
Archives Law and Machine-readable Data Files: A Look at the United States

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Introduction

In the strict sense of the word, archivists have responsibility for the official records of an organization, in contrast with manuscript curators who collect private documents accumulated by an individual person, or librarians who manage publications. The organizational records which the archivist is to manage may include a variety of materials, including machine-readable data

files. How these corporate records — regardless of media — are created, maintained, preserved and accessed is specified in the organization's official policy statements. Such policies will generally specify who in the organization has responsibility for each of these activities relating to the organization's official records. When the organization is a government entity, these policies are embodied in the laws or statutes of the government. Such laws are of obvious importance to government employees concerned with records since the statutes specify the basis for the activities relating to records by each agency and its personnel. Individuals wanting information from a government agency should also be aware of these laws because they have direct impact on the accessibility of the information. This paper will review the provisions of the laws relating to archives in the United States, relate them to machine-readable data files in the Federal Government, and then will use the records of the Bureau of the Census to illustrate the legislatively mandated approaches.

Within the United States, the Federal Government primarily controls the creation and disposition of record material through the Federal Records Act of 1950 as amended. This statute defines records as:

- all books, papers, maps, photographs, machine readable materials, or other documentary materials, 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 of data in them. [44 U.S.C. 3301]

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One should note that the definition of the records in this statute specifically includes "machine-readable materials."

The Federal Records Act also includes a provision that states:

- The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities. [44 U.S.C. 3101]

It is this provision that grants to the head of each agency the authority to determine what records the agency will create. Thus it is the Federal agency that determines what machine-readable information will be collected and processed.

Once an agency has created machine-readable records, they cannot be destroyed without the approval of the Archivist of the United States. If the Archivist determines that the machine-readable record has archival value and should not be destroyed, then disposition of the data involves their transfer to the National Archives for continued preservation.

When will the data be transferred? The timing of the transfer may best be described as a date negotiated between the agency and the Archives. For all records regardless of media, the Archivist:

- may 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 certifies 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. [44 U.S.C. 2107]

Because of the fragile nature of machine-readable records, a special provision for information on this medium has been added to the regulations which all Federal agencies must follow:

- When the National Archives and Records Service [Administration] has determined that a file is worthy of preservation, the agency should transfer the file to the National Archives as soon as it becomes inactive or whenever the agency can not provide proper care and handling of the tapes to guarantee the preservation of the information they contain. [41 C.F.R. 101-11.411-6]

In addition, the National Archives has the authority to establish the procedures which constitute proper care and handling. [41 C.F.R. 101-36.12]

Access by the public is governed by the Freedom of Information Act, the Federal Records Act, and individual statutes governing specific programs or data collection activities. The Freedom of Information Act generally provides that any person has the right of access, enforceable in court, to Federal agency records except to the extent that such records (or parts of those records) are protected from disclosure by any one of nine exemptions. This statutory guarantee to access Federal information applies equally to all record material — whether in the custody of the creating agency or in the National Archives. Thus the act of transferring the information to the National Archives neither expands or limits the right to access the information. The limitations on access stem not

from the physical location of the material but from the nine exemptions. One of these nine exemptions is "all matters specifically exempted from disclosure by statute." [5 U.S.C. 552] According to the Federal Records Act, all statutory limitations and restrictions on the examination and use of the records while in agency custody are transferred with the records when they go to the National Archives. Again the physical custody of the records does not affect any restrictions on access. These statutory restrictions:

- 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.[44 U.S.C. 2108]

Thus the statutory restrictions acknowledged in the Freedom of Information Act expire after thirty years unless extended by the Archivist of the United States in consultation with the agency.

The machine-readable records of the Bureau of the Census can serve as an illustration of the management of Federal records even though a specific provision of the Federal Records Act governs access to some records in the Census Bureau. First the Census Bureau determines what material it will collect as part of its census and survey activities. In making its determination of what information to collect and how, the Census Bureau actively seeks advice from a variety of sources including other Federal agencies. The National Archives does not offer advice to the Census Bureau on what questions should be asked or on how the censuses and surveys should be conducted. The National Archives does have the statutory

responsibility to "provide guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government". [44 U.S.C. 2904] With regard to the Census Bureau, the National Archives would interpret this provision as authorizing the National Archives to provide advice on how to document how the census or survey collected the information. It would not include advice on what information the census or survey should collect. However, if the Census Bureau determines that it will collect information which the National Archives determines to have archival value, then the Archives will advise the Census Bureau on how to process and maintain the information to ensure that the information is retained in a format that can be transferred to the National Archives.

Title 13 of the United States Code is the legislation which authorizes the Census Bureau to collect and process its data and imposes three restrictions on the information gathered by the Census Bureau. The Census Bureau may not:

- use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
- make any publication whereby the data furnished by any particular establishment or individual under this title can be identified;
- permit anyone other than sworn officers and employees of the Department [of Commerce] or bureau or agency thereof to examine the individual reports. [13 U.S.C. 9]

To comply with these limitations and yet to provide users with needed data, the Census Bureau creates public use files, either extracts or microaggregations. In this way, the Census Bureau can release information which will not

identify a respondent — whether an individual person or economic establishment. The National Archives has the responsibility for determining which information has archival value and which information may be destroyed when no longer needed by the agency. This determination is what the archivist refers to as "appraisal." Such appraisal of machine-readable information is done separately for microdata files with individually identifiable records, for public use extracts, and for microaggregations. The Federal Records Act would normally limit Title 13's restriction on the release of individual information to thirty years unless extended by the Archivist. However a provision in the Federal Records Act stipulates that:

- [w]ith 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... [44 U.S.C. 2108]

The key to this agreement is that:

- [a]fter the lapse of seventy-two years from the enumeration date of a decennial census, the National Archives and Records Service [Administration] may disclose information contained in these records for use in legitimate historical, genealogical or other worthwhile research. [H.R. Report 95-1522, August 21, 1978]

The statute that makes reference to this exchange of correspondence also grants the two agencies the authority to amend the agreement, provided that they publicize the change in the

Federal Register.

The statutory clause which makes reference to the exchange of letters specifies "census and survey records of the Bureau of the Census containing data identifying individuals enumerated in population censuses". Thus, this statute and the seventy-five year provision apply only to demographic information dealing with individual persons. They do not apply to the economic censuses and surveys which gather information from business establishments.

What laws do apply to identifiable information on business establishments? Under the authority of the Federal Records Act, the Archivist has appraised most of the microdata from the economic censuses and surveys as having sufficient value, primarily for economic time series studies, to warrant continued preservation in the National Archives. However, Title 13 restricts access to this information to Census Bureau employees only. As discussed earlier, the Federal Records Act limits statutory restrictions to thirty years unless extended by the Archivist of the United States. This statute also empowers the Archivist of the United States to direct and effect the transfer of any of these records which not used in the regular, current business of the Census Bureau.

Since such old economic information is not needed in the regular current business of the Bureau of the Census, the agency has agreed to transfer the information to the National Archives when the information is thirty years old. The mere transfer of material to the National Archives for continued preservation does not necessarily mean that the information is available to the public; the National Archives routinely accessions material to which access is denied for a period of time. Of course, any such restriction on access must be sanctioned by one of the exemptions of the Freedom of Information Act. A statutory restriction can be extended beyond thirty years by the Archivist in consultation with the agency "for reasons

consistent with standards established in relevant statutory law." Because of the permissiveness of this authority, Census and Archives personnel have from time to time discussed when the National Archives would be able to release Census-gathered machine-readable information concerning individual economic entities. To date, however, no agreement has been reached.

This review can allow one to draw some conclusions about records administration within the United States government. The legal provisions which relate to records and archives are "media non-specific" in that the statutes relate to all record material regardless of medium. However, as seen in the 1952 agreement regarding Census material, these policies and responsibilities generally have been developed to deal with human-readable records and have later been applied to all record material. The statutes divided responsibility for the administration of the record material. But in this division of responsibility, the Archivist has significant powers which have an impact on access to the information. The first of these powers is the exclusive authority to sanction the destruction of record material. Obviously, the destruction of a

document or a machine-readable data file effectively limits access to it. The Archivist has the authority to direct the transfer of non-current material to his custody after the records are thirty years old. Finally, the Archivist has primary responsibility to determine whether statutory restrictions will be extended past the thirty-year statutory limit. While only having a minimal impact on current or contemporary records, these latter powers can be decisive in determining access to older information. Yet, because of this division of authority, disagreements are possible among those sharing records management responsibilities. Until these differences are resolved, open questions — such as the ones about access to microdata from the economic census — will remain.■