § 5(g)(2)(D) (generally requiring disclosure of full records within twenty-five years after enactment). These statutes likewise recognize that governmental privileges should not persist *ad infinitum*.

C. Courts Have Considered The Passage Of Time When Analyzing The Applicability Of Other FOIA Exemptions.

Courts have recognized the need to consider the passage of time when considering other FOIA exemptions. *See, e.g.*, *Manna v. DOJ*, 51 F.3d 1158 (3d Cir. 1995); *Berman v. CIA*, 501 F.3d 1136 (9th Cir. 2007). *Manna* addressed Exemption 7(c), which allows the Government to withhold law enforcement records the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The *Manna* court noted the privacy interest protected by Exemption 7(C) "may become diluted with the passage of time," even if the "[p]assage of time alone is not enough to erase [it]." 51 F.3d at 1166. Similarly, in considering Exemption 3, which allows the Government to withhold information "specifically exempted from disclosure by statute," 5 U.S.C. § 552(b)(3), such as classified material protected by the National Security Act, the *Berman* court suggested that the passage of time requires heightened justification for withholding and permits the withholding only of documents with "extreme sensitivity," such as presidential security briefings. *See* 501 F.3d at 1145–46. Assertions under Exemption 5, like those under Exemptions 3 and 7, should be assessed in light of the passage of time.

II. THE PASSAGE OF THIRTY YEARS SINCE VOLUME V WAS DRAFTED HAS ELIMINATED ANY HARMS FROM DISCLOSURE.

The CIA must demonstrate that disclosing Volume V would actually threaten its history-writing process. That is, it must show that the release of its thirty-year-old draft history, whose contents are largely known (through the CIA's release of the underlying Inspector General Report and of Volumes I through IV), and whose supposed flaws have already been disclosed [A91–92], would discourage future agency historians from drafting candid histories. Particularly in light of the significant passage of time between now and Dr. Pfeiffer's original drafting, the CIA cannot make that showing here.

In finding that Exemption 5 applied to Volume V, the district court recognized two asserted harms from disclosure: (1) disclosure of Volume V, an unapproved draft history, would cause confusion with the public; and (2) disclosure would interfere with the CIA's history review process. *See Nat'l Sec. Archive v. CIA*, 859 F. Supp. 2d 65, 71 (D.D.C. 2012). Given the passage of decades, both harms are ephemeral in this case.

First, because of the multitude of information that has become publically available in the thirty years since Volume V was drafted, disclosing Dr. Pfeiffer's views on the subject would not confuse anyone. Ever since Inspector General Kirkpatrick completed his confidential report, it has been a source of lively debate within the CIA and beyond. The report itself—now publically released—contains

a blistering indictment of the CIA's role leading up to the Bay of Pigs; for example, it describes some of the Agency's efforts as "ludicrous or tragic or both," and places blame for the CIA's failure on "serious operational mistakes and omissions" and "grave mistakes of judgment." Inspector General's Survey of the Cuban Operation and Associated Documents 35, 98 (1961), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB341/IGrpt1.pdf.[4] Those criticized by the Inspector General Report, including the Deputy Director of Plans, had their own, differing view of the CIA's role in the Bay of Pigs operation, and their views are now publicly known as well. *See, e.g.*, Richard Bissell, An Analysis of the Cuban Operation by the Deputy Director (Plans) 2 (1962) ("[A] large majority of the conclusions reached in the [Inspector General Report] are misleading or wrong."), *available at* http://www.gwu.edu/~nsarchiv/ NSAEBB/ NSAEBB341/IGrpt2.pdf. Indeed, the debate about the merits of the Inspector General Report spread beyond now-released confidential documents to the public forum, with commentators arguing about whether the Inspector General or the Deputy Director painted a more accurate picture of the Agency's failings. *Compare* Ward W. Warren, *Inspector General: Master of All He Surveys*,

[4] Notably, the CIA did not release the Inspector General Report until after the Archive filed a FOIA request. *See* Tim Weiner, *C.I.A. Bares Its Bungling in Report on Bay of Pigs Invasion*, N.Y. Times, Feb. 22, 1998, *available at* http://www.nytimes.com/1998/02/22/world/cia-bares-its-bungling-in-report-on-bay-of-pigs-invasion.html?pagewanted=all&src=pm.

Periscope (1998), at 6 ("The search for accuracy regarding the CIA's operation to topple Fidel Castro should start with a reading of Richard Bissell's response to the IG report."), *with* Michael Warner, *The CIA's Internal Probe of the Bay of Pigs Affair*, Studies in Intelligence, Winter '98–'99 (somewhat favoring the Inspector General's view but acknowledging its deficiencies), *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98_99/art08.html. In light of these long-running and long-disclosed disagreements about where fault for the Bay of Pigs should lie, the public could not possibly be confused by adding Dr. Pfeiffer's unofficial views to the mix or believe that those views represent the official view of the CIA.

Second, at this point in time, there is no potential harm to the CIA's history review process. As the Archive points out, the CIA does not suggest that a final version of Volume V is in the works, which eliminates any concern that someone could compare Volume V to a final agency position and determine what the modern deliberative process entails. Archive Br. 28. Moreover, the CIA acknowledges that the deliberative process in place at the time Volume V was drafted is not the same process that is in place today. [A88–89 & n.1 (outlining differences between "the process in place during the 1980s" and the current

decisionmaking process).] Thus, disclosure cannot now harm the modern history-review protocol.

Finally, the basic chronology of this case bears re-emphasis: the Bay of Pigs invasion occurred in 1961; Dr. Pfeiffer completed his draft history in 1981; he retired from the Agency in 1984; and he died in 1997. The possibility that release of his draft *today*—in 2013, some sixteen years after his death—might chill the candor of future Jack Pfeiffers is nothing short of fanciful.

III. HISTORIANS AND THE PUBLIC HAVE A SIGNIFICANT NEED FOR ACCESS TO DOCUMENTS LIKE VOLUME V.

The CIA contends that the deliberative process privilege shields Volume V from disclosure because, regardless of the passage of time, Dr. Pfeiffer's draft "does not represent a final agency history" and was part of a "multilayer review process." Mot. for Summ. Affirmance 11; *see also id.* at 12–13. If accepted, this capacious view would keep permanently secret a vast number of historically significant government records. As shown below, the materials threatened by the CIA's position are essential to a complete understanding of our history. Exemption 5 does not sweep so far.

A. Applying Exemption 5 Here Would Threaten Access To A Wide Range Of Essential Government Records.

Although draft histories like Volume V may be rare, documents that do not "represent a final agency" action and are part of a "multilayer review process" are

not. Talking points, draft policy papers, comments on those papers, minutes and transcripts of policy meetings, memoranda to the file summarizing phone calls or in-person conversations—all of these records would be exempt from disclosure, for decades if not in perpetuity, under the CIA's miserly approach. *See* Philip G. Schrag, *Working Papers as Federal Records: The Need for New Legislation to Preserve the History of National Policy*, 46 Admin. L. Rev. 95, 102–03 (1994) (cataloguing the kinds of agency working papers). As a result, the information contained in these records, from unofficial CIA proposals to assassinate foreign leaders to Oliver North's selective edits to Iran-Contra memoranda, would reach the light of day, if at all, only by the Government's grace. Such a regime cannot be reconciled with FOIA. *See, e.g.*, *Mink*, 410 U.S. at 79–80.

Records like these are invaluable to historians and to the public at large. As the National Study Commission on Records and Documents of Federal Officials concluded, working papers are "often the only source of the information upon which to form judgments necessary to the democratic process." Nat'l Study Comm'n on Records and Documents of Pub. Officials, Final Report 6 (1977); *see also* Letter from Professor Edward D. Berkowitz to Professor Philip O. Schrag (Aug. 23, 1993) (historians "need to see the policy process when it is in a malleable state if [they] are to understand the options available to policymakers," *quoted in* Schrag, *supra*, at 99–100 & n.29). Indeed, as another report concluded,

these documents may often be *more* valuable in some ways than their final, polished counterparts: "To the historian, the 'quick and dirty' policy sketch may be acutely revealing of certain riveting contextual matters that are obscured by the final product." Nat'l Academy of Pub. Admin., The Effects of Electronic Recordkeeping on the Historical Record of the U.S. Gov't 40 (1989), *quoted in* Schrag, *supra*, at 99. And if government officials are deliberately misleading the public, these records may be the only hope for uncovering the truth. *See, e.g.*, Peter Kornbluh, *The Pinochet File* xviii (2003) (noting that comparing contemporaneous official statements with later-released materials revealed significant misstatements accompanying official U.S. policy toward Chile).

This Court has recognized the historical significance of documents like these. In *Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993) (per curiam), the Government argued that it could print and store old emails rather than keep them in electronic databases, in the process destroying information about the message's date, sender, and recipient. In rejecting that position, this Court noted that the omitted information, minor as it might seem, "may be of tremendous historical value in demonstrating what agency personnel were involved in making a particular policy decision and what officials knew, and when they knew it." *Id.* at 1285 (internal quotation marks and citation omitted). Those facts, in turn, would

shed essential light on the "*formulation* and dissemination of significant policy initiatives at the highest reaches of our government." *Id.* (emphasis added).

Congress and the National Archives and Records Administration ("NARA") agree. As noted above, when Congress instructed the State Department regarding its Foreign Relations of the United States historical series, it ordered the Department to include those records needed to document the United States' major foreign policy decisions, including records "providing supporting *and alternative views* to the policy position ultimately adopted." 22 U.S.C. § 4351(a) (emphasis added). Only documents like draft working papers provide alternative views, and Congress viewed them (and other significant records) as so essential to creating an accurate history that it gave the State Department special obligations to collect and publish them. Specifically, it required the Department and other agencies to identify such documents and to attempt to declassify them, *see* §§ 4353–4354, and it generally prohibited the Department from relying solely on FOIA exemptions when withholding a historically important record, *see* § 4355. In this same vein, NARA has instructed federal agencies to "[d]ocument the *formulation* and execution of basic policies and decisions and the taking of necessary actions." 36 C.F.R. § 1222.22(e) (emphasis added). Again, only draft documents like those at issue here could reflect the formulation of agency policy. NARA would not

instruct agencies to keep policymaking records that did not have potential historical value.

Indeed, the President's own advisory committee has recognized the importance of these records. The Public Interest Declassification Board ("PIDB") noted that potentially sensitive government records serve the "intrinsically important" purpose of "documenting the Government's national security history." Transforming the Security Classification System 23 (2012), *available at* http://www.archives.gov/declassification/pidb/recommendations/transforming-classification.pdf.[5] Such documentation would be woefully inadequate if it did not include records reflecting the development of public policy. The PIDB also recognized that government documents "inform[] public discussion of historical decisions and policies" and "lend[] context to contemporary decisionmaking." *Id.* As a result, it specifically recommended that, even where classification concerns are present, "[h]istorically significant records should be identified and set aside as early as possible after their creation to ensure their preservation, long-term access,

[5] The responsibilities of the PIDB include promoting "the fullest possible public access to a thorough, accurate, and reliable documentary record of significant U.S. national security decisions and activities." Transforming Classification: Blog of the Public Interest Declassification Board, *About the Board*, http://blogs.archives.gov/transformingclassification/?page_id=32 (last visited Jan. 29, 2013). Its members include individuals who formerly held posts with the National Security Agency, military intelligence groups, and the House of Representatives' Permanent Select Committee on Intelligence. *See id.*

and availability to agency policymakers and historians," and it suggested that such records be brought into the public domain "as early as possible." *Id.* If the CIA prevails, however, it will be able to withhold these historically important records from public disclosure for an eternity.

B. History Demonstrates That Records Like Volume V Provide Invaluable Insight Into Our Past.

It is no surprise that the importance of documents like Volume V is widely if not universally acknowledged: the history books are filled with examples of draft government documents shaping and reshaping our understanding of our past. We provide a few representative examples from United States history here, but the list could go on and on:

- **The Vietnam War and the Pentagon Papers—**As Justice Douglas noted, the internal debate about Vietnam policy reflected in these draft documents was "highly relevant to the debate in progress" about Vietnam more generally. *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

- **Policy Toward Cuba—**Relying extensively on internal memoranda and other such documents (many of which were released only after FOIA requests), historian Piero Gleijeses has provided a detailed examination of the struggle between the United States and Cuba for influence in post-colonial Africa. For example, in light of a recently disclosed memorandum to the Director of Central Intelligence, Gleijeses concluded that prior historians had overestimated the role President Kennedy's pledge not to invade Cuba (made to Fidel Castro during the Cuban missile crisis) played in the United States' subsequent decision not to attack. *See generally* Piero Gleijeses, *Conflicting Missions: Havana, Washington, and Africa, 1959–1976* (2002).

- **Support for the Pinochet Regime**—As one historian put it, memoranda of conversations, briefing papers prepared for presidents, and minutes from strategy meetings that finally came to light in the 1990s "contain[ed] new information on virtually every major issue, episode, and scandal that pockmark" the United States' dealings with Chile during the Cold War. Kornbluh, *The Pinochet File*, *supra*, at xvii–xviii. For example, the handwritten notes of CIA Director Richard Helms revealed that President Nixon personally ordered the overthrow of the elected government of Salvador Allende. *See id.* at 1–2.

- **The Iran-Contra Affair**—The congressional committees investigating the Iran-Contra Affair had access to a host of internal draft documents and other records documenting the development of the White House's arms-for-hostages policy. Through these records, Congress uncovered a number of otherwise undiscoverable facts about the incident and those responsible. *See, e.g.*, Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and House Select Comm. to Investigate Covert Arms Transactions with Iran, Rep. on the Iran-Contra Affair, S. Rep. No. 100-216, at 210–22 (1987) (citing numerous draft records and records of policy-forming meetings); *id.* at 202–03 (comparing North's drafts and concluding that his final versions withheld from President Reagan information about violations of the Arms Export Control Act and about his options for notifying Congress of his administration's actions).

- **Overthrow of Guatemala's Government**—In 1954, Guatemalan President Jacobo Árbenz Guzmán was overthrown by U.S.-backed forces. When the State Department originally published its Foreign Relations of the United States volume dealing with the incident, it lacked access to the CIA's documents and published a volume that, by failing to mention the CIA's role or note its omission, provided an "incomplete and distorted history." Mark J. Susser, State Department Historian, Preface, Foreign Relations, 1952–1954, Guatemala (Supplement), at iv (2003). Congress, upset by this sanitized history, passed the statutory provisions related to the series discussed above. The State Department, armed with newly accessible records of an initial plan to remove Árbenz and other "internal memoranda and cable traffic," published a supplement to the series correcting the earlier version's flaws. *Id.* at xii The newly released draft documents showed, amongst other things, that even though the CIA had never *officially* approved the assassination of Guatemalan leaders, various agency officials had made proposals related to assassinations. *See* Nick Cullather, *Secret*

History: The CIA's Classified Account of Its Operations in Guatemala, 1952–1954, xv, Appendix C (1999).

- **Environmental Policy—**By examining internal memoranda and letters, historians have unearthed information about Lady Bird Johnson's unofficial involvement in the development of early U.S. environmental policy, including her efforts to revise proposed billboard legislation and to secure the passage of the Highway Beautification Act of 1965. *See* Lewis L. Gould, *Lady Bird Johnson and Beautification*, at 168–69 & n. 62, 170–71 & n. 68, *in 2 The Johnson Years* (Robert A. Divine ed., 1981).

In keeping with the examples provided above, this case itself demonstrates the importance of working papers like Volume V. The newly-released information contained in Volumes I through IV has already enriched our understanding of the Bay of Pigs operation. For example, from these volumes we learned that the invading forces fired on their own aircraft because they could not tell their planes apart from Castro's and that the Government authorized the use of napalm in certain instances. *See* Associated Press, *Declassified CIA Documents: Friendly Fire Hit Cuban Exiles' Planes During Bay of Pigs Invasion*, Wash. Post., Aug. 15, 2011. Volume V likely contains other important insights into the Bay of Pigs operation. Nonetheless, under the CIA's view, Exemption 5 allows the Government to withhold important historical documents long after the need to protect agency deliberations has dissipated, simply because those documents came from an intermediate stage in the policy development process. This Court has never sanctioned such an expansive reading of Exemption 5's deliberative process privilege, and it should not do so now.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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Dated: January 29, 2013

ADDENDUM

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HISTORICAL AND REVISION NOTES—CONTINUED

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
(2)–(13)	5 U.S.C. 1001 (less (a)).	Mar. 30, 1948, ch. 161, §301, 62 Stat. 99. June 11, 1946, ch. 324, §2 (less (a)), 60 Stat. 237.

In paragraph (1), the sentence ''Nothing in this Act shall be construed to repeal delegations of authority as provided by law,'' is omitted as surplusage since there is nothing in the Act which could reasonably be so construed.

In paragraph (1)(G), the words ''or naval'' are omitted as included in ''military''.

In paragraph (1)(H), the words ''functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947'' are omitted as executed. Reference to the ''Selective Training and Service Act of 1940'' is omitted as that Act expired Mar. 31, 1947. Reference to the ''Sugar Control Extension Act of 1947'' is omitted as that Act expired on Mar. 31, 1948. References to the ''Housing and Rent Act of 1947, as amended'' and the ''Veterans' Emergency Housing Act of 1946'' have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by §111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87–256, 75 Stat. 538, since §111(c) of the Act provides that a reference in other Acts to a provision of law repealed by §111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87–256.

In paragraph (2), the words ''of any character'' are omitted as surplusage.

In paragraph (3), the words ''and a person or agency admitted by an agency as a party for limited purposes'' are substituted for ''but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes''.

In paragraph (9), a comma is supplied between the words ''limitation'' and ''amendment'' to correct an editorial error of omission.

In paragraph (10)(C), the words ''of any form'' are omitted as surplusage.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CODIFICATION

Section 551 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2242 of Title 7, Agriculture.

AMENDMENTS

2011—Par. (1)(H). Pub. L. 111–350 struck out ''chapter 2 of title 41;'' after ''title 12;''.

1994—Par. (1)(H). Pub. L. 103–272 substituted ''subchapter II of chapter 471 of title 49; or sections'' for ''or sections 1622,''.

1976—Par. (14). Pub. L. 94–409 added par. (14).

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94–409, set out as an Effective Date note under section 552b of this title.

STUDY AND REPORTS ON ADMINISTRATIVE SUBPOENAS

Pub. L. 106–544, §7, Dec. 19, 2000, 114 Stat. 2719, provided that:

''(a) STUDY ON USE OF ADMINISTRATIVE SUBPOENAS.—Not later than December 31, 2001, the Attorney General, in consultation with the Secretary of the Treasury, shall complete a study on the use of administrative subpoena power by executive branch agencies or entities and shall report the findings to the Committees on the Judiciary of the Senate and the House of Representatives. Such report shall include—

''(1) a description of the sources of administrative subpoena power and the scope of such subpoena power within executive branch agencies;

''(2) a description of applicable subpoena enforcement mechanisms;

''(3) a description of any notification provisions and any other provisions relating to safeguarding privacy interests;

''(4) a description of the standards governing the issuance of administrative subpoenas; and

''(5) recommendations from the Attorney General regarding necessary steps to ensure that administrative subpoena power is used and enforced consistently and fairly by executive branch agencies.

''(b) REPORT ON FREQUENCY OF USE OF ADMINISTRATIVE SUBPOENAS.—

''(1) IN GENERAL.—The Attorney General and the Secretary of the Treasury shall report in January of each year to the Committees on the Judiciary of the Senate and the House of Representatives on the number of administrative subpoenas issued by them under this section and the identity of the agency or component of the Department of Justice or the Department of the Treasury issuing the subpoena and imposing the charges.

''(2) EXPIRATION.—The reporting requirement of this subsection shall terminate in 3 years after the date of the enactment of this section [Dec. 19, 2000].''

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term ''search'' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term ''a representative of the news media'' means any person or entity that

gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98–620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of

the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, ''unusual circumstances'' means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for

records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term ''exceptional circumstances'' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term ''compelling need'' means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are—

(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) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

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

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

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

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency—

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) ''agency'' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) ''record'' and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(*l*) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90–23, §1, June 5, 1967, 81 Stat. 54; Pub. L. 93–502, §§1–3, Nov. 21, 1974, 88 Stat. 1561–1564; Pub. L. 94–409, §5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95–454, title IX, §906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub. L. 98–620, title IV, §402(2), Nov. 8, 1984, 98 Stat. 3357; Pub. L. 99–570, title I, §§1802, 1803, Oct. 27, 1986, 100 Stat. 3207–48, 3207–49; Pub. L. 104–231, §§3–11, Oct. 2, 1996, 110 Stat. 3049–3054; Pub. L. 107–306, title III, §312, Nov. 27, 2002, 116 Stat. 2390; Pub. L. 110–175, §§3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8–10(a), 12, Dec. 31, 2007, 121 Stat. 2525–2530; Pub. L. 111–83, title V, §564(b), Oct. 28, 2009, 123 Stat. 2184.)

HISTORICAL AND REVISION NOTES

1966 ACT

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1002.	June 11, 1946, ch. 324, §3, 60 Stat. 238.

In subsection (b)(3), the words ''formulated and'' are omitted as surplusage. In the last sentence of subsection (b), the words ''in any manner'' are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1967 ACT

Section 1 [of Pub. L. 90–23] amends section 552 of title 5, United States Code, to reflect Public Law 89–487.

In subsection (a)(1)(A), the words ''employees (and in the case of a uniformed service, the member)'' are substituted for ''officer'' to retain the coverage of Public Law 89–487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In the last sentence of subsection (a)(2), the words ''A final order * * * may be relied on * * * only if'' are substituted for ''No final order * * * may be relied upon * * * unless''; and the words ''a party other than an agency'' and ''the party'' are substituted for ''a private party'' and ''the private party'', respectively, on authority of the definition of ''private party'' in 5 App. U.S.C. 1002(g).

In subsection (a)(3), the words ''the responsible employee, and in the case of a uniformed service, the responsible member'' are substituted for ''the responsible officers'' to retain the coverage of Public Law 89–487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In subsection (a)(4), the words ''shall maintain and make available for public inspection a record'' are substituted for ''shall keep a record * * * and that record shall be available for public inspection''.

In subsection (b)(5) and (7), the words ''a party other than an agency'' are substituted for ''a private party'' on authority of the definition of ''private party'' in 5 App. U.S.C. 1002(g).

In subsection (c), the words ''This section does not authorize'' and ''This section is not authority'' are substituted for ''Nothing in this section authorizes'' and ''nor shall this section be authority'', respectively.

5 App. U.S.C. 1002(g), defining ''private party'' to mean a party other than an agency, is omitted since the words ''party other than an agency'' are substituted for the words ''private party'' wherever they appear in revised 5 U.S.C. 552.

5 App. U.S.C. 1002(h), prescribing the effective date, is omitted as unnecessary. That effective date is prescribed by section 4 of this bill.

REFERENCES IN TEXT

The date of enactment of the OPEN FOIA Act of 2009, referred to in subsec. (b)(3)(B), is the date of enactment of Pub. L. 111–83, which was approved Oct. 28, 2009.

CODIFICATION

Section 552 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2243 of Title 7, Agriculture.

AMENDMENTS

2009—Subsec. (b)(3). Pub. L. 111–83 added par. (3) and struck out former par. (3), which read as follows: ''spe-

to approve within that foreign country sales, assignment, or other dispositions of property by employees under the chief of mission's jurisdiction (as described in section 3927 of this title) to the extent that such sale, assignment, or other disposition is in accordance with regulations and policies, rules, and procedures issued pursuant to section 4343 of this title.

(c) Violation

Violation of this section, or other importation, sale, or other disposition of personal property within a foreign country which violates its laws or regulations or governing international law and is prohibited by regulations and policies, rules, and procedures issued pursuant to section 4343 of this title, shall be grounds for disciplinary action against an employee.

(Aug. 1, 1956, ch. 841, title III, § 302, as added Pub. L. 100–204, title I, § 186(a), Dec. 22, 1987, 101 Stat. 1368.)

§ 4343. Regulations

(a) Issuance; purpose

The Secretary of State may issue regulations to carry out the purposes of this chapter. The primary purpose of such regulations and related policies, rules, and procedures shall be to assure that employees and members of their families do not profit personally from sales or other transactions with persons who are not themselves entitled to exemption from import restrictions, duties, or taxes.

(b) Contractors

Such regulations shall require that, to the extent contractors enjoy importation or tax privileges in a foreign country because of their contractual relationship to the United States Government, after the effective date of this chapter contracting agencies shall include provisions in their contracts to carry out the purpose of this chapter.

(c) Chief of mission

In order to ensure that due account is taken of local conditions, including applicable laws, markets, exchange rate factors, and accommodation exchange facilities, such regulations may authorize the chief of mission to each foreign country to establish more detailed policies, rules, or procedures for the application of this chapter within that country to employees under the chief of mission's jurisdiction.

(Aug. 1, 1956, ch. 841, title III, § 303, as added Pub. L. 100–204, title I, § 186(a), Dec. 22, 1987, 101 Stat. 1368.)

REFERENCES IN TEXT

For the effective date of this chapter, referred to in subsec. (b), as being 180 days after Dec. 22, 1987, see section 186(b) of Pub. L. 100–204 set out as an Effective Date note under section 4341 of this title.

CHAPTER 53B—FOREIGN RELATIONS OF THE UNITED STATES HISTORICAL SERIES

Sec.

§ 4351. General authority and contents of publication

(a) Charter of publication

The Department of State shall continue to publish the ''Foreign Relations of the United States historical series'' (hereafter in this chapter referred to as the ''FRUS series''), which shall be a thorough, accurate, and reliable documentary record of major United States foreign policy decisions and significant United States diplomatic activity. Volumes of this publication shall include all records needed to provide a comprehensive documentation of the major foreign policy decisions and actions of the United States Government, including the facts which contributed to the formulation of policies and records providing supporting and alternative views to the policy position ultimately adopted.

(b) Editing principles

The editing of records for preparation of the FRUS series shall be guided by the principles of historical objectivity and accuracy. Records shall not be altered and deletions shall not be made without indicating in the published text that a deletion has been made. The published record shall omit no facts which were of major importance in reaching a decision, and nothing shall be omitted for the purpose of concealing a defect of policy.

(c) Deadline for publication of records

The Secretary of State shall ensure that the FRUS series shall be published not more than 30 years after the events recorded.

(Aug. 1, 1956, ch. 841, title IV, § 401, as added Pub. L. 102–138, title I, § 198(a), Oct. 28, 1991, 105 Stat. 685.)

COMPLIANCE WITH DEADLINE FOR PUBLICATION OF FRUS SERIES; NOTIFICATION TO CONGRESSIONAL COMMITTEES ON FAILURE TO COMPLY; FINAL DEADLINE

Section 198(c)(2) of Pub. L. 102–138 provided that:

''(A) In order to come into compliance with section 401(c) of the State Department Basic Authorities Act of 1956 [22 U.S.C. 4351(c)] (as amended by this section) the Secretary of State shall ensure that, by the end of the 3-year period beginning on the date of the enactment of this Act [Oct. 28, 1991], all volumes of the Foreign Relations of the United States historical series (FRUS) for the years that are more than 30 years before the end of that 3-year period have been published.

''(B) If the Secretary cannot reasonably meet the requirements of subparagraph (A), the Secretary shall notify the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives and describe how the Department of State plans to meet the requirements of subparagraph (A). In no event shall volumes subject to subparagraph (A) be published later than 5 years after the date of the enactment of this Act.''

§ 4352. Responsibility for preparation of FRUS series

(a) In general

(1)(A) The Historian of the Department of State shall be responsible for the preparation of the FRUS series, including the selection of records, in accordance with the provisions of this chapter.

(B) The Advisory Committee on Historical Diplomatic Documentation shall review records, and shall advise and make recommendations to the Historian concerning all aspects of preparation and publication of the FRUS series, including, in accordance with the procedures contained in section 4353 of this title, the review and selection of records for inclusion in volumes of the series.

(2) Other departments, agencies, and other entities of the United States Government shall cooperate with the Office of the Historian by providing full and complete access to the records pertinent to United States foreign policy decisions and actions and by providing copies of selected records in accordance with the procedures developed under section 4353 of this title, except that no access to any record, and no provision of any copy of a record, shall be required in the case of any record that was prepared less than 26 years before the date of a request for such access or copy made by the Office of the Historian.

(b) National Archives and Records Administration

Notwithstanding any other provision of this chapter, the requirement for the National Archives and Records Administration to provide access to, and copies of, records to the Department of State for the FRUS series shall be governed by chapter 21 of title 44, by any agreement concluded between the Department of State and the National Archives and Records Administration, and, in the case of Presidential records, by section 2204 of such title.

(Aug. 1, 1956, ch. 841, title IV, § 402, as added Pub. L. 102–138, title I, § 198(a), Oct. 28, 1991, 105 Stat. 685.)

AUTHORITY OF SECRETARY OF STATE

Except as otherwise provided, Secretary of State to have and exercise any authority vested by law in any official or office of Department of State and references to such officials or offices deemed to refer to Secretary of State or Department of State, as appropriate, see section 2651a of this title and section 161(d) of Pub. L. 103–236, set out as a note under section 2651a of this title.

§ 4353. Procedures for identifying records for FRUS series; declassification, revisions, and summaries

(a) Development of procedures

Not later than 180 days after October 28, 1991, each department, agency, or other entity of the United States Government engaged in foreign policy formulation, execution, or support shall develop procedures for its historical office (or a designated individual in the event that there is no historical office)—

(1) to coordinate with the State Department's Office of the Historian in selecting records for possible inclusion in the FRUS series;

(2) to permit full access to the original, unrevised records by such individuals holding appropriate security clearances as have been designated by the Historian as liaison to that department, agency, or entity, for purposes of this chapter, and by members of the Advisory Committee; and

(3) to permit access to specific types of records not selected for inclusion in the FRUS series by the individuals identified in paragraph (2) when requested by the Historian in order to confirm that records selected by that department, agency, or entity accurately represent the policymaking process reflected in the relevant part of the FRUS series.

(b) Declassification review

(1) Subject to the provisions of this subsection, records selected by the Historian for inclusion in the FRUS series shall be submitted to the respective originating agency for declassification review in accordance with that agency's procedures for such review, except that such declassification review shall be completed by the originating agency within 120 days after such records are submitted for review. If the originating agency determines that any such record is not declassifiable because of a continuing need to protect sources and methods for the collection of intelligence information or to protect other sensitive national security information, then the originating agency shall attempt to make such deletions in the text as will make the record declassifiable.

(2) If the Historian determines that the meaning of the records proposed for inclusion in a volume of the FRUS series would be so altered or changed by deletions made under paragraph (1) that publication in that condition could be misleading or lead to an inaccurate or incomplete historical record, then the Historian shall take steps to achieve a satisfactory resolution of the problem with the originating agency. Within 60 days of receiving a proposed solution from the Historian, the originating agency shall furnish the Historian a written response agreeing to the solution or explaining the reasons for the alteration or deletion.

(3) The Historian shall inform the Advisory Committee of any failure by an originating agency to complete its declassification review of a record within 120 days and of any steps taken under paragraph (2).

(4) If the Advisory Committee determines that the meaning of the records proposed for inclusion in a volume of the FRUS series would be so altered or changed by deletions made under paragraph (1), or if the Advisory Committee determines as a result of inspection of other documents under subsection (a)(3) of this section that the selection of documents could be misleading or lead to an inaccurate or incomplete historical record, then the Advisory Committee shall so advise the Secretary of State and submit recommendations to resolve the issue.

(5)(A) The Advisory Committee shall have full and complete access to the original text of any record in which deletions have been made. In the event that the head of any originating agency

considers it necessary to deny access by the Advisory Committee to the original text of any record, that agency head shall promptly notify the Advisory Committee in writing, describing the nature of the record in question and the justification for withholding that record.

(B) The Historian shall provide the Advisory Committee with a complete list of the records described in subparagraph (A).

(6) If a record is deleted in whole or in part as a result of review under this subsection then a note to that effect shall be inserted at the appropriate place in the FRUS volume.

(Aug. 1, 1956, ch. 841, title IV, § 403, as added Pub. L. 102–138, title I, § 198(a), Oct. 28, 1991, 105 Stat. 686.)

AUTHORITY OF SECRETARY OF STATE

Except as otherwise provided, Secretary of State to have and exercise any authority vested by law in any official or office of Department of State and references to such officials or offices deemed to refer to Secretary of State or Department of State, as appropriate, see section 2651a of this title and section 161(d) of Pub. L. 103–236, set out as a note under section 2651a of this title.

§ 4354. Declassification of State Department records

(a) Deadline for declassification

(1) Except as provided in subsection (b) of this section, each classified record of permanent historical value (as determined by the Secretary of State and the Archivist of the United States) which was published, issued, or otherwise prepared by the Department of State (or any officer or employee thereof acting in an official capacity) shall be declassified not later than 30 years after the record was prepared, shall be transferred to the National Archives and Records Administration, and shall be made available at the National Archives for public inspection and copying.

(2) Nothing in this subsection may be construed to require the declassification of a record wholly prepared by a foreign government.

(b) Exempted records

Subsection (a) of this section shall not apply to any record (or portion thereof) the publication of which the Secretary of State, in coordination with any agency that originated information in the records, determines—

(1) would compromise weapons technology important to the national defense of the United States or reveal sensitive information relating to the design of United States or foreign military equipment or relating to United States cryptologic systems or activities;

(2) would disclose the names or identities of living persons who provided confidential information to the United States and would pose a substantial risk of harm to such persons;

(3) would demonstrably impede current diplomatic negotiations or other ongoing official activities of the United States Government or would demonstrably impair the national security of the United States; or

(4) would disclose matters that are related solely to the internal personnel rules and practices of the Department of State or are contained in personnel, medical, or similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(c) Review

(1) The Advisory Committee shall review—

(A) the State Department's declassification procedures,

(B) all guidelines used in declassification, including those guidelines provided to the National Archives and Records Administration which are in effect on October 28, 1991, and

(C) by random sampling, records representative of all Department of State records published, issued, or otherwise prepared by the Department of State that remain classified after 30 years.

(2) In the event that the Secretary of State considers it necessary to deny access to records under paragraph (1)(C), the Secretary shall notify the Advisory Committee in writing, describing the nature of the records in question and the justification for withholding them.

(d) Annual reports by the Advisory Committee

The Advisory Committee shall annually submit to the Secretary of State and to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives a report setting forth its findings from the review conducted under subsection (c) of this section.

(e) Annual reports by the Secretary

(1) In general

Not later than March 1 of each year, the Secretary shall submit a report to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives on the compliance of the Department of State with the provisions of this chapter, including—

(A) the volumes published in the previous calendar year;

(B) the degree to which the Department is not in compliance with the deadline set forth in section 4351(c) of this title; and

(C) the factors relevant to the inability of the Department to comply with the provisions of this chapter, including section 4351(c) of this title.

(2) Form of reports

Each report required to be submitted by paragraph (1) shall be submitted in unclassified form, together with a classified annex if necessary.

(Aug. 1, 1956, ch. 841, title IV, § 404, as added Pub. L. 102–138, title I, § 198(a), Oct. 28, 1991, 105 Stat. 687; amended Pub. L. 107–228, div. A, title II, § 205, Sept. 30, 2002, 116 Stat. 1363.)

AMENDMENTS

2002—Subsec. (d). Pub. L. 107–228, § 205(a), substituted ''Annual reports by the Advisory Committee'' for ''Reporting requirement'' in heading and inserted ''and to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives'' after ''Secretary of State'' in text.

Subsec. (e). Pub. L. 107–228, § 205(b), substituted ''Annual reports by the Secretary'' for ''Report to Con-

gress'' in heading and amended text generally. Prior to amendment, text read as follows: ''Not later than 180 days after October 28, 1991, the Secretary of State shall prepare and submit a written report to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate on factors relevant to compliance with this section, and the procedures to be used for implementing the requirements of this section.''

CHANGE OF NAME

Committee on International Relations of House of Representatives changed to Committee on Foreign Affairs of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

COMPLIANCE WITH DECLASSIFICATION OF STATE DEPARTMENT RECORDS; NOTIFICATION TO CONGRESSIONAL COMMITTEES ON INABILITY TO COMPLY; FINAL DEADLINE

Section 198(c)(1) of Pub. L. 102–138 provided that: ''The Secretary of State shall ensure that the requirements of section 404 of the State Department Basic Authorities Act of 1956 [22 U.S.C. 4354] (as amended by this section) are met not later than one year after the date of enactment of this Act [Oct. 28, 1991]. If the Secretary cannot reasonably meet the requirements of such section, he shall so notify the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives, and describe how the Department of State intends to meet the requirements of that section. In no event shall full compliance with the requirements of such section take place later than 2 years after the date of enactment of this Act.''

§ 4355. Relationship to Privacy Act and Freedom of Information Act

(a) Privacy Act

Nothing in this chapter may be construed as requiring the public disclosure of records or portions of records protected under section 552a of title 5 (relating to the privacy of personal records).

(b) Freedom of Information Act

(1) Except as provided in paragraph (2), no record (or portion thereof) shall be excluded from publication in the FRUS series under section 4353 of this title, or exempted from the declassification requirement of section 4354 of this title, solely by virtue of the application of section 552(b) of title 5 (relating to the exemption of certain matters from freedom of information requirements).

(2) Records described in section 1202(f) of title 8 (relating to visa records) shall be excluded from publication in the FRUS series under section 4353 of this title and, to the extent applicable, exempted from the declassification requirement of section 4354 of this title.

(Aug. 1, 1956, ch. 841, title IV, § 405, as added Pub. L. 102–138, title I, § 198(a), Oct. 28, 1991, 105 Stat. 688.)

§ 4356. Advisory Committee

(a) Establishment

(1) There is established on a permanent basis the Advisory Committee on Historical Diplomatic Documentation for the Department of State. The activities of the Advisory Committee shall be coordinated by the Office of the Historian of the Department of State.

(2) The Advisory Committee shall be composed of 9 members and an executive secretary. The Historian shall serve as executive secretary.

(3)(A) The members of the Advisory Committee shall be appointed by the Secretary of State from among distinguished historians, political scientists, archivists, international lawyers, and other social scientists who have a demonstrable record of substantial research pertaining to the foreign relations of the United States. No officer or employee of the United States Government shall be appointed to the Advisory Committee.

(B)(i) Six members of the Advisory Committee shall be appointed from lists of individuals nominated by the American Historical Association, the Organization of American Historians, the American Political Science Association, Society of American Archivists, the American Society of International Law, and the Society for Historians of American Foreign Relations. One member shall be appointed from each list.

(ii) If an organization does not submit a list of nominees under clause (i) in a timely fashion, the Secretary of State shall make an appointment from among the nominees on other lists.

(b) Terms of service for appointments

(1) Except as provided in paragraph (2), members of the Advisory Committee shall be appointed for terms of three years.

(2) Of the members first appointed, as designated by the Secretary of State at the time of their appointment (after consultation with the appropriate organizations) three shall be appointed for terms of one year, three shall be appointed for terms of two years, and three shall be appointed for terms of three years.

(3) Each term of service under paragraph (1) shall begin on September 1 of the year in which the appointment is made.

(4) A vacancy in the membership of the Advisory Committee shall be filled in the same manner as provided under this subsection to make the original appointment. A member appointed to fill a vacancy occurring before the expiration of a term shall serve for the remainder of that term. A member may continue to serve when his or her term expires until a successor is appointed. A member may be appointed to a new term upon the expiration of his or her term.

(c) Selection of chairperson

The Advisory Committee shall select, from among its members, a chairperson to serve a term of 1 year. A chairperson may be reelected upon expiration of his or her term as chairperson.

(d) Meetings

A majority of the members of the Advisory Committee shall constitute a quorum. The Advisory Committee shall meet at least quarterly or as frequently as may be necessary to carry out its duties.

(e) Security clearances

(1) All members of the Advisory Committee shall be granted the necessary security clearances, subject to the standard procedures for granting such clearances.

(2) For purposes of any law or regulation governing access to classified records, a member of the Advisory Committee seeking access under this paragraph to a record shall be deemed to have a need to know.

(f) Compensation

(1) Members of the Advisory Committee—

(A) shall each receive compensation at a rate of not to exceed the daily equivalent of the annual rate of basic pay payable for positions at GS–15 of the General Schedule under section 5332 of title 5 for each day such member is engaged in the actual performance of the duties of the Advisory Committee; and

(B) shall be allowed travel expenses, including per diem in lieu of subsistence at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, while away from their homes or regular places of business in the performance of services of the Advisory Committee.

(2) The Secretary of State is authorized to provide for necessary secretarial and staff assistance for the Advisory Committee.

(3) The Federal Advisory Committee Act shall not apply to the Advisory Committee to the extent that the provisions of this chapter are inconsistent with that Act.

(Aug. 1, 1956, ch. 841, title IV, § 406, as added Pub. L. 102–138, title I, § 198(a), Oct. 28, 1991, 105 Stat. 688.)

REFERENCES IN TEXT

The Federal Advisory Committee Act, referred to in subsec. (f)(3), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

TERMINATION OF PREVIOUS ADVISORY COMMITTEE ON HISTORICAL DIPLOMATIC DOCUMENTATION

Section 198(b) of Pub. L. 102–138 provided that: ''The Advisory Committee on Historical Documentation for the Department of State established before the date of enactment of this Act [Oct. 28, 1991] shall terminate on such date.''

§ 4357. Definitions

For purposes of this chapter—

(1) the term ''Advisory Committee'' means the Advisory Committee on Historical Diplomatic Documentation for the Department of State;

(2) the term ''Historian'' means the Historian of the Department of State or any successor officer of the Department of State responsible for carrying out the functions of the Office of the Historian, Bureau of Public Affairs, of the Department of State, as in effect on October 28, 1991;

(3) the term ''originating agency'' means, with respect to a record, the department, agency, or entity of the United States (or any officer or employee thereof of acting in his official capacity) that originates, develops, publishes, issues, or otherwise prepares that record or receives that record from outside the United States Government; and

(4) the term ''record'' includes any written material (including any document, memorandum, correspondence, statistical data, book, or other papers), map, photograph, machine readable material, or other documentary material, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value in them, and such term does not include library or museum material made or acquired and preserved solely for reference or exhibition purposes, any extra copy of a document preserved only for convenience of reference, or any stocks of publications or of processed documents.

(Aug. 1, 1956, ch. 841, title IV, § 407, as added Pub. L. 102–138, title I, § 198(a), Oct. 28, 1991, 105 Stat. 690.)

AUTHORITY OF SECRETARY OF STATE

Except as otherwise provided, Secretary of State to have and exercise any authority vested by law in any official or office of Department of State and references to such officials or offices deemed to refer to Secretary of State or Department of State, as appropriate, see section 2651a of this title and section 161(d) of Pub. L. 103–236, set out as a note under section 2651a of this title.

CHAPTER 54—PRIVATE ORGANIZATION ASSISTANCE

SUBCHAPTER I—THE ASIA FOUNDATION

SUBCHAPTER II—NATIONAL ENDOWMENT FOR DEMOCRACY

SUBCHAPTER I—THE ASIA FOUNDATION

§ 4401. Findings

The Congress finds that—

(1) The Asia Foundation, a private nonprofit corporation incorporated in 1954 in the State of California, has long been active in promoting Asian-American friendship and cooperation and in lending encouragement and assistance to Asians in their own efforts to develop more open, more just, and more democratic societies;

(2) The Asia Foundation's commitment to strengthening indigenous Asian institutions which further stable national development, constructive social change, equitable economic growth, and cooperative international relationships is fully consistent with and supportive of long-term United States interests in Asia;

(3) The Asia Foundation, as a private organization, is able to conduct programs in response to Asian initiatives that would be difficult or impossible for an official United States instrumentality, and it is in a position in Asia to respond quickly and flexibly to meet new opportunities;

(Added Pub. L. 98–497, title I, §102(a)(2), Oct. 19, 1984, 98 Stat. 2281.)

PRIOR PROVISIONS

A prior section 2104 was renumbered section 2108 of this title.

EFFECTIVE DATE

Section effective Apr. 1, 1985, see section 301 of Pub. L. 98–497, set out as an Effective Date of 1984 Amendment note under section 2102 of this title.

EMERGENCY PREPAREDNESS FUNCTIONS

For assignment of certain emergency preparedness functions to Archivist of United States, see Parts 1, 2, and 20 of Ex. Ord. No. 12656, Nov. 18, 1988, 53 F.R. 47491, set out as a note under section 5195 of Title 42, The Public Health and Welfare.

§ 2105. Personnel and services

(a)(1) The Archivist is authorized to select, appoint, employ, and fix the compensation of such officers and employees, pursuant to part III of title 5, as are necessary to perform the functions of the Archivist and the Administration.

(2) Notwithstanding paragraph (1), the Archivist is authorized to appoint, subject to the consultation requirements set forth in paragraph (f)(2) of section 2203 of this title, a director at each Presidential archival depository established under section 2112 of this title. The Archivist may appoint a director without regard to subchapter I and subchapter VIII of chapter 33 of title 5, United States Code, governing appointments in the competitive service and the Senior Executive Service. A director so appointed shall be responsible for the care and preservation of the Presidential records and historical materials deposited in a Presidential archival depository, shall serve at the pleasure of the Archivist and shall perform such other functions as the Archivist may specify.

(b) The Archivist is authorized to obtain the services of experts and consultants under section 3109 of title 5.

(c) Notwithstanding the provisions of section 973 of title 10 or any other provision of law, the Archivist, in carrying out the functions of the Archivist or the Administration, is authorized to utilize in the Administration the services of officials, officers, and other personnel in other Federal agencies, including personnel of the armed services, with the consent of the head of the agency concerned.

(d) Notwithstanding section 1342 of title 31, United States Code, the Archivist is authorized to accept and utilize voluntary and uncompensated services.

(Added Pub. L. 98–497, title I, §102(a)(2), Oct. 19, 1984, 98 Stat. 2281; amended Pub. L. 107–67, title VI, §649, Nov. 12, 2001, 115 Stat. 556.)

PRIOR PROVISIONS

A prior section 2105 was renumbered section 2109 of this title.

AMENDMENTS

2001—Subsec. (a). Pub. L. 107–67 amended subsec. (a) generally, designating existing provisions as par. (1) and adding par. (2).

EFFECTIVE DATE

Section effective Apr. 1, 1985, see section 301 of Pub. L. 98–497, set out as an Effective Date of 1984 Amendment note under section 2102 of this title.

§ 2106. Reports to Congress

The Archivist shall submit to the Congress, in January of each year and at such other times as the Archivist finds appropriate, a report concerning the administration of functions of the Archivist, the Administration, the National Historical Publications and Records Commission, and the National Archives Trust Fund. Such report shall describe—

(1) program administration and expenditures of funds, both appropriated and nonappropriated, by the Administration, the Commission, and the Trust Fund Board;

(2) research projects and publications undertaken by Commission grantees, and by Trust Fund grantees, including detailed information concerning the receipt and use of all appropriated and nonappropriated funds;

(3) by account, the moneys, securities, and other personal property received and held by the National Archives Trust Fund Board, and of its operations, including a listing of the purposes for which funds are transferred to the National Archives and Records Administration for expenditure to other Federal agencies; and

(4) the matters specified in section 2904(c)(8) of this title.

(Added Pub. L. 98–497, title I, §102(a)(2), Oct. 19, 1984, 98 Stat. 2282.)

PRIOR PROVISIONS

A prior section 2106 was renumbered section 2110 of this title.

EFFECTIVE DATE

Section effective Apr. 1, 1985, see section 301 of Pub. L. 98–497, set out as an Effective Date of 1984 Amendment note under section 2102 of this title.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in this section relating to the requirement that the Archivist submit a report to Congress in January of each year, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and the last item on page 179 of House Document No. 103–7.

§ 2107. Acceptance of records for historical preservation

When it appears to the Archivist to be in the public interest, he may—

(1) accept for deposit with the National Archives of the United States the records of a Federal agency, the Congress, the Architect of the Capitol, or the Supreme Court determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government;

(2) direct and effect the transfer to the National Archives of the United States of records of a Federal agency that have been in existence for more than thirty years and determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government, unless the head of the agency which has custody of them certified in writing to the Archivist that they

must be retained in his custody for use in the conduct of the regular current business of the agency;

(3) direct and effect, with the approval of the head of the originating agency, or if the existence of the agency has been terminated, then with the approval of his successor in function, if any, the transfer of records, deposited or approved for deposit with the National Archives of the United States to public or educational institutions or associations; title to the records to remain vested in the United States unless otherwise authorized by Congress; and

(4) transfer materials from private sources authorized to be received by the Archivist by section 2111 of this title.

(Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1287, § 2103; Pub. L. 94–575, § 4(a), Oct. 21, 1976, 90 Stat. 2727; Pub. L. 95–416, § 1(a), Oct. 5, 1978, 92 Stat. 915; renumbered § 2107 and amended Pub. L. 98–497, title I, §§ 102(a)(1), 107(a)(1), Oct. 19, 1984, 98 Stat. 2280, 2285.)

HISTORICAL AND REVISION NOTES

Based on 44 U.S. Code, 1964 ed., § 397(a) (June 30, 1949, ch. 288, title V, § 507, as added Sept. 5, 1950, ch. 849, § 6(d), 64 Stat. 583; and amended July 12, 1952, ch. 703, § 1(*o*), (p), 66 Stat. 594; July 12, 1955, ch. 329, 69 Stat. 297; Aug. 12, 1955, ch. 859, 69 Stat. 695; July 3, 1956, ch. 513, § 4, 70 Stat. 494; June 13, 1957, Pub. L. 85–51, 71 Stat. 69).

PRIOR PROVISIONS

A prior section 2107 was renumbered section 2111 of this title.

AMENDMENTS

1984—Pub. L. 98–497, § 107(a)(1), substituted ''Archivist'' for ''Administrator of General Services'' in provisions preceding par. (1), substituted '', the Congress, the Architect of the Capitol, or the Supreme Court'' for ''or of the Congress'' in par. (1), substituted ''Archivist'' for ''Administrator'' in par. (2), and substituted ''Archivist'' for ''Administrator'' and ''section 2111'' for ''section 2107'' in par. (4).

1978—Par. (2). Pub. L. 95–416 substituted ''thirty years'' for ''fifty years''.

1976—Par. (4). Pub. L. 94–575 substituted reference to section ''2107'' for ''3106''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–497 effective Apr. 1, 1985, see section 301 of Pub. L. 98–497, set out as a note under section 2102 of this title.

SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103–345, § 1, Oct. 6, 1994, 108 Stat. 3128, provided that: ''This Act [amending provisions set out as a note below] may be cited as the 'President John F. Kennedy Assassination Records Collection Extension Act of 1994'.''

NATIONAL DATABASE FOR RECORDS OF SERVITUDE, EMANCIPATION, AND POST–CIVIL WAR RECONSTRUCTION

Pub. L. 110–404, § 7, Oct. 13, 2008, 122 Stat. 4285, provided that:

''(a) IN GENERAL.—The Archivist of the United States may preserve relevant records and establish, as part of the National Archives and Records Administration, an electronically searchable national database consisting of historic records of servitude, emancipation, and post-Civil War reconstruction, including the Refugees, Freedman, and Abandoned Land Records, Southern Claims Commission Records, Records of the Freedmen's Bank, Slave Impressments Records, Slave Payroll Records, Slave Manifest, and others, contained within the agencies and departments of the Federal Government to assist African Americans and others in conducting genealogical and historical research.

''(b) MAINTENANCE.—Any database established under this section shall be maintained by the National Archives and Records Administration or an entity within the National Archives and Records Administration designated by the Archivist of the United States.''

PRESIDENT JOHN F. KENNEDY ASSASSINATION RECORDS COLLECTION

Pub. L. 102–526, Oct. 26, 1992, 106 Stat. 3443, as amended by Pub. L. 103–345, §§ 2–5, Oct. 6, 1994, 108 Stat. 3128–3130; Pub. L. 105–25, § 1, July 3, 1997, 111 Stat. 240; Pub. L. 109–313, § 2(c)(1), Oct. 6, 2006, 120 Stat. 1735, provided that:

''SECTION 1. SHORT TITLE.

''This Act may be cited as the 'President John F. Kennedy Assassination Records Collection Act of 1992'.

''SEC. 2. FINDINGS, DECLARATIONS, AND PURPOSES.

''(a) FINDINGS AND DECLARATIONS.—The Congress finds and declares that—

''(1) all Government records related to the assassination of President John F. Kennedy should be preserved for historical and governmental purposes;

''(2) all Government records concerning the assassination of President John F. Kennedy should carry a presumption of immediate disclosure, and all records should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination;

''(3) legislation is necessary to create an enforceable, independent, and accountable process for the public disclosure of such records;

''(4) legislation is necessary because congressional records related to the assassination of President John F. Kennedy would not otherwise be subject to public disclosure until at least the year 2029;

''(5) legislation is necessary because the Freedom of Information Act [5 U.S.C. 552], as implemented by the executive branch, has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy;

''(6) legislation is necessary because Executive Order No. 12356 [50 U.S.C. 435 note], entitled 'National Security Information' has eliminated the declassification and downgrading schedules relating to classified information across government and has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy; and

''(7) most of the records related to the assassination of President John F. Kennedy are almost 30 years old, and only in the rarest cases is there any legitimate need for continued protection of such records.

''(b) PURPOSES.—The purposes of this Act are—

''(1) to provide for the creation of the President John F. Kennedy Assassination Records Collection at the National Archives and Records Administration; and

''(2) to require the expeditious public transmission to the Archivist and public disclosure of such records.

''SEC. 3. DEFINITIONS.

''In this Act:

''(1) 'Archivist' means the Archivist of the United States.

''(2) 'Assassination record' means a record that is related to the assassination of President John F. Kennedy, that was created or made available for use by, obtained by, or otherwise came into the possession of—

''(A) the Commission to Investigate the Assassination of President John F. Kennedy (the 'Warren Commission');

''(B) the Commission on Central Intelligence Agency Activities Within the United States (the 'Rockefeller Commission');

''(C) the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the 'Church Committee');

''(D) the Select Committee on Intelligence (the 'Pike Committee') of the House of Representatives;

''(E) the Select Committee on Assassinations (the 'House Assassinations Committee') of the House of Representatives;

''(F) the Library of Congress;

''(G) the National Archives and Records Administration;

''(H) any Presidential library;

''(I) any Executive agency;

''(J) any independent agency;

''(K) any other office of the Federal Government; and

''(L) any State or local law enforcement office that provided support or assistance or performed work in connection with a Federal inquiry into the assassination of President John F. Kennedy,

but does not include the autopsy records donated by the Kennedy family to the National Archives pursuant to a deed of gift regulating access to those records, or copies and reproductions made from such records.

''(3) 'Collection' means the President John F. Kennedy Assassination Records Collection established under section 4.

''(4) 'Executive agency' means an Executive agency as defined in subsection 552(f) of title 5, United States Code, and includes any Executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government, including the Executive Office of the President, or any independent regulatory agency.

''(5) 'Government office' means any office of the Federal Government that has possession or control of assassination records, including—

''(A) the House Committee on Administration with regard to the Select Committee on Assassinations of the records of the House of Representatives;

''(B) the Select Committee on Intelligence of the Senate with regard to records of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities and other assassination records;

''(C) the Library of Congress;

''(D) the National Archives as custodian of assassination records that it has obtained or possesses, including the Commission to Investigate the Assassination of President John F. Kennedy and the Commission on Central Intelligence Agency Activities in the United States; and

''(E) any other executive branch office or agency, and any independent agency.

''(6) 'Identification aid' means the written description prepared for each record as required in section 4.

''(7) 'National Archives' means the National Archives and Records Administration and all components thereof, including Presidential archival depositories established under section 2112 of title 44, United States Code.

''(8) 'Official investigation' means the reviews of the assassination of President John F. Kennedy conducted by any Presidential commission, any authorized congressional committee, and any Government agency either independently, at the request of any Presidential commission or congressional committee, or at the request of any Government official.

''(9) 'Originating body' means the Executive agency, government commission, congressional committee, or other governmental entity that created a record or particular information within a record.

''(10) 'Public interest' means the compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history surrounding the assassination of President John F. Kennedy.

''(11) 'Record' includes a book, paper, map, photograph, sound or video recording, machine readable material, computerized, digitized, or electronic information, regardless of the medium on which it is stored, or other documentary material, regardless of its physical form or characteristics.

''(12) 'Review Board' means the Assassination Records Review Board established by section 7.

''(13) 'Third agency' means a Government agency that originated an assassination record that is in the possession of another agency.

''SEC. 4. PRESIDENT JOHN F. KENNEDY ASSASSINATION RECORDS COLLECTION AT THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION.

''(a) IN GENERAL.—(1) Not later than 60 days after the date of enactment of this Act [Oct. 26, 1992], the National Archives and Records Administration shall commence establishment of a collection of records to be known as the President John F. Kennedy Assassination Records Collection. In so doing, the Archivist shall ensure the physical integrity and original provenance of all records. The Collection shall consist of record copies of all Government records relating to the assassination of President John F. Kennedy, which shall be transmitted to the National Archives in accordance with section 2107 of title 44, United States Code. The Archivist shall prepare and publish a subject guidebook and index to the collection.

''(2) The Collection shall include—

''(A) all assassination records—

''(i) that have been transmitted to the National Archives or disclosed to the public in an unredacted form prior to the date of enactment of this Act;

''(ii) that are required to be transmitted to the National Archives; or

''(iii) the disclosure of which is postponed under this Act;

''(B) a central directory comprised of identification aids created for each record transmitted to the Archivist under section 5; and

''(C) all Review Board records as required by this Act.

''(b) DISCLOSURE OF RECORDS.—All assassination records transmitted to the National Archives for disclosure to the public shall be included in the Collection and shall be available to the public for inspection and copying at the National Archives within 30 days after their transmission to the National Archives.

''(c) FEES FOR COPYING.—The Archivist shall—

''(1) charge fees for copying assassination records; and

''(2) grant waivers of such fees pursuant to the standards established by section 552(a)(4) of title 5, United States Code.

''(d) ADDITIONAL REQUIREMENTS.—(1) The Collection shall be preserved, protected, archived, and made available to the public at the National Archives using appropriations authorized, specified, and restricted for use under the terms of this Act.

''(2) The National Archives, in consultation with the Information Security Oversight Office, shall ensure the security of the postponed assassination records in the Collection.

''(e) OVERSIGHT.—The Committee on Government Operations [now Committee on Oversight and Government Reform] of the House of Representatives and the Committee on Governmental Affairs [now Committee on Homeland Security and Governmental Affairs] of the Senate shall have continuing oversight jurisdiction with respect to the Collection.

''SEC. 5. REVIEW, IDENTIFICATION, TRANSMISSION TO THE NATIONAL ARCHIVES, AND PUBLIC DISCLOSURE OF ASSASSINATION RECORDS BY GOVERNMENT OFFICES.

''(a) IN GENERAL.—(1) As soon as practicable after the date of enactment of this Act [Oct. 26, 1992], each Government office shall identify and organize its records relating to the assassination of President John F. Ken-

nedy and prepare them for transmission to the Archivist for inclusion in the Collection.

''(2) No assassination record shall be destroyed, altered, or mutilated in any way.

''(3) No assassination record made available or disclosed to the public prior to the date of enactment of this Act may be withheld, redacted, postponed for public disclosure, or reclassified.

''(4) No assassination record created by a person or entity outside government (excluding names or identities consistent with the requirements of section 6) shall be withheld, redacted, postponed for public disclosure, or reclassified.

''(b) CUSTODY OF ASSASSINATION RECORDS PENDING REVIEW.—During the review by Government offices and pending review activity by the Review Board, each Government office shall retain custody of its assassination records for purposes of preservation, security, and efficiency, unless—

''(1) the Review Board requires the physical transfer of records for purposes of conducting an independent and impartial review;

''(2) transfer is necessary for an administrative hearing or other Review Board function; or

''(3) it is a third agency record described in subsection (c)(2)(C).

''(c) REVIEW.—(1) Not later than 300 days after the date of enactment of this Act [Oct. 26, 1992], each Government office shall review, identify and organize each assassination record in its custody or possession for disclosure to the public, review by the Review Board, and transmission to the Archivist.

''(2) In carrying out paragraph (1), a Government office shall—

''(A) determine which of its records are assassination records;

''(B) determine which of its assassination records have been officially disclosed or publicly available in a complete and unredacted form;

''(C)(i) determine which of its assassination records, or particular information contained in such a record, was created by a third agency or by another Government office; and

''(ii) transmit to a third agency or other Government office those records, or particular information contained in those records, or complete and accurate copies thereof;

''(D)(i) determine whether its assassination records or particular information in assassination records are covered by the standards for postponement of public disclosure under this Act; and

''(ii) specify on the identification aid required by subsection (d) the applicable postponement provision contained in section 6;

''(E) organize and make available to the Review Board all assassination records identified under subparagraph (D) the public disclosure of which in whole or in part may be postponed under this Act;

''(F) organize and make available to the Review Board any record concerning which the office has any uncertainty as to whether the record is an assassination record governed by this Act;

''(G) give priority to—

''(i) the identification, review, and transmission of all assassination records publicly available or disclosed as of the date of enactment of this Act in a redacted or edited form; and

''(ii) the identification, review, and transmission, under the standards for postponement set forth in this Act, of assassination records that on the date of enactment of this Act are the subject of litigation under section 552 of title 5, United States Code; and

''(H) make available to the Review Board any additional information and records that the Review Board has reason to believe it requires for conducting a review under this Act.

''(3) The Director of each archival depository established under section 2112 of title 44, United States Code, shall have as a priority the expedited review for public disclosure of assassination records in the possession and custody of the depository, and shall make such records available to the Review Board as required by this Act.

''(d) IDENTIFICATION AIDS.—(1)(A) Not later than 45 days after the date of enactment of this Act [Oct. 26, 1992], the Archivist, in consultation with the appropriate Government offices, shall prepare and make available to all Government offices a standard form of identification or finding aid for use with each assassination record subject to review under this Act.

''(B) The Archivist shall ensure that the identification aid program is established in such a manner as to result in the creation of a uniform system of electronic records by Government offices that are compatible with each other.

''(2) Upon completion of an identification aid, a Government office shall—

''(A) attach a printed copy to the record it describes;

''(B) transmit to the Review Board a printed copy; and

''(C) attach a printed copy to each assassination record it describes when it is transmitted to the Archivist.

''(3) Assassination records which are in the possession of the National Archives on the date of enactment of this Act, and which have been publicly available in their entirety without redaction, shall be made available in the Collection without any additional review by the Review Board or another authorized office under this Act, and shall not be required to have such an identification aid unless required by the Archivist.

''(e) TRANSMISSION TO THE NATIONAL ARCHIVES.—Each Government office shall—

''(1) transmit to the Archivist, and make immediately available to the public, all assassination records that can be publicly disclosed, including those that are publicly available on the date of enactment of this Act [Oct. 26, 1992], without any redaction, adjustment, or withholding under the standards of this Act; and

''(2) transmit to the Archivist upon approval for postponement by the Review Board or upon completion of other action authorized by this Act, all assassination records the public disclosure of which has been postponed, in whole or in part, under the standards of this Act, to become part of the protected Collection.

''(f) CUSTODY OF POSTPONED ASSASSINATION RECORDS.—An assassination record the public disclosure of which has been postponed shall, pending transmission to the Archivist, be held for reasons of security and preservation by the originating body until such time as the information security program has been established at the National Archives as required in section 4(e)(2).

''(g) PERIODIC REVIEW OF POSTPONED ASSASSINATION RECORDS.—(1) All postponed or redacted records shall be reviewed periodically by the originating agency and the Archivist consistent with the recommendations of the Review Board under section 9(c)(3)(B).

''(2)(A) A periodic review shall address the public disclosure of additional assassination records in the Collection under the standards of this Act.

''(B) All postponed assassination records determined to require continued postponement shall require an unclassified written description of the reason for such continued postponement. Such description shall be provided to the Archivist and published in the Federal Register upon determination.

''(C) The periodic review of postponed assassination records shall serve to downgrade and declassify security classified information.

''(D) Each assassination record shall be publicly disclosed in full, and available in the Collection no later than the date that is 25 years after the date of enactment of this Act [Oct. 26, 1992], unless the President certifies, as required by this Act, that—

''(i) continued postponement is made necessary by an identifiable harm to the military defense, intel-

ligence operations, law enforcement, or conduct of foreign relations; and

''(ii) the identifiable harm is of such gravity that it outweighs the public interest in disclosure.

''(h) FEES FOR COPYING.—Executive branch agencies shall—

''(1) charge fees for copying assassination records; and

''(2) grant waivers of such fees pursuant to the standards established by section 552(a)(4) of title 5, United States Code.

''SEC. 6. GROUNDS FOR POSTPONEMENT OF PUBLIC DISCLOSURE OF RECORDS.

''Disclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of this Act if there is clear and convincing evidence that—

''(1) the threat to the military defense, intelligence operations, or conduct of foreign relations of the United States posed by the public disclosure of the assassination record is of such gravity that it outweighs the public interest, and such public disclosure would reveal—

''(A) an intelligence agent whose identity currently requires protection;

''(B) an intelligence source or method which is currently utilized, or reasonably expected to be utilized, by the United States Government and which has not been officially disclosed, the disclosure of which would interfere with the conduct of intelligence activities; or

''(C) any other matter currently relating to the military defense, intelligence operations or conduct of foreign relations of the United States, the disclosure of which would demonstrably impair the national security of the United States;

''(2) the public disclosure of the assassination record would reveal the name or identity of a living person who provided confidential information to the United States and would pose a substantial risk of harm to that person;

''(3) the public disclosure of the assassination record could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that invasion of privacy is so substantial that it outweighs the public interest;

''(4) the public disclosure of the assassination record would compromise the existence of an understanding of confidentiality currently requiring protection between a Government agent and a cooperating individual or a foreign government, and public disclosure would be so harmful that it outweighs the public interest; or

''(5) the public disclosure of the assassination record would reveal a security or protective procedure currently utilized, or reasonably expected to be utilized, by the Secret Service or another Government agency responsible for protecting Government officials, and public disclosure would be so harmful that it outweighs the public interest.

''SEC. 7. ESTABLISHMENT AND POWERS OF THE ASSASSINATION RECORDS REVIEW BOARD.

''(a) ESTABLISHMENT.—There is established as an independent agency a board to be known as the Assassinations Records Review Board.

''(b) APPOINTMENT.—(1) The President, by and with the advice and consent of the Senate, shall appoint, without regard to political affiliation, 5 citizens to serve as members of the Review Board to ensure and facilitate the review, transmission to the Archivist, and public disclosure of Government records related to the assassination of President John F. Kennedy.

''(2) The President shall make nominations to the Review Board not later than 90 calendar days after the date of enactment of this Act [Oct. 26, 1992].

''(3) If the Senate votes not to confirm a nomination to the Review Board, the President shall make an additional nomination not later than 30 days thereafter.

''(4)(A) The President shall make nominations to the Review Board after considering persons recommended by the American Historical Association, the Organization of American Historians, the Society of American Archivists, and the American Bar Association.

''(B) If an organization described in subparagraph (A) does not recommend at least 2 nominees meeting the qualifications stated in paragraph (5) by the date that is 45 days after the date of enactment of this Act, the President shall consider for nomination the persons recommended by the other organizations described in subparagraph (A).

''(C) The President may request an organization described in subparagraph (A) to submit additional nominations.

''(5) Persons nominated to the Review Board—

''(A) shall be impartial private citizens, none of whom is presently employed by any branch of the Government, and none of whom shall have had any previous involvement with any official investigation or inquiry conducted by a Federal, State, or local government, relating to the assassination of President John F. Kennedy;

''(B) shall be distinguished persons of high national professional reputation in their respective fields who are capable of exercising the independent and objective judgment necessary to the fulfillment of their role in ensuring and facilitating the review, transmission to the public, and public disclosure of records related to the assassination of President John F. Kennedy and who possess an appreciation of the value of such material to the public, scholars, and government; and

''(C) shall include at least 1 professional historian and 1 attorney.

''(c) SECURITY CLEARANCES.—(1) All Review Board nominees shall be granted the necessary security clearances in an accelerated manner subject to the standard procedures for granting such clearances.

''(2) All nominees shall qualify for the necessary security clearance prior to being considered for confirmation by the Committee on Governmental Affairs [now Committee on Homeland Security and Governmental Affairs] of the Senate.

''(d) CONFIRMATION HEARINGS.—(1) The Committee on Governmental Affairs [now Committee on Homeland Security and Governmental Affairs] of the Senate shall hold confirmation hearings within 30 days in which the Senate is in session after the nomination of 3 Review Board members.

''(2) The Committee on Governmental Affairs shall vote on the nominations within 14 days in which the Senate is in session after the confirmation hearings, and shall report its results to the full Senate immediately.

''(3) The Senate shall vote on each nominee to confirm or reject within 14 days in which the Senate is in session after reported by the Committee on Governmental Affairs.

''(e) VACANCY.—A vacancy on the Review Board shall be filled in the same manner as specified for original appointment within 30 days of the occurrence of the vacancy.

''(f) CHAIRPERSON.—The Members of the Review Board shall elect one of its members as chairperson at its initial meeting.

''(g) REMOVAL OF REVIEW BOARD MEMBER.—(1) No member of the Review Board shall be removed from office, other than—

''(A) by impeachment and conviction; or

''(B) by the action of the President for inefficiency, neglect of duty, malfeasance in office, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the member's duties.

''(2)(A) If a member of the Review Board is removed from office, and that removal is by the President, not later than 10 days after the removal the President shall submit to the Committee on Government Operations [now Committee on Oversight and Government Reform] of the House of Representatives and the Committee on Governmental Affairs [now Committee on Homeland

Security and Governmental Affairs] of the Senate a report specifying the facts found and the grounds for the removal.

''(B) The President shall publish in the Federal Register a report submitted under paragraph (2)(A), except that the President may, if necessary to protect the rights of a person named in the report or to prevent undue interference with any pending prosecution, postpone or refrain from publishing any or all of the report until the completion of such pending cases or pursuant to privacy protection requirements in law.

''(3)(A) A member of the Review Board removed from office may obtain judicial review of the removal in a civil action commenced in the United States District Court for the District of Columbia.

''(B) The member may be reinstated or granted other appropriate relief by order of the court.

''(h) COMPENSATION OF MEMBERS.—(1) A member of the Review Board shall be compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the performance of the duties of the Review Board.

''(2) A member of the Review Board shall be allowed reasonable travel expenses, including per diem in lieu of subsistence, at rates for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from the member's home or regular place of business in the performance of services for the Review Board.

''(i) DUTIES OF THE REVIEW BOARD.—(1) The Review Board shall consider and render decisions on a determination by a Government office to seek to postpone the disclosure of assassination records.

''(2) In carrying out paragraph (1), the Review Board shall consider and render decisions—

''(A) whether a record constitutes an assassination record; and

''(B) whether an assassination record or particular information in a record qualifies for postponement of disclosure under this Act.

''(j) POWERS.—(1) The Review Board shall have the authority to act in a manner prescribed under this Act including authority to—

''(A) direct Government offices to complete identification aids and organize assassination records;

''(B) direct Government offices to transmit to the Archivist assassination records as required under this Act, including segregable portions of assassination records, and substitutes and summaries of assassination records that can be publicly disclosed to the fullest extent;

''(C)(i) obtain access to assassination records that have been identified and organized by a Government office;

''(ii) direct a Government office to make available to the Review Board, and if necessary investigate the facts surrounding, additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act; and

''(iii) request the Attorney General to subpoena private persons to compel testimony, records, and other information relevant to its responsibilities under this Act;

''(D) require any Government office to account in writing for the destruction of any records relating to the assassination of President John F. Kennedy;

''(E) receive information from the public regarding the identification and public disclosure of assassination records;

''(F) hold hearings, administer oaths, and subpoena witnesses and documents; and

''(G) use the Federal Acquisition Service in the same manner and under the same conditions as other departments and agencies of the United States; and

''(H) use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

''(2) A subpoena issued under paragraph (1)(C)(iii) may be enforced by any appropriate Federal court acting pursuant to a lawful request of the Review Board.

''(k) WITNESS IMMUNITY.—The Review Board shall be considered to be an agency of the United States for purposes of section 6001 of title 18, United States Code.

''(*l*) OVERSIGHT.—(1) The Committee on Government Operations [now Committee on Oversight and Government Reform] of the House of Representatives and the Committee on Governmental Affairs [now Committee on Homeland Security and Governmental Affairs] of the Senate shall have continuing oversight jurisdiction with respect to the official conduct of the Review Board and the disposition of postponed records after termination of the Review Board, and shall have access to any records held or created by the Review Board.

''(2) The Review Board shall have the duty to cooperate with the exercise of such oversight jurisdiction.

''(m) SUPPORT SERVICES.—The Administrator of the General Services Administration shall provide administrative services for the Review Board on a reimbursable basis.

''(n) INTERPRETIVE REGULATIONS.—The Review Board may issue interpretive regulations.

''(*o*) TERMINATION AND WINDING UP.—(1) The Review Board and the terms of its members shall terminate not later than September 30, 1998.

''(2) Upon its termination, the Review Board shall submit reports to the President and the Congress including a complete and accurate accounting of expenditures during its existence, and shall complete all other reporting requirements under this Act.

''(3) Upon termination and winding up, the Review Board shall transfer all of its records to the Archivist for inclusion in the Collection, and no record of the Review Board shall be destroyed.

''SEC. 8. ASSASSINATION RECORDS REVIEW BOARD PERSONNEL.

''(a) EXECUTIVE DIRECTOR.—(1) Not later than 45 days after the initial meeting of the Review Board, the Review Board shall appoint one citizen, without regard to political affiliation, to the position of Executive Director.

''(2) The person appointed as Executive Director shall be a private citizen of integrity and impartiality who is a distinguished professional and who is not a present employee of any branch of the Government and has had no previous involvement with any official investigation or inquiry relating to the assassination of President John F. Kennedy.

''(3)(A) A candidate for Executive Director shall be granted the necessary security clearances in an accelerated manner subject to the standard procedures for granting such clearances.

''(B) A candidate shall qualify for the necessary security clearance prior to being approved by the Review Board.

''(4) The Executive Director shall—

''(A) serve as principal liaison to Government offices;

''(B) be responsible for the administration and coordination of the Review Board's review of records;

''(C) be responsible for the administration of all official activities conducted by the Review Board; and

''(D) have no authority to decide or determine whether any record should be disclosed to the public or postponed for disclosure.

''(5) The Executive Director shall not be removed for reasons other than by a majority vote of the Review Board for cause on the grounds of inefficiency, neglect of duty, malfeasance in office, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the responsibilities of the Executive Director or the staff of the Review Board.

''(b) STAFF.—(1) The Review Board, without regard to the civil service laws, may appoint and terminate additional personnel as are necessary to enable the Review Board and its Executive Director to perform the duties of the Review Board.

''(2)(A) Except as provided in subparagraph (B), a person appointed to the staff of the Review Board shall be a private citizen of integrity and impartiality who is not a present employee of any branch of the Government and who has had no previous involvement with any official investigation or inquiry relating to the assassination of President John F. Kennedy.

''(B) An individual who is an employee of the Government may be appointed to the staff of the Review Board if in that position the individual will perform only administrative functions.

''(3)(A) A candidate for staff shall be granted the necessary security clearances in an accelerated manner subject to the standard procedures for granting such clearances.

''(B)(i) The Review Board may offer conditional employment to a candidate for a staff position pending the completion of security clearance background investigations. During the pendency of such investigations, the Review Board shall ensure that any such employee does not have access to, or responsibility involving, classified or otherwise restricted assassination record materials.

''(ii) If a person hired on a conditional basis under clause (i) is denied or otherwise does not qualify for all security clearances necessary to carry out the responsibilities of the position for which conditional employment has been offered, the Review Board shall immediately terminate the person's employment.

''(c) COMPENSATION.—Subject to such rules as may be adopted by the Review Board, the chairperson, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title relating to classification and General Schedule pay rates, may—

''(1) appoint an Executive Director, who shall be paid at a rate not to exceed the rate of basic pay for level V of the Executive Schedule; and

''(2) appoint and fix compensation of such other personnel as may be necessary to carry out this Act.

''(d) ADVISORY COMMITTEES.—(1) The Review Board shall have the authority to create advisory committees to assist in fulfilling the responsibilities of the Review Board under this Act.

''(2) Any advisory committee created by the Review Board shall be subject to the Federal Advisory Committee Act (5 U.S.C. App.).

''(e) SECURITY CLEARANCE REQUIRED.—An individual employed in any position by the Review Board (including an individual appointed as Executive Director) shall be required to qualify for any necessary security clearance prior to taking office in that position, but may be employed conditionally in accordance with subsection (b)(3)(B) before qualifying for that clearance.

''SEC. 9. REVIEW OF RECORDS BY THE ASSASSINATION RECORDS REVIEW BOARD.

''(a) CUSTODY OF RECORDS REVIEWED BY BOARD.—Pending the outcome of the Review Board's review activity, a Government office shall retain custody of its assassination records for purposes of preservation, security, and efficiency, unless—

''(1) the Review Board requires the physical transfer of records for reasons of conducting an independent and impartial review; or

''(2) such transfer is necessary for an administrative hearing or other official Review Board function.

''(b) STARTUP REQUIREMENTS.—The Review Board shall—

''(1) not later than 90 days after the date of its appointment, publish a schedule for review of all assassination records in the Federal Register; and

''(2) not later than 180 days after the date of enactment of this Act [Oct. 26, 1992], begin its review of assassination records under this Act.

''(c) DETERMINATIONS OF THE REVIEW BOARD.—(1) The Review Board shall direct that all assassination records be transmitted to the Archivist and disclosed to the public in the Collection in the absence of clear and convincing evidence that—

''(A) a Government record is not an assassination record; or

''(B) a Government record or particular information within an assassination record qualifies for postponement of public disclosure under this Act.

''(2) In approving postponement of public disclosure of an assassination record, the Review Board shall seek to—

''(A) provide for the disclosure of segregable parts, substitutes, or summaries of such a record; and

''(B) determine, in consultation with the originating body and consistent with the standards for postponement under this Act, which of the following alternative forms of disclosure shall be made by the originating body:

''(i) Any reasonably segregable particular information in an assassination record.

''(ii) A substitute record for that information which is postponed.

''(iii) A summary of an assassination record.

''(3) With respect to each assassination record or particular information in assassination records the public disclosure of which is postponed pursuant to section 6, or for which only substitutions or summaries have been disclosed to the public, the Review Board shall create and transmit to the Archivist a report containing—

''(A) a description of actions by the Review Board, the originating body, the President, or any Government office (including a justification of any such action to postpone disclosure of any record or part of any record) and of any official proceedings conducted by the Review Board with regard to specific assassination records; and

''(B) a statement, based on a review of the proceedings and in conformity with the decisions reflected therein, designating a recommended specified time at which or a specified occurrence following which the material may be appropriately disclosed to the public under this Act.

''(4)(A) Following its review and a determination that an assassination record shall be publicly disclosed in the Collection or postponed for disclosure and held in the protected Collection, the Review Board shall notify the head of the originating body of its determination and publish a copy of the determination in the Federal Register within 14 days after the determination is made.

''(B) Contemporaneous notice shall be made to the President for Review Board determinations regarding executive branch assassination records, and to the oversight committees designated in this Act in the case of legislative branch records. Such notice shall contain a written unclassified justification for public disclosure or postponement of disclosure, including an explanation of the application of any standards contained in section 6.

''(d) PRESIDENTIAL AUTHORITY OVER REVIEW BOARD DETERMINATION.—

''(1) PUBLIC DISCLOSURE OR POSTPONEMENT OF DISCLOSURE.—After the Review Board has made a formal determination concerning the public disclosure or postponement of disclosure of an executive branch assassination record or information within such a record, or of any information contained in an assassination record, obtained or developed solely within the executive branch, the President shall have the sole and nondelegable authority to require the disclosure or postponement of such record or information under the standards set forth in section 6, and the President shall provide the Review Board with an unclassified written certification specifying the President's decision within 30 days after the Review Board's determination and notice to the executive branch agency as required under this Act, stating the justification for the President's decision, including the applicable grounds for postponement under section 6, accompanied by a copy of the identification aid required under section 4.

''(2) PERIODIC REVIEW.—Any executive branch assassination record postponed by the President shall be

subject to the requirements of periodic review, downgrading and declassification of classified information, and public disclosure in the collection set forth in section 4.

''(3) RECORD OF PRESIDENTIAL POSTPONEMENT.—The Review Board shall, upon its receipt, publish in the Federal Register a copy of any unclassified written certification, statement, and other materials transmitted by or on behalf of the President with regard to postponement of assassination records.

''(e) NOTICE TO PUBLIC.—Every 30 calendar days, beginning on the date that is 60 calendar days after the date on which the Review Board first approves the postponement of disclosure of an assassination record, the Review Board shall publish in the Federal Register a notice that summarizes the postponements approved by the Review Board or initiated by the President, the House of Representatives, or the Senate, including a description of the subject, originating agency, length or other physical description, and each ground for postponement that is relied upon.

''(f) REPORTS BY THE REVIEW BOARD.—(1) The Review Board shall report its activities to the leadership of the Congress, the Committee on Government Operations [now Committee on Oversight and Government Reform] of the House of Representatives, the Committee on Governmental Affairs [now Committee on Homeland Security and Governmental Affairs] of the Senate, the President, the Archivist, and the head of any Government office whose records have been the subject of Review Board activity.

''(2) The first report shall be issued on the date that is 1 year after the date of enactment of this Act [Oct. 26, 1992], and subsequent reports every 12 months thereafter until termination of the Review Board.

''(3) A report under paragraph (1) shall include the following information:

''(A) A financial report of the expenses for all official activities and requirements of the Review Board and its personnel.

''(B) The progress made on review, transmission to the Archivist, and public disclosure of assassination records.

''(C) The estimated time and volume of assassination records involved in the completion of the Review Board's performance under this Act.

''(D) Any special problems, including requests and the level of cooperation of Government offices, with regard to the ability of the Review Board to operate as required by this Act.

''(E) A record of review activities, including a record of postponement decisions by the Review Board or other related actions authorized by this Act, and a record of the volume of records reviewed and postponed.

''(F) Suggestions and requests to Congress for additional legislative authority needs.

''(G) An appendix containing copies of reports of postponed records to the Archivist required under section 9(c)(3) made since the date of the preceding report under this subsection.

''(4) At least 90 calendar days before completing its work, the Review Board shall provide written notice to the President and Congress of its intention to terminate its operations at a specified date.

''SEC. 10. DISCLOSURE OF OTHER MATERIALS AND ADDITIONAL STUDY.

''(a) MATERIALS UNDER SEAL OF COURT.—

''(1) The Review Board may request the Attorney General to petition any court in the United States or abroad to release any information relevant to the assassination of President John F. Kennedy that is held under seal of the court.

''(2)(A) The Review Board may request the Attorney General to petition any court in the United States to release any information relevant to the assassination of President John F. Kennedy that is held under the injunction of secrecy of a grand jury.

''(B) A request for disclosure of assassination materials under this Act shall be deemed to constitute a showing of particularized need under Rule 6 of the Federal Rules of Criminal Procedure [18 U.S.C. App.].

''(b) SENSE OF CONGRESS.—It is the sense of the Congress that—

''(1) the Attorney General should assist the Review Board in good faith to unseal any records that the Review Board determines to be relevant and held under seal by a court or under the injunction of secrecy of a grand jury;

''(2) the Secretary of State should contact the Government of the Republic of Russia and seek the disclosure of all records of the government of the former Soviet Union, including the records of the Komitet Gosudarstvennoy Bezopasnosti (KGB) and the Glaynoye Razvedyvatelnoye Upravleniye (GRU), relevant to the assassination of President Kennedy, and contact any other foreign government that may hold information relevant to the assassination of President Kennedy and seek disclosure of such information; and

''(3) all Executive agencies should cooperate in full with the Review Board to seek the disclosure of all information relevant to the assassination of President John F. Kennedy consistent with the public interest.

''SEC. 11. RULES OF CONSTRUCTION.

''(a) PRECEDENCE OVER OTHER LAW.—When this Act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law (except section 6103 of the Internal Revenue Code [26 U.S.C. 6103]), judicial decision construing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure, with the exception of deeds governing access to or transfer or release of gifts and donations of records to the United States Government.

''(b) FREEDOM OF INFORMATION ACT.—Nothing in this Act shall be construed to eliminate or limit any right to file requests with any executive agency or seek judicial review of the decisions pursuant to section 552 of title 5, United States Code.

''(c) JUDICIAL REVIEW.—Nothing in this Act shall be construed to preclude judicial review, under chapter 7 of title 5, United States Code, of final actions taken or required to be taken under this Act.

''(d) EXISTING AUTHORITY.—Nothing in this Act revokes or limits the existing authority of the President, any executive agency, the Senate, or the House of Representatives, or any other entity of the Government to publicly disclose records in its possession.

''(e) RULES OF THE SENATE AND HOUSE OF REPRESENTATIVES.—To the extent that any provision of this Act establishes a procedure to be followed in the Senate or the House of Representatives, such provision is adopted—

''(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and is deemed to be part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House, and it supersedes other rules only to the extent that it is inconsistent with such rules; and

''(2) with full recognition of the constitutional right of either House to change the rules (so far as they relate to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

''SEC. 12. TERMINATION OF EFFECT OF ACT.

''(a) PROVISIONS PERTAINING TO THE REVIEW BOARD.—The provisions of this Act that pertain to the appointment and operation of the Review Board shall cease to be effective when the Review Board and the terms of its members have terminated pursuant to section 7(*o*).

''(b) OTHER PROVISIONS.—The remaining provisions of this Act shall continue in effect until such time as the Archivist certifies to the President and the Congress that all assassination records have been made available to the public in accordance with this Act.

''SEC. 13. AUTHORIZATION OF APPROPRIATIONS.

''(a) IN GENERAL.—There are authorized to be appropriated to carry out the provisions of this Act $1,600,000 for fiscal year 1998.

''(b) INTERIM FUNDING.—Until such time as funds are appropriated pursuant to subsection (a), the President may use such sums as are available for discretionary use to carry out this Act.

''SEC. 14. SEVERABILITY.

''If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of that provision to other persons not similarly situated or to other circumstances shall not be affected by the invalidation.''

[For transfer of the functions, personnel, assets, and obligations of the United States Secret Service, including the functions of the Secretary of the Treasury relating thereto, to the Secretary of Homeland Security, and for treatment of related references, see sections 381, 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.]

CLASSIFIED NATIONAL SECURITY INFORMATION

For provisions authorizing Archivist to review, downgrade, and declassify information of former Presidents under control of Archivist pursuant to this section, see Ex. Ord. No. 13526, §3.5(b), Dec. 29, 2009, 75 F.R. 718, set out as a note under section 435 of Title 50, War and National Defense.

§ 2108. Responsibility for custody, use, and withdrawal of records

(a) The Archivist shall be responsible for the custody, use, and withdrawal of records transferred to him. When records, the use of which is subject to statutory limitations and restrictions, are so transferred, permissive and restrictive statutory provisions with respect to the examination and use of records applicable to the head of the agency from which the records were transferred or to employees of that agency are applicable to the Archivist and to the employees of the National Archives and Records Administration, respectively. Except as provided in subsection (b) of this section, when the head of a Federal agency states, in writing, restrictions that appear to him to be necessary or desirable in the public interest with respect to the use or examination of records being considered for transfer from his custody to the Archivist, the Archivist shall, if he concurs,,[1] impose such restrictions on the records so transferred, and may not relax or remove such restrictions without the written concurrence of the head of the agency from which the material was transferred, or of his successor in function, if any. In the event that a Federal agency is terminated and there is no successor in function, the Archivist is authorized to relax, remove, or impose restrictions on such agency's records when he determines that such action is in the public interest. Statutory and other restrictions referred to in this subsection shall remain in force until the records have been in existence for thirty years unless the Archivist by order, having consulted with the head of the transferring Federal agency or his successor in function, determines, with respect to specific bodies of records, that for reasons consistent with standards established in relevant statutory law, such restrictions shall remain in force for a longer period. Restriction on the use or examination of records deposited with the National Archives of the United States imposed by section 3 of the National Archives Act, approved June 19, 1934, shall continue in force regardless of the expiration of the tenure of office of the official who imposed them but may be removed or relaxed by the Archivist with the concurrence in writing of the head of the agency from which material was transferred or of his successor in function, if any.

(b) With regard to the census and survey records of the Bureau of the Census containing data identifying individuals enumerated in population censuses, any release pursuant to this section of such identifying information contained in such records shall be made by the Archivist pursuant to the specifications and agreements set forth in the exchange of correspondence on or about the date of October 10, 1952, between the Director of the Bureau of the Census and the Archivist of the United States, together with all amendments thereto, now or hereafter entered into between the Director of the Bureau of the Census and the Archivist of the United States. Such amendments, if any, shall be published in the Register.

(Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1288, §2104; Pub. L. 95–416, §1(b), Oct. 5, 1978, 92 Stat. 915; renumbered §2108 and amended Pub. L. 98–497, title I, §§102(a)(1), 107(a)(2), Oct. 19, 1984, 98 Stat. 2280, 2285.)

HISTORICAL AND REVISION NOTES

Based on 44 U.S. Code, 1964 ed., §397(b) (June 30, 1949, ch. 288, title V, §507, as added Sept. 5, 1950, ch. 849, §6(d), 64 Stat. 583).

REFERENCES IN TEXT

Section 3 of the National Archives Act, approved June 19, 1934, referred to in subsec. (a), was classified to section 300c of former Title 44, Public Printing and Documents, and was repealed by act June 30, 1949, ch. 288, title VI, §602(a)(32), renumbered and added Sept. 5, 1950, ch. 849, §7(d), 64 Stat. 590.

PRIOR PROVISIONS

A prior section 2108 was renumbered section 2112 of this title.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–497, §107(a)(2), substituted ''the Archivist and to the employees of the National Archives and Records Administration'' for ''the Administrator, the Archivist of the United States, and to the employees of the General Services Administration'', struck out ''and in consultation with the Archivist of the United States'' before ''impose such restrictions'' in third sentence, struck out ''the Archivist and'' after ''having consulted with'' in fifth sentence, substituted ''Archivist'' for ''Administrator of General Services'' wherever appearing, and substituted ''Archivist'' for ''Administrator'' wherever appearing.

Subsec. (b). Pub. L. 98–497, §107(a)(2)(D), substituted ''Archivist'' for ''Administrator of General Services''.

1978—Pub. L. 95–416 designated existing provisions as subsec. (a), inserted provisions permitting the Administrator to relax, remove, or impose restrictions in the public interest of records of agencies which have been terminated and requiring the Administrator with regard to duration of restrictions to consult with the Archivist and the head of the transferring Federal agency

[1] So in original.

''productions, exclusive of material copyrighted or patented, come into the custody or possession of the Administrator of General Services, the United States or its agents are not liable for infringement of literary property rights or analogous rights''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–497 effective Apr. 1, 1985, see section 301 of Pub. L. 98–497, set out as a note under section 2102 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–553 effective Jan. 1, 1978, see section 102 of Pub. L. 94–553, set out as an Effective Date note preceding section 101 of Title 17, Copyrights.

§ 2118. Records of Congress

The Secretary of the Senate and the Clerk of the House of Representatives, acting jointly, shall obtain at the close of each Congress all the noncurrent records of the Congress and of each congressional committee and transfer them to the National Archives and Records Administration for preservation, subject to the orders of the Senate or the House of Representatives, respectively.

(Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1291, § 2114; renumbered § 2118 and amended Pub. L. 98–497, title I, §§ 102(a)(1), 107(a)(10), Oct. 19, 1984, 98 Stat. 2280, 2286.)

HISTORICAL AND REVISION NOTES

Based on 44 U.S. Code, 1964 ed., § 402 (Aug. 2, 1946, ch. 753, title I, § 140, 60 Stat. 833).

AMENDMENTS

1984—Pub. L. 98–497, § 107(a)(10)), substituted ''National Archives and Records Administration'' for ''General Services Administration''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–497 effective Apr. 1, 1985, see section 301 of Pub. L. 98–497, set out as a note under section 2102 of this title.

§ 2119. Cooperative agreements

(a) AUTHORITY.—The Archivist may enter into cooperative agreements pursuant to section 6305 of title 31 that involve the transfer of funds from the National Archives and Records Administration to State and local governments, other public entities, educational institutions, or private nonprofit organizations (including foundations or institutes organized to support the National Archives and Records Administration or the Presidential archival depositories operated by it) for the public purpose of carrying out programs of the National Archives and Records Administration.

(b) LIMITATIONS.—Not more than $25,000 may be transferred under a cooperative agreement entered into as authorized by subsection (a). Not more than a total of $75,000 may be transferred under such agreements in any fiscal year.

(c) REPORT.—Not later than December 31st of each year, the Archivist shall submit to the Committee on Government Reform of the House of Representatives and the Committee on Governmental Affairs of the Senate a report on the provisions, amount, and duration of each cooperative agreement entered into as authorized by subsection (a) during the preceding fiscal year.

(Added Pub. L. 108–383, § 5(a), Oct. 30, 2004, 118 Stat. 2219.)

CHANGE OF NAME

Committee on Government Reform of House of Representatives changed to Committee on Oversight and Government Reform of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

Committee on Governmental Affairs of Senate changed to Committee on Homeland Security and Governmental Affairs of Senate, effective Jan. 4, 2005, by Senate Resolution No. 445, One Hundred Eighth Congress, Oct. 9, 2004.

§ 2120. Online access of founding fathers documents

The Archivist may enter into a cooperative agreement to provide online access to the published volumes of the papers of—

(1) George Washington;
(2) Alexander Hamilton;
(3) Thomas Jefferson;
(4) Benjamin Franklin;
(5) John Adams;
(6) James Madison; and
(7) other prominent historical figures, as determined appropriate by the Archivist of the United States.

(Added Pub. L. 110–404, § 4(a), Oct. 13, 2008, 122 Stat. 4283.)

TRANSFER OF FUNDS

Pub. L. 110–404, § 4(b), Oct. 13, 2008, 122 Stat. 4283, provided that:

''(1) IN GENERAL.—The Archivist of the United States, in the role as chairman of the National Historical Publications and Records Commission may enter into cooperative agreements pursuant to section 6305 of title 31, United States Code, that involve the transfer of funds from the National Historical Publications and Records Commission to State and local governments, tribal governments, other public entities, educational institutions, or private nonprofit organizations for the public purpose of carrying out section 2120 of title 44, United States Codes [sic].

''(2) REPORT.—Not later than December 31st of each year, the Archivist of the United States shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a report on the provisions, amount, and duration of each cooperative agreement entered into as authorized by paragraph (1) during the preceding fiscal year.''

CHAPTER 22—PRESIDENTIAL RECORDS

§ 2201. Definitions

As used in this chapter—

(1) The term ''documentary material'' means all books, correspondence, memorandums, doc-

[1] So in original. Does not conform to section catchline.

uments, 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 recordations.

(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)[1] 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 therof,[2] 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.

(Added Pub. L. 95–591, § 2(a), Nov. 4, 1978, 92 Stat. 2523.)

[1] See References in Text note below.

[2] So in original. Probably should be ''thereof,''.

REFERENCES IN TEXT

Section 552(e) of title 5, referred to in par. (2)(B)(i), was redesignated section 552(f) of title 5 by section 1802(b) of Pub. L. 99–570.

EFFECTIVE DATE

Section 3 of Pub. L. 95–591 provided that: ''The amendments made by this Act [enacting this chapter, amending sections 2111 and 2112 of this title, and enacting provisions set out as notes under this section] shall be effective with respect to any Presidential records (as defined in section 2201(2) of title 44, as amended by section 2 of this Act) created during a term of office of the President beginning on or after January 20, 1981.''

SHORT TITLE OF 1978 AMENDMENT

For short title of Pub. L. 95–591, which enacted this chapter, as the ''Presidential Records Act of 1978'', see section 1 of Pub. L. 95–591, set out as a note under section 101 of this title.

SEPARABILITY

Section 4 of Pub. L. 95–591 provided that: ''If any provision of this Act [enacting this chapter, amending sections 2107 and 2108 of this title and enacting provisions set out as notes under this section] is held invalid for any reason by any court, the validity and legal effect of the remaining provisions shall not be affected thereby.''

§ 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.

(Added Pub. L. 95–591, § 2(a), Nov. 4, 1978, 92 Stat. 2524.)

§ 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 in-

tend 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 Oversight 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.

(Added Pub. L. 95–591, § 2(a), Nov. 4, 1978, 92 Stat. 2524; amended Pub. L. 104–186, title II, § 223(9), Aug. 20, 1996, 110 Stat. 1752.)

REFERENCES IN TEXT

This Act, referred to in subsec. (f)(1), probably means Pub. L. 95–591, Nov. 4, 1978, 92 Stat. 2523, known as the Presidential Records Act of 1978, which enacted this chapter, amended sections 2107 and 2108 of this title, and enacted provisions set out as notes under section 2201 of this title. For complete classification of this Act to the Code, see Short Title of 1978 Amendment note set out under section 101 of this title and Tables.

AMENDMENTS

1996—Subsec. (e). Pub. L. 104–186 substituted ''House Oversight'' for ''House Administration''.

CHANGE OF NAME

Committee on Governmental Affairs of Senate changed to Committee on Homeland Security and Governmental Affairs of Senate, effective Jan. 4, 2005, by Senate Resolution No. 445, One Hundred Eighth Congress, Oct. 9, 2004.

Committee on House Oversight of House of Representatives changed to Committee on House Administration of House of Representatives by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999.

Committee on Government Operations of House of Representatives treated as referring to Committee on Government Reform and Oversight of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Government Reform and Oversight of House of Representatives changed to Committee on Government Reform of House of Representatives by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999. Committee on Government Reform of House of Representatives changed to Committee on Oversight and Government Reform of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007.

CLASSIFIED NATIONAL SECURITY INFORMATION

For provisions authorizing Archivist to review, downgrade, and declassify information of former Presidents under control of Archivist pursuant to this section, see Ex. Ord. No. 13526, § 3.5(b), Dec. 29, 2009, 75 F.R. 718, set out as a note under section 435 of Title 50, War and National Defense.

§ 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 informa-

tion 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.

(Added Pub. L. 95–591, § 2(a), Nov. 4, 1978, 92 Stat. 2525; amended Pub. L. 98–497, title I, § 107(b)(7), Oct. 19, 1984, 98 Stat. 2287.)

REFERENCES IN TEXT

This Act, referred to in subsec. (c)(2), probably means Pub. L. 95–591, Nov. 4, 1978, 92 Stat. 2523, known as the Presidential Records Act of 1978, which enacted this chapter, amended sections 2107 and 2108 of this title, and enacted provisions set out as notes under section 2201 of this title. For complete classification of this Act to the Code, see Short Title of 1978 Amendment note set out under section 101 of this title and Tables.

AMENDMENTS

1984—Subsec. (c)(1). Pub. L. 98–497 substituted ''National Archives and Records Administration'' for ''National Archives and Records Service of the General Services Administration''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–497 effective Apr. 1, 1985, see section 301 of Pub. L. 98–497, set out as a note under section 2102 of this title.

EXECUTIVE ORDER NO. 12667

Ex. Ord. No. 12667, Jan. 18, 1989, 54 F.R. 3403, which established 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 this chapter, was revoked by Ex. Ord. No. 13233, § 13, Nov. 1, 2001, 66 F.R. 56029, formerly set out below.

EXECUTIVE ORDER NO. 13233

Ex. Ord. No. 13233, Nov. 1, 2001, 66 F.R. 56025, which related to further implementation of the Presidential Records Act, was revoked by Ex. Ord. No. 13489, § 6, Jan. 21, 2009, 74 F.R. 4671, set out below.

EX. ORD. NO. 13489. PRESIDENTIAL RECORDS

Ex. Ord. No. 13489, Jan. 21, 2009, 74 F.R. 4669, provided:

By the authority vested in me as President by the Constitution and the 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 (NARA) 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, 44 U.S.C. 2201–2207.

(d) ''NARA regulations'' refers to the NARA regulations implementing the Presidential Records Act [of 1978], 36 C.F.R. Part 1270.

(e) ''Presidential records'' refers to those documentary materials maintained by NARA pursuant to the Presidential Records Act, including Vice Presidential records.

(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 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, using 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 for a time certain and with reason for the extension of time provided in the notice. If a shorter period of time is required under the circumstances set forth in section 1270.44 of the NARA regulations, the Archivist shall so indicate in the notice.

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 executive 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 notified promptly of any such determination.

(c) If 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 living 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 executive agencies as the Archivist 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. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

SEC. 6. *Revocation.* Executive Order 13233 of November 1, 2001, is revoked.

BARACK OBAMA.

§ 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 subpena 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 the 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.

(Added Pub. L. 95–591, § 2(a), Nov. 4, 1978, 92 Stat. 2527; amended Pub. L. 98–497, title I, § 107(b)(7), Oct. 19, 1984, 98 Stat. 2287.)

AMENDMENTS

1984—Par. (1). Pub. L. 98–497 substituted ''National Archives and Records Administration'' for ''National Archives and Records Service of the General Services Administration''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–497 effective Apr. 1, 1985, see section 301 of Pub. L. 98–497, set out as a note under section 2102 of this title.

§ 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.

(Added Pub. L. 95–591, § 2(a), Nov. 4, 1978, 92 Stat. 2527.)

§ 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.

(Added Pub. L. 95–591, § 2(a), Nov. 4, 1978, 92 Stat. 2527.)

CHAPTER 23—NATIONAL ARCHIVES TRUST FUND BOARD

AMENDMENTS

1984—Pub. L. 98–497, title II, § 202(c), Oct. 19, 1984, 98 Stat. 2294, amended item 2302 generally.

§ 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.

(Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1292; Pub. L. 94–391, Aug. 19, 1976, 90 Stat. 1192; Pub. L. 95–379, Sept. 22, 1978, 92 Stat. 724; Pub. L. 98–497, title I, § 107(b)(8), Oct. 19, 1984, 98 Stat. 2287.)

HISTORICAL AND REVISION NOTES

Based on 44 U.S. Code, 1964 ed., §§ 300bb, 391 (part) (July 9, 1941, ch. 284, § 2, 55 Stat. 581; Aug. 2, 1946, ch. 753, title I, §§ 102, 121, 60 Stat. 814, 822; June 30, 1949, ch. 288, title I, § 104, 63 Stat. 381).

This section incorporates only the last sentence of paragraph (b) of former section 391. The balance of that section will be found in sections 1506, 2102, 2501, and 2902 of the revision.

AMENDMENTS

1984—Pub. L. 98–497 struck out ''The authority of the Administrator of General Services under section 754 of title 40 to regroup, transfer, and distribute functions within the General Services Administration does not extend to the Board or its functions.''

1978—Pub. L. 95–379 substituted references to the Secretary of the Treasury and the Chairman of the National Endowment for the Humanities, for references to the chairman of the House Committee on Government Operations and the Senate Committee on Post Office and Civil Service.

1976—Pub. L. 94–391 substituted reference to House Committee on Government Operations for reference to House Committee on Post Office and Civil Service.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–497 effective Apr. 1, 1985, see section 301 of Pub. L. 98–497, set out as a note under section 2102 of this title.

§ 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;

[1] Section catchline amended by Pub. L. 98–497 without corresponding amendment of analysis.

serial or record sets of agency publications and processed documents, including annual reports, brochures, pamphlets, books, handbooks, posters and maps.)

§ 1222.16 How are nonrecord materials managed?

(a) Agencies must develop recordkeeping requirements to distinguish records from nonrecord materials.

(b) The following guidelines should be used in managing nonrecord materials:

(1) If a clear determination cannot be made, the materials should be treated as records. Agencies may consult with NARA for guidance.

(2) Nonrecord materials must be physically segregated from records or, for electronic non-record materials, readily identified and segregable from records;

(3) Nonrecord materials should be purged when no longer needed for reference. NARA's approval is not required to destroy such materials.

§ 1222.18 Under what conditions may nonrecord materials be removed from Government agencies?

(a) Nonrecord materials, including extra copies of unclassified or formally declassified agency records kept only for convenience of reference, may be removed by departing employees from Government agency custody only with the approval of the head of the agency or the individual(s) authorized to act for the agency on records issues.

(b) National security classified information may not be removed from Government custody, except for a removal of custody taken in accordance with the requirements of the National Industrial Security Program established under Executive Order 12829, as amended, or a successor Order.

(c) Information which is restricted from release under the Privacy Act of 1974 (5 U.S.C. 552a), as amended, or other statutes may not be removed from Government custody except as permitted under those statutes.

(d) This section does not apply to use of records and nonrecord materials in the course of conducting official agency business, including telework and authorized dissemination of information.

§ 1222.20 How are personal files defined and managed?

(a) Personal files are defined in § 1220.18 of this subchapter. This section does not apply to agencies and positions that are covered by the Presidential Records Act of 1978 (44 U.S.C. 2201–2207) (see 36 CFR part 1270 of this chapter).

(b) Personal files must be clearly designated as such and must be maintained separately from the office's official records.

(1) Information about private (nonagency) matters and agency business must not be mixed in outgoing agency documents, such as correspondence and messages.

(2) If information about private matters and agency business appears in a received document, the document is a Federal record. Agencies may make a copy of the document with the personal information deleted or redacted, and treat the copy as the Federal record.

(3) Materials labeled ''personal,'' ''confidential,'' or ''private,'' or similarly designated, and used in the transaction of public business, are Federal records. The use of a label such as ''personal'' does not affect the status of documentary materials in a Federal agency.

Subpart B—Agency Recordkeeping Requirements

§ 1222.22 What records are required to provide for adequate documentation of agency business?

To meet their obligation for adequate and proper documentation, agencies must prescribe the creation and maintenance of records that:

(a) Document the persons, places, things, or matters dealt with by the agency.

(b) Facilitate action by agency officials and their successors in office.

(c) Make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.

(d) Protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.

(e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.

(f) Document important board, committee, or staff meetings.

§ 1222.24 How do agencies establish recordkeeping requirements?

(a) Agencies must ensure that procedures, directives and other issuances; systems planning and development documentation; and other relevant records include recordkeeping requirements for records in all media, including those records created or received on electronic mail systems. Recordkeeping requirements must:

(1) Identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties;

(2) Specify the use of materials and recording techniques that ensure the preservation of records as long as they are needed by the Government;

(3) Specify the manner in which these materials must be maintained wherever held;

(4) Propose how long records must be maintained for agency business through the scheduling process in part 1225 of this subchapter;

(5) Distinguish records from nonrecord materials and comply with the provisions in Subchapter B concerning records scheduling and disposition;

(6) Include procedures to ensure that departing officials and employees do not remove Federal records from agency custody and remove nonrecord materials only in accordance with § 1222.18;

(7) Define the special recordkeeping responsibilities of program managers, information technology staff, systems administrators, and the general recordkeeping responsibilities of all agency employees.

(b) Agencies must provide the training described in § 1220.34(f) of this subchapter and inform all employees that they are responsible and accountable for keeping accurate and complete records of their activities.

§ 1222.26 What are the general recordkeeping requirements for agency programs?

To ensure the adequate and proper documentation of agency programs, each program must develop recordkeeping requirements that identify:

(a) The record series and systems that must be created and maintained to document program policies, procedures, functions, activities, and transactions;

(b) The office responsible for maintaining the record copies of those series and systems, and the applicable system administrator responsible for ensuring authenticity, protection, and ready retrieval of electronic records;

(c) Related records series and systems;

(d) The relationship between paper and electronic files in the same series; and

(e) Policies, procedures, and strategies for ensuring that records are retained long enough to meet programmatic, administrative, fiscal, legal, and historical needs as authorized in a NARA-approved disposition schedule.

§ 1222.28 What are the series level recordkeeping requirements?

To ensure that record series and systems adequately document agency policies, transactions, and activities, each program must develop recordkeeping requirements for records series and systems that include:

(a) Identification of information and documentation that must be included in the series and/or system;

(b) Arrangement of each series and the records within the series and/or system;

(c) Identification of the location of the records and the staff responsible for maintaining the records;

(d) Policies and procedures for maintaining the documentation of phone calls, meetings, instant messages, and electronic mail exchanges that include substantive information about agency policies and activities;

(e) Policies and procedures for identifying working files and for determining

CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, in accordance with Rule 29(d) and 32(a)(7) of the Federal Rules of Appellate Procedure, the foregoing amicus curiae brief contains 5,593 words, as determined by Microsoft Word 2007. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). The brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman, 14-point.

/s/ Gregory G. Katsas
Gregory G. Katsas

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send an electronic notification of such filing to all parties. I also hereby certify that I will have eight copies hand-delivered or sent via Federal Express overnight delivery to the Court within two business days.

/s/ Gregory G. Katsas
Gregory G. Katsas