Statement
Of
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Information Policy, Census, and National Archives Subcommittee
Oversight and Government Reform Committee
On
The "Electronic Communications Preservation Act,"
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2154 Rayburn HOB
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Thank you, Chairman Clay, Mr. Turner, and Members of the Subcommittee, for the opportunity to speak today on the proposed legislation that would require the Executive Branch to make concrete and documented progress toward the preservation of electronic records, including e-mail.

My name is Patrice McDermott. I am the Director of OpenTheGovernment.org, a coalition of consumer and good government groups, library associations, journalists, environmentalists, labor organizations and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

In 1982, the Committee on the Records of Government proclaimed that "the United States is in danger of losing its memory."[1] They were talking about paper records. Our memory is at much greater risk now. And, of course, this is not just the loss of our family photos, as it were, but of that information necessary for accountability. Across the federal government, we do not know with any certainty that all of the documents and information that we need to write our history, to understand policy development and implementation, to trace who knew what, read and edited what document, are being preserved.

Why is our memory in danger? Because the vast majority – if not all – of our documentary and information history is being created electronically but not necessarily well-managed and preserved electronically. Those of us outside government understand that the common policy is to only preserve the final policy document, for instance. That is important, but not sufficient. Some of us who have been around for more than a few years remember the days of carbon copies and complete paper files. In the government, the paper copies were annotated and initialed by those who saw and commented on them. It was not just the final version of the policy or memo that was filed away, but a documentary history of that policy's development.

This is the stuff of "what did you know and when did you know it"; it is the stuff of history and accountability. The various reasons given for not preserving it all are ones

1 Committee on the Records of the Government 1985:9, 86-87.

that we have heard before – the volume is too great; we don't have the resources to manage all this; it is not of importance to the leadership of our agency. Another reason is that Congress has been lax in holding agencies accountable and for ensuring that records management is seen as part of the mission-critical components of every department and agency. The loss of documents and information through indifference should be viewed with as much alarm as their loss through a system breach. The end result is the same except with indifference – or intentional failure to preserve – we will not necessarily know what has been taken from us and will not be able to restore our history to its previous status.

The National Archives and Records Administration (NARA) is supposed to be the leader in this area. The Federal Records Act gives NARA clear authority (44 USC 2904) including for promulgating standards, procedures, and guidelines, and conducting inspections or surveys of the records and the records management programs and practices within and between Federal agencies. As far back as 1996, NARA committed to working "with agencies on the design of recordkeeping systems for creating and maintaining records of value." While a procurement standard developed by the Department of Defense was accepted many years ago by NARA, very little progress has been made government-wide toward electronic records management systems. Records are stored on servers and, in some cases, on individual PCs, but they are not managed in the sense of being easily retrievable by subject or creator or, I would guess, disposition schedule. We repeatedly have to relearn the lesson, apparently, that servers and backup tapes are not appropriate records management systems.

A report, "*Record Chaos: The Deplorable State of Electronic Record Keeping in the Federal Government*," issued last week by Citizens for Responsibility and Ethics in Washington (http://www.citizensforethics.org/recordchaos), in which OpenTheGovernment.org offered some assistance, gives us a good indication of the state we are in with electronic records generally and electronic communications in particular. To determine federal agency compliance with electronic record keeping obligations, CREW used a combination of FOIA requests and internet-based research from federal agency websites to compile the written guidance and policies on electronic record keeping within the majority of larger, cabinet-level agencies. The intent was to assess the sufficiency of current electronic record keeping policies. The FOIA requests went to a variety of cabinet-level agencies seeking CREW also submitted FOIA requests to a handful of agencies on discrete topics to test the agencies= ability to locate and produce responsive email records. To ascertain actual agency practices, CREW and OpenTheGovernment.org prepared a non-scientific on-line survey on email record keeping practices and policies that was submitted to over 400 agency records managers. Eighty-seven partial or complete responses were received over a three-week period. Unless otherwise noted, statistics cited on this survey have at least 50 respondents for a particular question.

The report focuses on email records due to their ubiquitous nature in the federal government and in the modern office. A 1999 Department of Justice memo speculated that, in aggregate, federal agencies created at least 36.5 billion messages per year, a

number that most certainly has increased exponentially in nine years. More recently, a respondent to our online survey posited that about 90% of the business of the federal government was conducted by email. And while electronic records include a variety of records (e.g., spreadsheets, maps, pictures), the widespread usage of email records makes them a top priority for agency record keeping policies. A key finding for this hearing is that no agency looked at used an agency-wide electronic record keeping system. Previously published reports document that most agencies do not use electronic systems for any records management.

The survey confirmed what CREW's research into agency policy had shown, namely that the most popular method of email records management is to print email records and file them with paper records. It is important to note that this was an option made available to the agencies by NARA in its GRS 20. Survey results also pointed to the fact that some agencies seem to have multiple policies governing email records or no policy at all, something that the FOIA releases from agencies hinted at. Worse than multiple policies, is a lack of any method to manage email records. When asked how emails are preserved at their agency one person responded, Awe have not gotten to that phase of records management.@

Only six respondent to our survey said that their agency exclusively used some type of electronic system to manage its email records. Eighty-three percent of respondents (but only five individuals) who used an electronic system to manage their emails said that their system was searchable for email records. By contrast, of those using paper or some other system, 61% found it difficult to impossible to search for and find specific email records. This is, of course, the sort of difficulty over which NARA was sued[2] when GRS 20 was issued.

Significantly, the survey also exposed a potential legal pitfall in the apparent lack of concern for metadata. As was made clear in the case of Armstrong v. Executive Office of the President[3] -- which involved a challenge the government's plans to dispose of electronic mail and word processing records of Reagan, Bush and Clinton White House officials at the end of each administration -- metadata must be retained with its associated email records. Metadata includes the names of senders and recipients including those carbon copied (cc'd), date of e-mail transmission, and, if requested time and date of receipt acknowledgment. Yet, in the survey fewer than 75% of respondents said that the most basic information, the time and date of the e-mail and full names of the sender and recipients, was saved. Other potentially important email data fared even worse: attachments to emails were retained only by 68% of respondents, while names of those cc'd on emails by only 56%.

Lack of compliance and lack of penalties for non-compliance emerged as major problems. One respondent commented, AI do know that less than 80% of the agency complies.@ Overall, 30% of respondents did not think their co-workers complied with email record policies; 34% were not aware of any monitoring of employee record

2 Public Citizen, et al v. Carlin 6 August 1999. 184 F.3d 900. 910-11 (D.C. Cir. 1999)
3 See Armstrong v, Executive Office of the President, 810 F.Supp. at 341.

keeping practices; and 56% said there was no penalty for non-compliance (at least on the agency level). This is an area where agencies and NARA can make quick and meaningful changes.

In general, our admittedly unscientific survey exposed a number of major problems.

- First, there is a lack of consistent policies, as evidenced by the fact that so many respondents use multiple techniques to preserve email records at their agencies.

- Second, movement towards electronic record systems has been unacceptably slow.

- Third, agencies are exposing themselves to legal problem and litigation sanctions, particularly in regard to the lack of care for metadata, if not corrected. Indeed, the failure of the federal government to adequately meet its electronic record keeping obligations has exposed it to potential liability in a host of other contexts. Inadequate electronic record keeping also means inadequate compliance with the FOIA and other information access statutes. Agencies= ability to meet their litigation obligations are seriously hampered by their inability to deal effectively with electronic records.

- Fourth, agencies lack training and compliance monitoring, two problems that would be easily cured by reforming agency policy and increased NARA involvement. Even knowledgeable agency employees lack a basic understanding of their record keeping obligations and how they can be satisfied. Written policies and guidelines within individual agencies are often inconsistent, confusing or outright misleading. This lack of understanding correlates directly to a lack of compliance with record keeping obligations.

The blame in terms of compliance falls most squarely on NARA, which, as I noted earlier, has a statutory obligation to promulgate standards, procedures, and guidelines, and conduct inspections or surveys of the records and the records management programs and practices within and between Federal agencies. NARA has elected, however, to limit its role to providing guidance only with little or no agency follow-through. Most significantly, NARA has abandoned its previous practice of conducting annual audits of agency compliance and proclaimed publicly that the responsibility rests first and last with individual federal agencies. At a symposium last fall, NARA was told by agency personnel that the failure to audit meant a failure of records management.

- Fifth, senior-level agency management needs to realize the serious problems with their agencies= electronic records management and take steps to correct them.

The legislation under discussion at this hearing is an important step in terms of announcing that Congress is going to pay attention to this serious issue, and of taking some beginning steps toward addressing the systemic problems with electronic records in

general and electronic communications records in particular. We appreciate this initiative.

I do not think, however, that this bill goes nearly as far as it needs to. I am focusing my remarks only on the Federal Records Act section of the bill, as I know others are addressing the Presidential Records Act portion. As I noted earlier, NARA has been talking since at least 1996 about to working "with agencies on the design of recordkeeping systems for creating and maintaining records of value." We know from the CREW report (and the GAO report to date) that in essence little has concretely occurred and, therefore, the agencies have done nothing. NARA and the agencies don't need another 18 months to "establish mandatory minimum functional requirements and a software certification testing process to certify electronic records management applications to be used by federal agencies;" NARA endorsed "*Design Criteria Standard for Electronic Records Management Software Applications, DoD 5015.2-STD"* in November **1998**.

Nor do the agencies need three more years – beyond the 18 months -- to comply with a requirement to implement the regulations and an electronic records management system. This is an issue that has been under discussion for more than 10 years. What are needed are some enforceable repercussions for failure to meet obligations under the Federal Records Act. I do not think anyone has ever been prosecuted for destroying, much less failing to preserve federal records. Records management is not a priority in agencies, as evidenced by our survey. Unless Congress makes it a priority, including through funding, we will likely be having this same discussion in years to come. Congress must make the agencies answerable and agencies must make employees answerable. Reporting is not going to be enough, although I do not have a specific remedy to offer today.

In a limited defense of the agencies and NARA, the volume of electronic communications conducted by government officials is growing exponentially. Not every electronic communication is worthy of permanent preservation. GRS 20 has given agencies permission to treat all e-mail according to a common schedule for disposition; the policy of print and destroy the electronic copy derives from it. The legislation needs to make explicit that "managing" electronic communications means developing records schedules for them according to office, etc. and getting the Archivist's approval of those schedules. The need for the scheduling electronic communications along with the records of offices and programs – record series – unfortunately highlights a separate issue with NARA's records management priorities. Again, starting at least in 1996, NARA began looking at "functional appraisal;" evaluating records for how well they document major agency *functions* rather than individual agency *offices*. More recently, they described this as focusing on "those records that are essential to the government as a whole for accountability, protection of rights, and documentation of the national experience." (Ready Access to Essential Evidence, 1997-2008, Revised 2003, p.14) Those records are, of course, essential but not sufficient to constitute the United States' memory or its policy and political history.

The partners in OpenTheGovernment.org look forward to opportunities to work on this bill and to ensure that strong legislation begins to move the Executive Branch forward on

this critical aspect of government management and accountability.

Thank you for the opportunity to speak to you on this important issue. I am happy to answer any questions you might have.