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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Part 1270

[FDMS No. NARA-16-0005; NARA-2017-042]

RIN 3095-AB87

Presidential Records

AGENCY: National Archives and Records Administration (NARA).

ACTION: Final rule.

SUMMARY: We are revising this regulation to reflect changes instituted by the Presidential and Federal Records Acts Amendments of 2014 (2014 Amendments). These Amendments in part added new requirements to the Presidential Records Act (PRA), which went into effect in 2014. The changes to this regulation make clear that, when we maintain electronic Presidential records on behalf of the President before the President's term of office expires, the President retains exclusive control over the records. In addition, the proposed changes establish procedures that we will follow to notify an incumbent President and former President when we propose to disclose Presidential records to the public, Congress, the courts, or the incumbent President under the provisions of the PRA allowing for access to Presidential records otherwise subject to restrictions. We began the regulatory revision process in response to the 2014 Amendments to reduce confusion about access to Presidential records in light of these recent changes in the law. We published a notice of proposed rulemaking in the *Federal Register* on December 28, 2016, with a public comment period ending on January 27, 2017. We received no comments.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: National Archives and Records Administration; Regulation Comments Desk, Suite 4100; 8601 Adelphi Road; College Park, MD 20746001.

FOR FURTHER INFORMATION CONTACT: Kimberly Keravuori, by email at regulation_comments@nara.gov, by telephone at 301-837-3151, or by mail at External Policy Program Manager; Strategy Division (MP), Suite 4100; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740-6001.

SUPPLEMENTARY INFORMATION:

BACKGROUND.

We are revising our regulations governing Presidential and Vice Presidential records to incorporate changes made by the Presidential and Federal Records Act Amendments of 2014, (“2014 Amendments,” Pub. L. 113-187, 128 Stat. 1017).

The 2014 Amendments made several changes to the Presidential Records Act (44 U.S.C. 2201-2209). The most substantial change was codifying the procedures by which we notify former and incumbent Presidents so that they may consider whether to restrict public access to Presidential records of former Presidents that are in our legal custody. Executive order previously controlled this review process, which was then subject to change by any sitting administration. Because Congress codified the privilege review for public disclosures in the 2014 Amendments, we are revising the regulation to set out processes for giving notice in such cases, and for former or incumbent Presidents to consider whether to assert a constitutionally based privilege.

The 2014 Amendments did not codify the provisions of the Executive Order allowing for notification to the former and incumbent President when Congress, the courts, or the incumbent President (instead of the public) makes the request for records subject to access restrictions. To ensure that the former and incumbent Presidents are given notice and an opportunity to consider whether to assert a constitutionally based privilege in those circumstances as well, we are revising our regulation to set out procedures we follow prior to disclosing records under the PRA's exceptions to restricted access, which are similar to the procedures we follow when we propose to make disclosures to the public.

The 2014 Amendments also authorized an incumbent President to transfer physical custody of their permanent electronic Presidential records to NARA, while leaving legal custody with the President, and some other minor changes. We are therefore also revising the regulation to reflect these changes.

We are also making a small revision to the regulation to be consistent with 2016 amendments to the Freedom of Information Act, and are revising the wording and organization of the regulation to make it easier to follow, in compliance with provisions of the Plain Writing Act of 2010.

REGULATORY ANALYSIS.

Review under Executive Orders 12866 and 13563

Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (September 30, 1993), and Executive Order 13563, Improving Regulation and Regulation Review, 76 FR 23821 (January 18, 2011), direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). This rule is “significant” under section 3(f) of Executive Order

12866. It involves revisions to existing regulations to bring them in line with statutory changes, and affects only individuals or Government entities and access to Presidential or Vice Presidential records. The Office of Management and Budget (OMB) has reviewed this regulation.

Review under Executive Order 13771

This action is exempt from Executive Order 13771, 82 FR 9339 (February 3, 2017) because it is a regulation issued with respect to agency organization and management.

Review under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*)

Although this rule is not subject to the Regulatory Flexibility Act, see 5 U.S.C. 553(a)(2), 601(2), NARA has considered whether this rule, if promulgated, would have a significant economic impact on a substantial number of small entities (5 U.S.C. 603). NARA certifies, after review and analysis, that this rule will not have a significant adverse economic impact on a substantial number of small entities because it affects only individuals or Government entities and access to Presidential or Vice Presidential records.

Review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*)

This rule does not contain any information collection requirements subject to the Paperwork Reduction Act.

Review under Executive Order 13132, Federalism, 64 FR 43255 (August 4, 1999)

Review under Executive Order 13132 requires that agencies review regulations for Federalism effects on the institutional interest of states and local governments, and, if the effects are sufficiently substantial, prepare a Federal assessment to assist senior policy makers. This rule will not have any direct effects on State and local governments within the meaning of the Executive Order. Therefore, the regulation requires no Federalism assessment.

List of Subjects in 36 CFR Part 1270

Archives and records, Government in the Sunshine Act, Open government, Presidential records.

For the reasons stated in the preamble, NARA revises 36 CFR part 1270 to read as follows:

PART 1270—PRESIDENTIAL RECORDS

Subpart A—General Provisions

Sec.

- 1270.1 Scope of part.
- 1270.2 Application.
- 1270.4 Definitions.

Subpart B—Custody and Control of Presidential Records

- 1270.20 Presidential records in the physical custody of the Archivist.
- 1270.22 Designating a representative to act for a President.
- 1270.24 When the Archivist may act for a President.

Subpart C—Disposing of Presidential Records

- 1270.30 Disposing of Presidential records by an incumbent President.
- 1270.32 Disposing of Presidential records in the Archivist's custody.

Subpart D—Accessing Presidential Records

- 1270.38 Public access to Presidential records.
- 1270.40 Restricting access to Presidential records.
- 1270.42 Appealing restricted access.
- 1270.44 Exceptions to restricted access.
- 1270.46 Notice of intent to disclose Presidential records to the public.
- 1270.48 Releasing records to the public and claiming privilege against disclosure.
- 1270.50 Consulting with law enforcement agencies.

Authority: 44 U.S.C. 2201--2209.

Subpart A—General Provisions

§ 1270.1 Scope of part.

This part implements the provisions of the Presidential Records Act of 1978, as amended, 44 U.S.C. 2201--2209, and establishes requirements for preserving, protecting, disposing of, and providing access to all Presidential and Vice-Presidential records created during a Presidential or Vice Presidential term of office beginning on or after January 20, 1981.

§ 1270.2 Application.

This part, except §§ 1270.46 and 1270.48, applies to Vice-Presidential records in the same manner as to Presidential records. The Vice President's duties and responsibilities, with respect to Vice-Presidential records, are the same as the President's duties and responsibilities with respect to Presidential records, except those in §§ 1270.46 and 1270.48. The Archivist's authority with respect to Vice-Presidential records is the same as the Archivist's authority with respect to Presidential records, except that the Archivist may enter into an agreement with a non-Federal archival repository to deposit Vice-Presidential records, if the Archivist determines it to be in the public interest.

§ 1270.4 Definitions.

For the purposes of this part—

Agency has the meaning given by 5 U.S.C. 551(1)(A)--(D) and 552(f).

Archivist means the Archivist of the United States or staff of the National Archives and Records Administration acting on behalf of the Archivist.

Presidential records has the meaning given by 44 U.S.C. 2201(2).

Subpart B—Custody and Control of Presidential Records

§ 1270.20 Presidential records in the physical custody of the Archivist.

During a President's term of office, the President may request that the Archivist maintain physical custody of Presidential records, including digital or electronic records. However, the President remains exclusively responsible for control and access to their records until their term of office concludes. During the President's terms of office, the Archivist does not disclose any of these records, except under the President's direction, until the President's term of office concludes. If a President serves consecutive terms, the Archivist does not disclose records without the President's direction until the end of the last term, or the end of another period if specified in 44 U.S.C. 2204 and subpart E of this part.

§ 1270.22 Designating a representative to act for a President.

(a) Title 44 U.S.C. chapter 22 grants the President certain discretion and authority over Presidential records. An incumbent or former President may designate one or more representatives to exercise this discretion and authority, including in the event of the President's death or disability.

(b) The designation under paragraph (a) of this section is effective only if the Archivist receives written notice of it, including the names of the representatives, before the President dies or is disabled.

§ 1270.24 When the Archivist may act for a President.

If a President specifies restrictions on access to Presidential records under 44 U.S.C. 2204(a), but has not made a designation under § 1270.22 at the time of their death or disability, the Archivist exercises the President's discretion or authority under 44 U.S.C. 2204, except as limited by 44 U.S.C. 2208 and § 1270.48.

Subpart C—Disposing of Presidential Records

§ 1270.30 Disposing of Presidential records by an incumbent President.

An incumbent President may dispose of any Presidential records of their administration that, in the President's opinion, lack administrative, historical, informational, or evidentiary value, if the President obtains the Archivist's written views about the proposed disposal and either—

(a) Those views state that the Archivist does not intend to request Congress's advice on the matter because the Archivist either does not consider the records proposed for disposal to be of special interest to Congress or does not consider it to be in the public interest to consult with Congress about the proposed disposal; or

(b)(1) Those views state that the Archivist considers either that the records proposed for disposal may be of special interest to Congress or that consulting with Congress about the proposed disposal is in the public interest; and

(2) The President submits copies of the proposed disposal schedule to the Senate and the House of Representatives at least 60 calendar days of continuous congressional session before the proposed disposal date. For the purpose of this section, a continuous congressional session breaks only when Congress adjourns *sine die* (with no date set to resume). If either House of Congress adjourns with a date set to resume, and breaks for more than three days, the adjourned days do not count when computing the 60-day timeline. The President submits copies of the proposed disposal schedule to the Senate Committees on Rules and Administration and Homeland Security and Governmental Affairs, and to the House Committees on House Administration and Oversight and Government Reform.

§ 1270.32 Disposing of Presidential records in the Archivist's custody.

(a) The Archivist may dispose of Presidential records in the Archivist's legal custody that the Archivist appraises and determines to have insufficient administrative, historical, informational, or evidentiary value to warrant continuing to preserve them.

(b) If the Archivist determines that Presidential records have insufficient value under paragraph (a) of this section, the Archivist publishes a proposed disposal notice in the *Federal Register* with a public comment period of at least 45 days. The notice describes the records the Archivist proposes to dispose of, the reason for disposing of them, and the projected earliest disposal date.

(c) After the public comment period in paragraph (b) of this section, the Archivist publishes a final disposal notice in the *Federal Register* at least 60 calendar days before the earliest disposal date. The notice includes:

- (1) A reasonably specific description of the records scheduled for disposal;
- (2) The earliest disposal date; and
- (3) A concise statement of the reason for disposing of the records.

(d) Publishing the notice required by paragraph (c) of this section in the *Federal Register* constitutes a final agency action for purposes of review under 5 U.S.C. 701--706.

Subpart D—Accessing Presidential Records

§ 1270.38 Public access to Presidential records.

Public access to Presidential records generally begins five years after the President leaves office, and is administered through the Freedom of Information Act (5 U.S.C. 552), as modified by the Presidential Records Act (44 U.S.C. 2204(c)).

§ 1270.40 Restricting access to Presidential records.

(a) An incumbent President may, prior to the end of the President's term of office or last consecutive term of office, restrict access to certain information within Presidential records created during their administration, for a period not to exceed 12 years after the President leaves office (in accordance with 44 U.S.C. 2204).

(b) If a President specifies such restrictions, the Archivist consults with that President or the President's designated representative to identify the affected records, or any reasonably segregable portion of them.

(c) The Archivist then restricts public access to the identified records or the restricted information contained in them until the earliest of following occurs:

(1) The restricting President waives the restriction, in whole or in part;

(2) The restriction period in paragraph (a) of this section expires for the category of information; or

(3) The Archivist determines that the restricting President or an agent of that President has published the restricted record, a reasonably segregable portion of the record, or any significant element or aspect of the information contained in the record, in the public domain.

§ 1270.42 Appealing restricted access.

(a) If the Archivist denies a person access to a Presidential record or a reasonably segregable portion of it due to a restriction made under § 1270.40, that person may file an administrative appeal. To file an administrative appeal requesting access to Presidential records, send it to the director of the Presidential Library of the President during whose term of office the record was created, at the address listed in 36 CFR 1253.3. To file an administrative appeal requesting access to Vice Presidential records, send it to the director of the Presidential Materials Division at the address listed in 36 CFR 1253.1.

- (b) An appeal must arrive to the director within 90 calendar days from the date on the access denial letter.
- (c) Appeals must be in writing and must identify:
 - (1) The specific records the requester is seeking; and
 - (2) The reasons why the requester believes they should have access to the records.
- (d) The director responds to the requester in writing and within 30 working days from the date they receive the appeal. The director's response states whether or not the director is granting access to the Presidential records and the basis for that decision. The director's decision to withhold release of Presidential records is final and is not subject to judicial review.

§ 1270.44 Exceptions to restricted access.

- (a) Even when a President imposes restrictions on access under § 1270.40, NARA still makes Presidential records of former Presidents available in the following instances, subject to any rights, defenses, or privileges which the United States or any agency or person may invoke:
 - (1) To a court of competent jurisdiction in response to a properly issued subpoena or other judicial process, for the purposes of any civil or criminal investigation or proceeding;
 - (2) To an incumbent President if the President seeks records that contain information they need to conduct current Presidential business and the information is not otherwise available;
 - (3) To either House of Congress, or to a congressional committee or subcommittee, if the congressional entity seeks records that contain information it needs to conduct business within its jurisdiction and the information is not otherwise available; or
 - (4) To a former President or their designated representative for access to the Presidential records of that President's administration, except that the Archivist does not make any original

Presidential records available to a designated representative that has been convicted of a crime that involves reviewing, retaining, removing, or destroying NARA records.

(b) The President, either House of Congress, or a congressional committee or subcommittee must request the records they seek under paragraph (a) of this section from the Archivist in writing and, where practicable, identify the records with reasonable specificity.

(c) The Archivist promptly notifies the President (or their representative) during whose term of office the record was created, and the incumbent President (or their representative) of a request for records under paragraph (a) of this section.

(d) Once the Archivist notifies the former and incumbent Presidents of the Archivist's intent to disclose records under this section, either President may assert a claim of constitutionally based privilege against disclosing the record or a reasonably segregable portion of it within 30 calendar days after the date of the Archivist's notice. The incumbent or former President must personally make any decision to assert a claim of constitutionally based privilege against disclosing a Presidential record or a reasonably segregable portion of it.

(e) The Archivist does not disclose a Presidential record or reasonably segregable part of a record if it is subject to a privilege claim asserted by the incumbent President unless:

(1) The incumbent President withdraws the privilege claim; or

(2) A court of competent jurisdiction directs the Archivist to release the record through a final court order that is not subject to appeal.

(f)(1) If a former President asserts the claim, the Archivist consults with the incumbent President, as soon as practicable and within 30 calendar days from the date that the Archivist receives notice of the claim, to determine whether the incumbent President will uphold the claim.

(2) If the incumbent President upholds the claim asserted by the former President, the Archivist does not disclose the Presidential record or a reasonably segregable portion of the record unless:

- (i) The incumbent President withdraws the decision upholding the claim; or
- (ii) A court of competent jurisdiction directs the Archivist to disclose the record through a final court order that is not subject to appeal.

(3) If the incumbent President does not uphold the claim asserted by the former President, fails to decide before the end of the 30-day period detailed in paragraph (f)(1) of this section, or withdraws a decision upholding the claim, the Archivist discloses the Presidential record 60 calendar days after the Archivist received notification of the claim (or 60 days after the withdrawal) unless a court order in an action in any Federal court directs the Archivist to withhold the record, including an action initiated by the former President under 44 U.S.C. 2204(e).

(g) The Archivist may adjust any time period or deadline under this subpart, as appropriate, to accommodate records requested under this section.

§ 1270.46 Notice of intent to disclose Presidential records to the public.

When the Archivist determines it is in the public interest to make a Presidential record available to the public for the first time, the Archivist will:

(a) Promptly notify, in writing, the former President during whose term of office the record was created and the incumbent President, or their representatives, of the intended disclosure.

This notice informs the Presidents of the 60-day period in which either President may make a claim of constitutionally based privilege under § 1270.48; and

(b) Notify the public. The notice includes the following information about the intended disclosure:

- (1) The number of pages;
- (2) A brief description of the records;
- (3) The NARA case number;
- (4) The date on which the 60-working-day period set out in §1270.48(a) expires; and
- (5) Any other information the Archivist may decide.

§ 1270.48 Releasing records to the public and claiming privilege against disclosure.

(a) Once the Archivist notifies the former and incumbent Presidents of the Archivist's intent to disclose records under § 1270.46, either President may assert a claim of constitutionally based privilege against disclosing the record or a reasonably segregable portion of it. A President must assert their claim within 60 working days after the date of the Archivist's notice, and make the claim in accordance with paragraph (d) of this section.

(b) If neither President asserts a claim within the 60-working-day period, the Archivist discloses the Presidential record covered by the notice. If either President asserts a claim on a reasonably segregable part of the record, the Archivist may disclose only the portion of the record not subject to the claim.

(c)(1) The incumbent or former President may extend the period under paragraph (a) of this section once, for not more than 30 additional working days, by sending the Archivist a written statement asserting that the President needs the extension to adequately review the record.

(2) However, if the 60-day period under paragraph (a) of this section, or any extension of that period under paragraph (c)(1) of this section, would end during the first six months of the

incumbent President's first term of office, then the 60-day period or extension automatically extends to the end of that six-month period.

(d)(1) The incumbent or former President must personally make any decision to assert a claim of constitutionally based privilege against disclosing a Presidential record or a reasonably segregable portion of it.

(2) The President must notify the Archivist, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate, of a privilege claim under paragraph (a) of this section on the same day that the President asserts such a claim.

(e)(1) If a former President asserts the claim, the Archivist consults with the incumbent President, as soon as practicable and within 30 calendar days from the date that the Archivist receives notice of the claim, to determine whether the incumbent President will uphold the claim.

(2) The Archivist notifies the former President and the public of the incumbent President's decision on the former President's claim no later than 30 calendar days after the Archivist receives notice of the claim.

(3) If the incumbent President upholds the claim asserted by the former President, the Archivist does not disclose the Presidential record or a reasonably segregable portion of the record unless:

- (i) The incumbent President withdraws the decision upholding the claim; or
- (ii) A court of competent jurisdiction directs the Archivist to disclose the record

through a final court order that is not subject to appeal.

(4) If the incumbent President does not uphold the claim asserted by the former President, fails to decide before the end of the 30-day period detailed in paragraph (e)(1) of this section, or

withdraws a decision upholding the claim, the Archivist discloses the Presidential record 90 calendar days after the Archivist received notification of the claim (or 90 days after the withdrawal) unless a court order in an action in any Federal court directs the Archivist to withhold the record, including an action initiated by the former President under 44 U.S.C. 2204(e).

(f) The Archivist does not disclose a Presidential record or reasonably segregable part of a record if it is subject to a privilege claim asserted by the incumbent President unless:

- (1) The incumbent President withdraws the privilege claim; or
- (2) A court of competent jurisdiction directs the Archivist to release the record through a final court order that is not subject to appeal.

§ 1270.50 Consulting with law enforcement agencies.

(a) The Archivist requests specific guidance from the appropriate law enforcement agency when the Archivist is determining whether to release Presidential records compiled for law enforcement purposes that may be subject to 5 U.S.C. 552(b)(7). The Archivist requests guidance if:

- (1) No general guidance applies;
- (2) The record is particularly sensitive; or
- (3) The type of record or information is widespread throughout the files.

(b) When the Archivist decides to release Presidential records compiled for law enforcement purposes, the Archivist notifies any agency that has provided guidance on those records under this section. The notice includes the following:

- (1) A description of the records in question;

(2) A statement that the records described contain information compiled for law enforcement purposes and may be subject to the exemption provided by 5 U.S.C. 552(b)(7) for records of this type; and

(3) The name of a contact person at NARA.

(c) Any guidance an agency provides under paragraph (a) of this section is not binding on the Archivist. The Archivist decides whether Presidential records are subject to the exemption in 5 U.S.C. 552(b)(7).

David S. Ferriero,

Archivist of the United States.

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