



DOCUMENT EXPLOITATION

VIA E-MAIL

Margaret Hawkins
Director
Records Management Services
National Archives & Records Administration

October 26, 2014

RE: Proposed CIA Records Schedule N1-263-14-1

Dear Ms. Hawkins:

I write to comment on the proposed records schedule referenced above that would authorize the disposal of certain emails of the Central Intelligence Agency (CIA). For the reasons explained below, I submit that the Archivist of the United States should not approve the schedule. The central problem is that CIA's one-page "flexible" schedule is dangerously ambiguous and NARA must evaluate it in the context of a pattern of unauthorized CIA record destruction – including the infamous destruction of CIA interrogation tapes in 2005 – that has irretrievably damaged the historical record and undermined accountability. It is time for the Archivist finally to draw a line in the sand on the destruction of CIA records.

1. What email has CIA already destroyed?

The place to begin is the middle of the schedule where CIA parenthetically describes its view of the status quo. CIA states that its current policy "allows disposal of *temporary*, *transitory*, or *nonrecord* email requiring shorter retention in accordance with General Records Schedule [GRS] 23 Item 7 *and other relevant GRS or Agency Records Control Schedule citations*" (emphasis added). This statement raises two crucial issues that alone should give the Archivist pause.

First, NARA is well aware of CIA's repeated misuse of the term "nonrecord" and the Archivist must avoid any appearance of "approval" of CIA's misinterpretation. CIA destroyed the interrogation tapes, for example, based on its inexplicable assertion that

the tapes were not “records.”¹ Nearly 9 years after the destruction and almost 7 years after the public disclosure of the destruction, the CIA has still not substantively responded to NARA’s ongoing inquiry into this unlawful destruction pursuant to 36 CFR § 1230.14.² Moreover, as NARA found during its evaluation of CIA recordkeeping in 2000, for decades the CIA improperly treated *all* documents at its field sites as “nonrecords” that could be destroyed at CIA’s whim.³

Even more directly on point, the last time the Archivist of the United States approved a CIA schedule that expressly countenanced the destruction of “nonrecords” (N1-263-87-2) it led to widespread destruction of historically significant CIA Operational Activity Files. The NARA appraisal archivist at the time noted that CIA oddly wanted “nonrecords” to be “clearly identified as disposable in its schedule” even though the language was technically unnecessary.⁴ The full significance did not become apparent until 2001 when NARA finally reviewed the process whereby CIA was purportedly “screening” for such “nonrecords.” NARA discovered that CIA was destroying – as “nonrecords” – “policy, management, development, and planning documents, as well as other significant documentation of a substantive nature.” NARA concluded that the Operational Activity Files in fact contained “virtually no documentation that is non-record.” NARA concluded by stating that CIA’s Operational Activity Files “document some of the most important and sensitive activities of the U.S. Government and must be preserved intact.”⁵

¹ Michael Isikoff, *The CIA and the Archives*, NEWSWEEK, Dec. 20, 2007 (quoting CIA spokesman stating “The bottom line is that these videotapes were not federal records as defined by the Federal Records Act”), <http://www.newsweek.com/cia-and-archives-94445>.

² NARA opened its inquiry through a December 2007 letter to CIA. Letter from Paul M. Wester, NARA, to Joseph Lambert, CIA (Dec. 10, 2007), *available at* <http://www.dcofiles.com/1.pdf>. The last correspondence was a letter from CIA to NARA in 2010 in which CIA represented that it would finally respond to NARA substantively once the Department of Justice “released its report on the investigation into this matter.” Letter from Joseph W. Lambert, CIA, to Paul M. Wester, Jr., NARA (Dec. 7, 2010), *available at* <http://www.dcofiles.com/2010127.pdf>. The Department of Justice never released such a report.

³ See NAT’L ARCHIVES & RECORDS ADMIN., RECORDS MANAGEMENT IN THE CENTRAL INTELLIGENCE AGENCY 50 (2000), *available at* <http://fas.org/sgp/othergov/naracia.pdf> [hereinafter 2000 NARA Evaluation].

⁴ Memorandum from Michael L. Miller, Records Appraisal and Disposition Division, NARA, Job No. N1-263-87-2, at 2 (Aug. 22, 1989), *available at* <http://www.dcofiles.com/22.pdf>.

⁵ Letter from Michael J. Kurtz, Assistant Archivist for Records Services, NARA, to Edmund Cohen, Director, Office of Information Management, CIA (Feb. 8, 2001), *available at* <http://www.dcofiles.com/governmentattic/8.pdf>.

Even after this discovery, it took over five years (2001 to 2006) of CIA delay before a revised schedule for Operational Activity Files was put in place that did not include the “nonrecord” carve-out. At one point, NARA even threatened to withdraw its approval of the older schedule, but unfortunately did not do so. It strains credulity that CIA foot-dragging during this period was not connected to an intent to preserve the tenuous position taken by CIA lawyers that there was no legal obligation to retain the “nonrecord” interrogation tapes,⁶ which – according to CIA representations to a federal court – “were held in operational files.”⁷ Despite being kept in the dark about the tapes, NARA – to its credit – was adamant, mandating in 2003 that approving a new schedule that would make “all parts of all” CIA operational files permanent “was made at the highest levels of NARA and is not open to negotiation.”⁸ If such a schedule had been put in place at that time, as NARA demanded, the interrogation tapes might well exist today. CIA, however, continued to delay and only agreed to a new schedule in early 2006, “coincidentally” just months after the tapes had been destroyed.

The Archivist must not allow this history to repeat itself.

Second, CIA should identify exactly what other “relevant” GRS items or “Agency records control schedule citations” it is referencing that it believes currently allows CIA to destroy emails. The only specific citation is GRS 23, Item 7 which governs only an extremely limited class of e-mails that “have minimal or no documentary or evidential value.” Examples of such records noted in the GRS include “notices of holidays or charity and welfare fund appeals” or “routine notifications of meetings.”

Concern about CIA’s cryptic reference to other “relevant” schedules is far from speculative. As NARA is aware, during the late 1990s CIA attempted to justify extensive earlier destruction of records documenting the 1953 coup in Iran and other covert activities on the basis of improperly broad readings of GRS items. NARA found that CIA destruction of these covert action files was not authorized by any of the GRS or CIA schedules that CIA purported to rely upon, including generic GRS items that pertained only to “administrative management projects, not mission-related

⁶ See Douglas Cox, *New Details on the Destroyed CIA Tapes*, DOCUMENT EXPLOITATION, May 17, 2012, <http://www.docexblog.com/2012/05/new-details-on-destroyed-cia-tapes.html>.

⁷ CIA’s Memorandum of Law in Opposition to Plaintiff’s Motion for Contempt and Sanctions, *ACLU v. Dep’t of Justice* (S.D.N.Y., Jan. 10, 2008) (No. 04-4151), at 1, *available at* <https://www.aclu.org/sites/default/files/torturefoia/legaldocuments/Opposition011008.pdf>.

⁸ Letter from Michael J. Kurtz, NARA, to CIA (Apr. 17, 2003), at Bates 1016, *available at* <http://www.dcofiles.com/20030417.pdf>.

activities.”⁹ CIA simply refused, however, to accept NARA’s conclusion that there had been an unlawful destruction of federal records.

Further, CIA’s suggestion that unidentified GRS items or CIA schedules might currently apply to CIA email, raises the possibility that CIA has improperly applied records schedules that cover only paper material to destroy electronic material. For nearly a decade following NARA’s 2000 evaluation of CIA recordkeeping, NARA repeatedly and consistently criticized CIA for failing to schedule its electronic records and continually advised that CIA could not apply schedules covering paper records to electronic records.¹⁰

2. What email has CIA preserved?

CIA’s improper interpretation of the terms “record” and “nonrecord” also impacts CIA’s other parenthetical statement on which its justification for the proposed schedule principally relies – that “Agency policy requires users to retain email that meet the definition of a record requiring longer retention in an approved recordkeeping system.” The appraisal relies heavily on this assertion – emails covered by the schedule do not need to be retained, the appraisal concludes, because they are “[c]aptured elsewhere in permanent records” given that it is purportedly “deeply embedded in Agency culture . . . to file email in appropriate files, corresponding to record schedule items, per Agency policy.” Such statements do not survive scrutiny.

The appraisal notes, for example, that *current* CIA email policy is “print and file.” Is NARA aware of *any* agency in which “print and file” is legitimately “embedded in Agency culture”? As NARA’s most recent guidance on email (from September 2014) warns “[c]ontinued use of the ‘print and file’ method of managing email puts agencies at risk of losing records, not having them available for business needs, and allegations of unauthorized destruction.” The appraisal suggests that going forward CIA will utilize new procedures for filing emails. If this involves electronic filing, it may well be an improvement, but the appraisal makes clear the procedures are new and cannot be viewed historically as “embedded in Agency culture.”

Moreover, CIA’s blanket assurances – supposedly based on its own “extensive analysis” – that CIA employees have all along been (a) properly identifying what emails are records and (b) meticulously preserving those emails in recordkeeping systems is

⁹ Letter from Michael J. Kurtz, NARA, to Edmund Cohen, CIA (June 22, 1998), *available at* <http://www.dcofiles.com/19980722.pdf>.

¹⁰ See, e.g., Letter from Michael J. Kurtz, NARA, to CIA (Apr. 17, 2003), at Bates 1019, *available at* <http://www.dcofiles.com/20030417.pdf> (“As NARA has noted in the evaluation report, subsequent meetings, and earlier responses, CIA’s approved schedules, which were largely approved for paper records only, may not be applied to analogous electronic records.”) (emphasis in original).

directly undermined by NARA's own factual findings. During its review of CIA's recordkeeping, for example, NARA found a widespread "tendency" among CIA personnel to "inappropriately regard their files as non-record working papers or 'soft' files that could be destroyed at will."¹¹ Indeed, specifically in relation to CIA email, CIA staff openly "expressed concern" to NARA "over the lack of formal guidance on such issues as determining the record status of individual messages and when and how information in an e-mail system should be deleted."¹² NARA required CIA to undertake remedial steps to "[e]nsure that employees . . . are aware of requirements in federal law and regulation to document and maintain in appropriate files all important policy and decision making actions, including those discussed via electronic mail (e-mail)."¹³

Even based on publicly available information, therefore, any suggestion that the proper filing of email is "deeply embedded" in CIA culture is highly suspect and, in any event, cannot be a justification for the destruction of email that may, according to the appraisal, date back as far as 1990.

Finally, the extent to which CIA has properly preserved its unscheduled email up to the present and the extent to which these records are really unnecessarily duplicative of copies properly preserved in recordkeeping systems does not have to be left to speculation or trust. NARA could undertake – and a reasonable reading of the law may *require* it to undertake – an independent assessment of CIA's assertions and the value of the records CIA is proposing to destroy through, at the very least, sampling of these emails. If history is any guide, CIA will either actively resist or passive-aggressively delay for years any such independent NARA assessment, which should itself give the Archivist cause to question whether CIA is acting in good faith.

3. Operative Language in CIA's Schedule is a Dog's Breakfast

Moving to what ought be the focus of the schedule, CIA's proposed retention language is helplessly ambiguous and should not be acceptable to the Archivist.

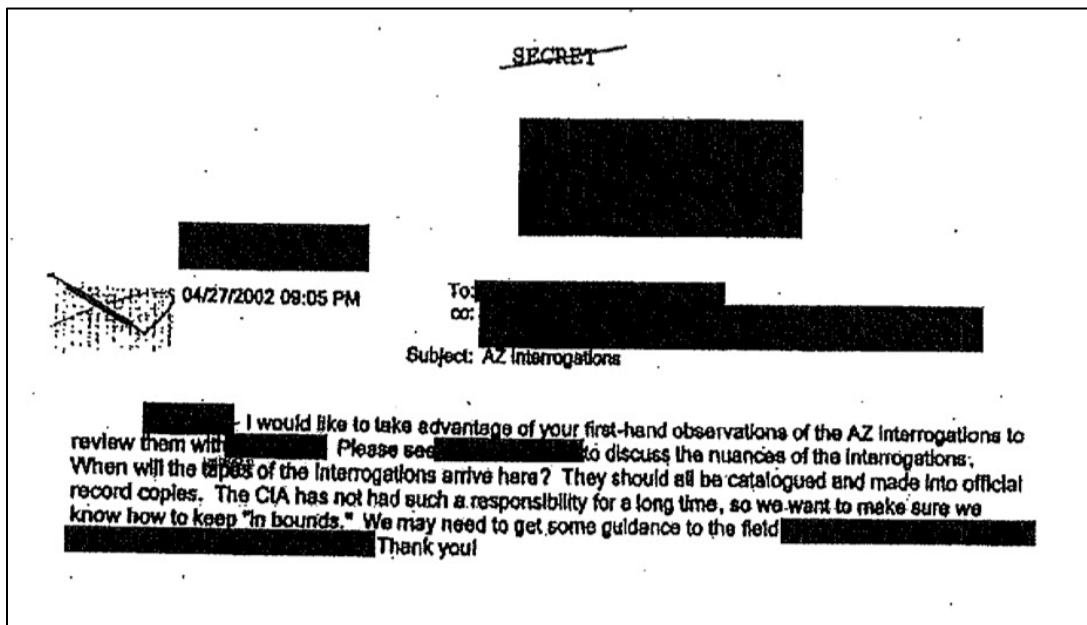
First, CIA's description of "Non-Senior Email" begins oddly with the phrase "*Record* copies of emails . . ." (emphasis added). As NARA is aware, CIA has often taken the position that there is one "official" "record" copy of a document (despite its inconsistency with federal regulations that multiple copies of the same document can all constitute records). Take a look, for example, at this CIA email from April 2002 in which a CIA official said that the interrogation tapes should be "made into record

¹¹ 2000 NARA Evaluation, at 31.

¹² *Id.* at 46.

¹³ *Id.* at 17.

copies” as though a special procedure were necessary in order to transform the tapes into records, which is, of course, not how the law works.



The concern, therefore, is that defining Non-Senior Email as “Record copies of email” could be interpreted by CIA employees as covering *the* “official” “record” copies of these emails (based on CIA’s misuse of these terms) that are filed within an otherwise permanent recordkeeping system. Clearly the NARA appraiser does not interpret the schedule in this way, but the appraisal is not formally part of the SF115 schedule. The episode described above of CIA applying “nonrecord” in an approved schedule in a manner NARA did not intend, as well as the discovery a few years ago that the Securities and Exchange Commission was destroying investigation files based on a misreading of an approved schedule¹⁴ are compelling illustrations that records schedules must avoid ambiguity at all costs in order to prevent either intentional or inadvertent misinterpretation and improper destruction.

Second, the schedule further describes “Non-Senior Email” as “email created, sent, or received by all Agency personnel (including staff and contractors) who are not in senior leadership positions as defined below*. . .”. The asterisk, however, is a non-sequitur as it does not lead to a simple list of excluded senior positions, but to a statement that the schedule excludes “records” that “document the formation of significant policies, decisions, or actions of” certain senior leadership positions. Is this additional language extraneous to the list of senior officials or does this mean that emails from non-senior employees are nevertheless not “Non-Senior Email” subject to the schedule if those emails “document the formation of significant policies . . .”? The schedule is unclear.

¹⁴ SECURITIES & EXCHANGE COMM., REPORT OF INVESTIGATION, CASE NO. OIG-567, *available at* <http://www.sec.gov/foia/docs/oig-567.pdf>.

This description of Non-Senior Email also does not make clear whether it only covers the sent email in the outbox of the non-senior employee or whether it would also encompass a received copy of that email in the inbox of one of the senior officials listed (given that it is still email *sent by* a non-senior employee). The description could be read either way.

Finally, after designating Non-Senior Email “temporary,” the operative retention language states, “After separation of staff employee, contractor, or other category of personnel, destroy at 3 years or when no longer needed, whichever is sooner.” The wording of this awkward sentence creates a serious risk of misinterpretation as its intended meaning lacks clarity. Options include:

(1) Non-Senior Email must be retained until the separation of the individual employee (which according to the appraisal averages 22 years) and then – after that period – they are retained for an additional 3 years or less than an additional 3 years if it is determined they are no longer needed. This reading seems to make the most sense grammatically as the “After separation” phrase appears to modify both the “destroy at 3 years” phase and the “when no longer needed” phrase; or

(2) Non-Senior Email *may* be retained until the separation of the individual employee and up to 3 years afterward or it can be destroyed before separation or even before 3 years, if it is no longer needed; or

(3) Non-Senior Email *may* be destroyed either (a) at separation, (b) at 3 years, or (c) when no longer needed.

The ambiguous language is compounded by the difficulty of understanding what CIA is trying to accomplish. The appraisal notes, for example, that CIA employees generally want to be *able* to maintain access to their email for the duration of their employment, which would suggest at least a *permissive* reading of the retention period (*i.e.*, an employee *may* retain such email for duration of employment), such as in options (2) and (3) above, but the most grammatical reading would be that the “After separation” phrase defines a *mandatory* retention period (*i.e.*, employees *must* retain all covered email for the duration of employment) as in option (1).

Trying to comprehend the proposed schedule – which thus may require some employees to retain significant quantities of email for an average of 22 years – is made even more difficult by the fact that CIA simultaneously wants the flexibility to destroy other emails that are records before they are even 3 years old, which required special permission from the Government Accountability Office pursuant to 36 CFR § 1225.20. The appraisal assumes this would only apply to “extreme outliers” who are employed for less than 3 years. The accuracy of that depends, in part however, upon which interpretation of the ambiguous retention language is applied.

Moreover, consider the reality that shorter-term CIA employees and temporary CIA contractors have included some of the most central figures in the torture program – such as Bruce Jessen and James Mitchell¹⁵ – and in possible Constitutional and criminal violations against the U.S. Congress – such as CIA contractors removing documents from computers used by the Senate Select Intelligence Committee.¹⁶ Indeed, had it been in place earlier, the schedule on its face would have provided for the prompt destruction of emails of a short-term, non-senior CIA employee named Edward Snowden. The long-term value of employee or contractor emails clearly is not tied to the length of their employment with CIA.

For all the foregoing reasons, I submit that the Archivist of the United States should not approve this schedule. There is too much at stake. I am certain the CIA has the ability to draft a records schedule that is clear and unambiguous without endangering national security or “sources and methods.” If and when CIA does so, NARA should evaluate it vigorously, being mindful of CIA’s past course of conduct.

Thank you for your time and consideration.

Sincerely,

/s/ Douglas Cox

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¹⁵ See generally S. COMM. ON ARMED SERVICES, INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Comm. Print 2008).

¹⁶ *Statement of Sen. Dianne Feinstein on Intel Committee’s CIA Detention, Interrogation Report*, Mar. 11, 2014, <http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report>.