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INSIGHT

Electronic Records Management and U.S. Secret Service

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As part of its inquiry, the Select Committee to Investigate the January 6th Attack on the U.S. Capitol (Select Committee) issued subpoenas to the multiple federal agencies that responded on January 6, including the U.S. Secret Service (USSS). The USSS responded to the Select Committee's July 15, 2022, subpoena with an "initial production" of information on July 19. Upon receiving the USSS's response, the National Archives and Records Administration (NARA) announced that it was investigating a "potential unauthorized deletion" of USSS text messages. USSS's treatment of text messages has raised questions about how electronic records are handled by federal agencies, and how existing laws apply.

Congressional interest has arisen from many perspectives, including USSS's compliance with federal recordkeeping laws; whether agencies can apply existing statute and guidance to the management of text messages and other electronic formats; and the ability of Congress to conduct oversight into executive branch activities. This Insight provides a summary of how federal records are managed, including records in electronic formats, discusses improper disposal investigations, and concludes with considerations for Congress.

What Are Federal Records?

Since 2014, federal and presidential records have been defined not by the media used to store the information but rather by the content of the information itself. Federal records are defined as

> recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business … as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them.

Federal Records Management

The Federal Records Act governs the treatment of federal records produced by agencies, including USSS. The stated purpose of this law is that each federal agency head

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> 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 the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

NARA assesses records material for their preservation value and the length of time records must be retained through the records control schedule process. Not all records are considered appropriate for permanent preservation; most records are considered temporary records. Common records created across the government are determined by general records schedules. Some agencies, including USSS, also have specific records control schedules for their particular materials. NARA works with agency records officers to create these schedules. Both general and agency-specific records schedules contain information on how long the discussed records are to be preserved. Temporary records are regularly disposed of according to their records control schedule while permanent records are retained indefinitely.

In some cases, communications between agencies and certain components of the Executive Office of the President may be governed by the related Presidential Records Act. Unlike federal records, which may be considered temporary or permanent records depending on their content, all presidential records are considered permanent records.

Managing Electronic Messages

NARA Bulletin 2015-02 provides specific guidance on agency management of electronic messages, including text messages. NARA regulations also state that agencies must develop recordkeeping requirements that include policies and procedures for maintaining the documentation of phone calls, instant messages, and electronic mail exchanges. For USSS, the Under Secretary for Management via the Department of Homeland Security (DHS) Office of Administration is responsible for records management implementation. In its 2017 records management inspection, NARA noted deficiencies in DHS records management policies, including that they "have been in draft form for several years" and must be revised, approved, and issued. Although NARA closed its DHS inspection, in which USSS policies were considered as part of the larger DHS inspection, USSS has not been inspected separately in the past decade.

Federal employees are generally prohibited from creating or sending records via a "non-official electronic messaging account" unless the employee copies an official electronic messaging account when sending the message or forwards a copy of the record to an official electronic messaging account no later than 20 days after the original creation or transmission of the record. On July 13, the DHS Inspector General stated that many USSS text messages "were erased as part of a device-replacement program." To limit future loss of text message information, the USSS is reportedly exploring disabling the iMessage function on agency-issued iPhones; however, this may not address the use of text messages generally.

Improper Disposal Investigations

In the event of unlawful removal, defacing, or erasure of records, the Federal Records Act requires the Archivist to initiate action through the Attorney General for the recovery of the records. Furthermore

> In any case in which the head of a Federal agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action described in subsection (a), or is participating in, or believed to be participating in any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

Investigation of the unlawful removal or destruction of government and presidential records requires the joint cooperation of NARA and DOJ. The Archivist may not independently initiate action without the

Attorney General. People who remove or destroy federal records may be guilty of a crime. Criminal statutes, such as 18 U.S.C. §641, 18 U.S.C. §1519, and 18 U.S.C. §2071, may apply to cases of improper records disposal.

Issues for Congress

For Congress and the public to have a complete understanding of agency actions, it is important for agencies to identify and collect electronic messaging records as completely as possible. In practice, however, questions regarding the use of diverse electronic messaging platforms to document government activity may make a complete collection difficult. Regarding federal electronic message management, Congress may wish to consider

- Does current DHS and USSS guidance provide clarity around non-official electronic messaging accounts and procedures to forward materials?
- How frequently are electronic messages within agencies collected and assessed for preservation value?
- What training or procedures are in place to ensure electronic recordkeeping compliance at the individual level?

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