

May 6, 2019

David S. Ferriero
Archivist of the United States
700 Pennsylvania Avenue, N.W.
Washington, D.C. 20408

BY EMAIL: david.ferriero@nara.gov

Re: Request for Agency Guidance on Public Disclosure of Records Management Policies

Dear Mr. Ferriero:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that you issue guidance to all Executive Branch agencies directing them to proactively disclose, and make available to the public, any official policies, procedures, or directives designed to implement the requirements of the Federal Records Act (“FRA”). Lacking such guidance, agencies have taken inconsistent approaches, with some publicly disclosing FRA policies on their websites, others shielding them from public view absent a specific Freedom of Information Act (“FOIA”) request, and still others failing to disclose them even in the face of a FOIA request. As the FRA itself recognizes, the public has a substantial interest in an agency’s recordkeeping policies and practices, which have major implications for individuals affected by the government’s actions. Mandating public disclosure of such policies also helps to encourage government-wide FRA compliance. The Archivist should therefore issue clear guidance on this issue to all federal agencies.

The FRA requires agencies to “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.” 44 U.S.C. § 3101; *see also* 36 C.F.R. § 1222.22. The Act further requires agencies to “establish and maintain an active, continuing program for the economical and efficient management of the records of the agency,” which “shall provide for” compliance with the FRA’s recordkeeping requirements. 44 U.S.C. § 3102. These requirements help fulfill a key congressional goal of the FRA: ensuring “[a]ccurate and complete documentation of the policies and transactions of the Federal Government.” *Id.* § 2902(1).

As you know, the Archivist has significant authority to implement and ensure compliance with the FRA. That authority is outlined in 44 U.S.C. § 2904, which provides that the “Archivist shall provide guidance and assistance to Federal agencies with respect to ensuring—(1) economical and effective records management; (2) adequate and proper documentation of the policies and transactions of the Federal Government; and (3) proper records disposition.” *Id.* § 2904(a). In carrying out these duties, the Archivist “shall have the responsibility to,” among

other things, “promulgate standards, procedures, and guidelines with respect to records management,” and “direct the continuing attention of Federal agencies and the Congress on the need for adequate policies governing records management.” *Id.* § 2904(c)(1), (5). Exercising this authority, the Archivist has promulgated regulations instructing agencies to establish certain recordkeeping guidelines and directives, and to provide related training, designed to ensure agency-wide compliance with the FRA. *See* 36 C.F.R. § 1222.24.

The FRA also contemplates private enforcement. As the D.C. Circuit has long recognized, “the legislative history of the [FRA] supports a finding that Congress intended, expected, and positively desired private researchers and private parties whose rights may have been affected by government actions to have access to the documentary history of the federal government.” *Armstrong v. Bush*, 924 F.2d 282, 287-88 (D.C. Cir. 1991). Consistent with this congressional intent, private parties may seek judicial review of the adequacy of an agency’s “recordkeeping guidelines and directives.” *Id.* at 296.

Because the FRA imposes recordkeeping obligations designed to ensure documentation of an agency’s “essential transactions” and to “protect . . . persons directly affected by the agency’s activities,” 44 U.S.C. § 3101, and because the Act contemplates private enforcement of these obligations, the public has a substantial interest in agencies’ records management policies. Yet agencies do not consistently disclose those policies to the public. Although some agencies proactively make their FRA policies publicly available on their websites,¹ others do not, and instead require a FOIA request to obtain such policies.

CREW’s recent experience with the Department of Homeland Security (“DHS”) is illustrative. In October 2018, CREW emailed DHS to obtain its operative records management policies—policies that are of particularly strong public interest given the agency’s catastrophic recordkeeping failures relating to its family separation practices. *See* Attachment 1.² CREW explained that although DHS’s website includes a “records management directive” referencing a “publication” that purportedly outlines the agency’s records management policies and procedures, the publication itself is not posted on DHS’s website. *Id.* DHS responded that if the “policy is not available on the DHS.gov site, then [CREW] will need to file a FOIA request.” *Id.* DHS later added that the records management directive cited by CREW has actually “been superseded.” Attachment 2. CREW responded that (1) it had in fact submitted a FOIA request for DHS’s records management policies, to which DHS had not responded; and (2) such a request is not necessary in any event, because an agency’s records management policies and procedures are subject to the FOIA’s “proactive disclosure” provisions. *Id.* DHS did not respond to CREW’s email. And, to this day, DHS has not responded to CREW’s FOIA request.

An agency’s failure to proactively disclose its FRA policies is incompatible with the FRA’s statutory scheme, which, as noted, contemplates private oversight and enforcement. Such non-disclosure also violates FOIA. Under that statute’s “proactive disclosure” provisions,

¹ *See, e.g.*, EPA, <https://bit.ly/2GTTr3sf>; Dep’t of Energy, <https://bit.ly/2Y70zdZ>; Dep’t of Education, <https://bit.ly/2Wmba4e>.

² CREW has separately sued DHS over its recordkeeping failures relating to family separations. *See CREW v. DHS*, 18-cv-2473 (D.D.C.).

“[e]ach agency, in accordance with published rules, *shall make available for public inspection* in an electronic format . . . those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,” and “administrative staff manuals and instructions to staff that affect a member of the public.” 5 U.S.C. § 552(a)(2)(B), (C) (emphasis added). Because FRA policies are instructions to agency staff concerning the creation and management of records designed to, among other things, “[p]rotect the financial, legal, and other rights of . . . of persons directly affected by the Government’s actions,” and to “[d]ocument the persons . . . dealt with by the agency,” 36 C.F.R. § 1222.22(d), (a), they most certainly qualify as “administrative staff manuals and instructions to staff that affect a member of the public,” bringing those policies squarely within the scope of 5 U.S.C. § 552(a)(2). Accordingly, they are subject to mandatory disclosure.

Moreover, insofar as proactive disclosure of FRA policies would subject those policies to greater public scrutiny, it incentivizes agencies to develop and establish recordkeeping policies strictly in compliance with the FRA. It therefore furthers the Archivist’s core mission of promoting FRA compliance throughout the federal government.

Thus, pursuant to the Archivist’s statutory duty to “provide guidance and assistance to Federal agencies” concerning “effective records management,” 44 U.S.C. § 2904, we respectfully request that you issue clear guidance requiring all agencies to proactively make available to the public on a forward-going basis any official FRA policies, procedures, or directives.³

Sincerely,



Noah Bookbinder
Executive Director

Attachments:

1. Oct. 15, 2018 email exchange between T. Hudson (DHS) and N. Sus (CREW)
2. Oct. 19, 2018 email exchange between T. Hudson (DHS) and N. Sus (CREW)

³ CREW does not believe it is necessary to submit a formal petition for rulemaking on this issue, but it is prepared to do so if deemed necessary.

Attachment 1



Nikhel Sus <nsus@citizensforethics.org>

DHS records management policy publication?

Hudson, Tammy <tammy.hudson@hq.dhs.gov>
To: Nikhel Sus <nsus@citizensforethics.org>

Mon, Oct 15, 2018 at 10:54 AM

Good morning Nik,

If the policy is not available on the DHS.gov site, then you will need to file a FOIA request.
<https://www.dhs.gov/steps-file-foia>

Thank you,

Tammy Hudson

Records Officer, Department of Homeland Security

From: Nikhel Sus <nsus@citizensforethics.org>
Sent: Monday, October 15, 2018 9:58 AM
To: Hudson, Tammy <tammy.hudson@HQ.DHS.GOV>
Subject: DHS records management policy publication?

Good morning Ms. Hudson,

My name is Nikhel Sus and I am a counsel at CREW. I'm attempting to locate DHS's records management policy. It does not appear to be available on DHS's website.

Section 6 of DHS Records Management Directive 0550.1 says

"The **attached publication** establishes specific DHS policy and procedures for managing records effectively and efficiently throughout their life cycle. These procedures will help DHS successfully accomplish its mission, preserve official records in accordance with applicable statutory and regulatory requirements, and promote access to information by DHS staff and the public as appropriate." https://www.dhs.gov/sites/default/files/publications/mgmt_directive_0550_1_records_management_0.pdf

The "attached publication" is not in fact attached, nor can I find it online.

Are you able to provide the publication, or point me in the right direction? I would greatly appreciate it.

Thanks very much,

Nik

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Nikhel Sus

Staff Counsel, Complaints & Litigation

Citizens for Responsibility and Ethics in Washington (CREW)

202-408-5565

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Attachment 2



Nikhel Sus <nsus@citizensforethics.org>

DHS records management policy publication?

Nikhel Sus <nsus@citizensforethics.org>
To: "Hudson, Tammy" <tammy.hudson@hq.dhs.gov>

Fri, Oct 19, 2018 at 10:23 AM

Thanks for the response, Tammy. We did submit a FOIA request on October 12 for documents "reflecting currently operative policies, procedures, protocols, or directives concerning DHS's records management program"--see attached. But we do not believe such a request is necessary, because any publication reflecting DHS's operative policies and procedures for records management and compliance with the Federal Records Act is subject to FOIA's "proactive" disclosure provisions. See 5 U.S.C. § 552(a)(2)(B), (C) ("Each agency, in accordance with published rules, shall make available for public inspection in an electronic format . . . those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register," and "administrative staff manuals and instructions to staff that affect a member of the public"). In addition, you mentioned that Directive 0550.1 has been superseded--the document effecting that policy change (which does not appear to have been publicly announced) is likewise subject to FOIA's proactive disclosure requirements.

Indeed, other agencies routinely make their records management handbooks available online. For example:

- EPA, <https://www.epa.gov/sites/production/files/2018-09/documents/interim-records-mgmt-policy-20180822.pdf>
- Energy, https://www.energy.gov/sites/prod/files/2016/12/f34/Records%20Management%20Handbook_0.pdf
- Education, <https://ed.gov/policy/gen/leg/foia/acsom6103.pdf>
- OPM, <https://www.opm.gov/about-us/open-government/digital-government-strategy/fitara/records-management-handbook.pdf>

We are interested in obtaining these policies/procedures as soon as possible, and, as noted, believe DHS has an affirmative obligation to make them available to the public even without a FOIA request. Happy to discuss at your convenience.

Best,
Nik

On Mon, Oct 15, 2018 at 10:54 AM, Hudson, Tammy <tammy.hudson@hq.dhs.gov> wrote:

Sorry – I should have also mentioned that Directive 0550.1 has been superseded.

Tammy Hudson

Records Officer, Department of Homeland Security

From: Nikhel Sus <nsus@citizensforethics.org>
Sent: Monday, October 15, 2018 9:58 AM
To: Hudson, Tammy <tammy.hudson@HQ.DHS.GOV>
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2018.10.12 DHS FOIA 1.pdf

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