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ARKANSAS'S PUBLIC RECORDS RETENTION PROGRAM: RECORDS RETENTION AS A CORNERSTONE OF CITIZENSHIP AND SELF-GOVERNMENT

Richard J. Peltz*

I. INTRODUCTION

"Records retention" is sexier than it sounds. It sounds like a digestive disorder suffered by clerical workers, perhaps resulting from extended periods of desk work without standing. Even archiving, records retention's highbrow cousin, does not have a lively reputation. When Nadine Strossen addressed the Society of American Archivists, she tactfully teased her hosts with a conversation she had overheard in an elevator: "Sounds like a real party! Let's do it to the Dewey Decimal System!"¹ Records retention's dullness motivated four researchers in England to write a research article about how government records retention programs should appear "sexy" to win funding.²

But records retention is important, and sexy in its way, because it provides the unseen foundation for flashier endeavors with high-profile consequences. Although investigative journalism and the "right to know" lead to Pulitzer Prizes and riveting revelations of government scandal, it is humble records retention that lurks behind the curtains and puts on the show. For without an obligation on government to retain records of its affairs, there is nothing for the journalist to investigate, nothing for the public to learn.³ It

* Associate Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock. The author is grateful to the many persons who gave time and information to support the development of this article, including persons who provided comments upon a draft, namely, Drew Mashburn and James Winningham, *cf. infra* notes 332, 440, and accompanying text, though the contents of this article, including opinions and errors, remain solely expressions of the author. The author further thanks Milton Scott, formerly of the Arkansas Press Association, *cf. infra* note 336, for his warm collegiality and his tireless dedication to the people's right to know in Arkansas; his retirement left the shoes of a giant.

1. Nadine Strossen, President, American Civil Liberties Union, Keynote Address at the Society of American Archivists 68th Annual Meeting (Aug. 5, 2004), <http://www.archivists.org/conference/boston2004/strossen.asp> (last visited Mar. 25, 2005).

2. Graham Coulson, et al., *Securing Funding in the Local Government Bidding Culture: Are Records Sufficiently "Sexy" to Succeed?*, 11 RECORDS MGMT. J. 83 (2001) (obtained without pagination from EBSCO Host Academic Search Premier database). Behind its alluring title, the article, which published a study of the Management Research Institute of the University of Northumbria at Newcastle, concerned such matters as resources and location that tend to deter archive services from competing for external funding.

3. As is typical of state sunshine laws, the Arkansas Freedom of Information Act (FOIA) does not plainly require government to retain records before a FOIA request is pending. JOHN J. WATKINS & RICHARD J. PELTZ, *THE ARKANSAS FREEDOM OF INFORMATION ACT* 20 (4th ed. 2004). There is a dictum in *Depoyster v. Cole*, 298 Ark. 203, 207, 766 S.W.2d

is records retention—along with its parent, records management—that makes sure the smoking gun is there in the first place, so that some enterprising muckraker can come along and find it.

There has been a swell in interest lately about business records retention, amid some high-profile court opinions condemning corporate litigants for destroying records even before they were sought in discovery.⁴ A government litigant could face similar burdens. Still, litigation notwithstanding, the range of situations in which a failure to retain records can preclude public accountability, not to mention cause harm to individuals and the public, is as expansive as the range of applications of a state freedom of information act (FOIA). There need not even be knowing misconduct on the part of any public official. An unwitting clerk may destroy records as soon as they are created—records that document a massive and well-intended, but later demonstrably unwise, expenditure of public funds—leaving a curious citizen to wonder at depleted coffers. Records of a state construction project that would reveal an initially unrecognizable but ultimately serious flaw may be destroyed in a routine office cleaning before a fatal accident prompts investigators and the media to seek a cause.

Indeed, even beyond the cause of public accountability, a FOIA and records retention together play a vital role just in documenting the everyday workings of government and society. Were seemingly routine records destroyed, a legislative task force that was ignorant of previous undertakings might reinvent the wheel in developing an audit program. A post mortem biography of a public official or public entity might be impossible to render, given a failure to preserve daily calendars. A historian who seeks to recount efforts to reform the Arkansas education system might be unable to do so if primary sources were not preserved.

All the same, records retention per se is not an absolute good. State agencies that retain all records out of an abundance of caution, lacking statutory or regulatory guidance, find themselves overwhelmed by a deluge of paper impossible to manage and impossible to store. Even electronic media are no panacea; they pose perplexing problems such as uncertain longevity resulting from physical decay or technological obsolescence. Thus, the problem of record preservation, and the inextricably interrelated problem of providing continuous and timely public access, cannot be solved just by saving everything.

606, 608 (1989), suggesting that more might have been required of a FOIA-subject entity that discarded records adjudicated public before they were subject to a FOIA request. But the decision can be read as limited to the facts, upon which the records, secret ballots, represented the only documentation of a vote that should have been, but was not, conducted in the open. See WATKINS & PELTZ, *supra*, at 23.

4. See *infra* note 17 and accompanying text.

Therefore, as empowering of citizens, business, and media as a FOIA is, a freedom of information system can only be as strong as its companion records retention program. Government transparency is meaningless when there is nothing to see, or when there is so much extraneous matter that detail dissolves.

It is therefore surprising and unfortunate that at the start of the 85th General Assembly in 2005, Arkansas had been without a records retention system for nearly four years.⁵ Public entities in the state continued to operate under a patchwork of statutory requirements pertinent to particular records and government subdivisions,⁶ as well as various federal requirements⁷ and internal policies.⁸ But there was no comprehensive system across state government to ensure the preservation even of commonly held and administratively or historically valuable records. The success of an Arkansas FOIA request, and thus the investigation of an ordinary citizen, reporter, academic, or historian, turned on the vagaries of the patchwork, the foresight or whims of public officials, or mere fortune.

Arkansas is now undertaking a concerted effort to develop a workable records retention policy. The product in progress is relatively limited in its applicability, considering the full range of potential record retention issues across all levels of state and local government. But this effort is an important first step that promises to lay a lasting foundation for development, refinement, and expansion in the years to come. It is therefore important for all attorneys, public and private, and all citizens concerned about open government, to take notice of the process that is underway and to participate in it. This article means to facilitate that awareness and participation—and in the process perhaps to persuade the reader that records retention is sexier than it sounds.

Part II of this article provides background: it charts the scope of this article and then outlines records retention through its history and development

5. See 2001 Ark. Acts 4750 (repealing ARK. CODE ANN. §§ 13-4-101 to -112). Judicial records retention is a separate matter outside the scope of this article. See ARK. CODE ANN. §§ 13-4-201 to -204 (2005); *In re Administrative Order Number 7*, 317 Ark. Appendix 651, 1994 Ark. LEXIS 378 (June 20, 1994). Before its 1994 administrative order, which promulgated a simple records schedule, the Arkansas Supreme Court had kept everything since its creation in 1836 and the Court of Appeals since its creation in 1979. *In re Administrative Order Number 7*, 317 Ark. Appendix 651, 1994 Ark. LEXIS 378 (June 20, 1994).

6. *E.g.*, ARK. CODE ANN. §§ 13-4-301 to -308 (2005); see WATKINS & PELTZ, *supra* note 3, at 24.

7. *E.g.*, 45 C.F.R. § 164.530(j)(2) (2002) (setting six-year-or-longer retention period for certain policies and procedures to protect personal health information pursuant to Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936).

8. Internal agency retention policies in effect in 1994 are collected in Records of Governor's Task Force on the Retention of Historic Records, 1994, Folder 1, in the Manuscript Collection of the Arkansas History Commission.

in the federal government by discussing its general principles and modes of practice, sketching the problems that have arisen specially in the electronic era, and then giving an overview of its development at the state level. Part III describes the recent history of records retention law in Arkansas, up to and including the initiative enacted by the General Assembly in 2005, and the process and product of a state working group that labored on this problem in the months leading up to the 2005 legislative session. Part IV provides analysis, and Part V looks ahead.

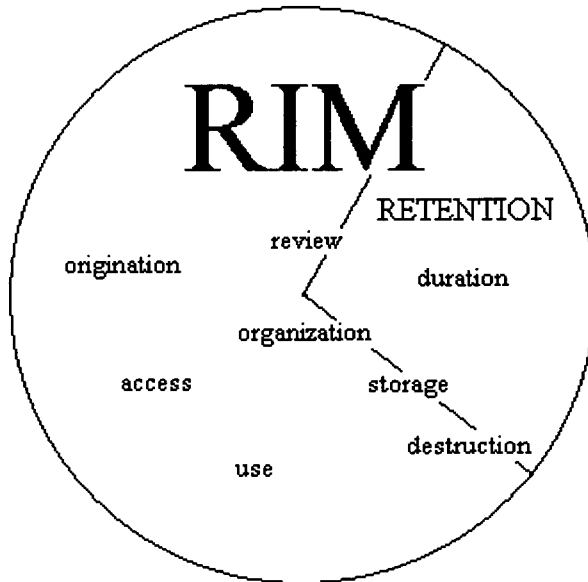
II. BACKGROUND

This Part provides a background on records retention. Part II.A presents an overview of records and information management and its relation to the more specific concept of records retention, confining the scope of discussion to public records retention. Part II.B traces the history of records retention through the present day at the federal level. Part II.C reviews fundamental principles and points of practice in records retention. Part II.D addresses the problems presented by electronic records. Part II.E offers an overview of records retention at the state level and explains the scope and contents of two state general records schedules by way of example.

A. Overview and Scope

Records retention is a slice of a broader doctrinal pie sometimes termed "records and information management," or "RIM."⁹ RIM and retention may be visualized as in this illustration.

9. This acronym is used widely, see, e.g., David O. Stephens, *International Standards and Best Practices in RIM*, INFO. MGMT. J., Apr. 2000, at 68 (describing efforts to develop RIM standards and model practices at the international level), but not exclusively, and not always to mean the same thing. This Article will use "RIM" broadly to mean all concerted records and management activities, regardless of era or medium. This usage should be distinguished from narrower applications of "RIM" or similar terms. For example, Ira A. Penn, a federal government retiree and prominent scholar in RIM, has referred to and criticized "IRM," or "information resources management," as referring specifically to the "acquisition, operation, and maintenance of automated data processing and telecommunications 'equipment.'" Ira A. Penn, *Information Management Legislation in the Last Quarter of the 20th Century: A Records Management Disaster*, RECORDS MGMT. Q., Jan. 1997, at 3 (obtained without pagination from EBSCO Host Business Source Premier Database). Penn distinguishes his IRM from some broader notion of "Federal records management." *Id.* The *Information Management Journal* is the successor to *Records Management Quarterly*, published by Association of Records Managers and Administrators (ARMA) International. ARMA International is concerned with RIM in both private and public sectors.



RIM on the whole concerns everything that happens during the “life” of a record,¹⁰ from origination to ultimate disposition, whether that disposition is destruction or permanent storage.¹¹ Records retention is unconcerned with the genesis of records, but takes up matters after creation. Records

10. The definition of a “record” varies among sources, but is always drafted so as to be expansive. *See, e.g.*, PHYLLIS M. LYBARGER, RECORDS RETENTION SCHEDULING 1 (1980) (“A record is any documentary material, regardless of physical form, that has the following three characteristics: (1) It is generated or received by [an entity] in connection with transacting its business or is related to its legal obligations. (2) It is retained for any period of time. (3) It is necessary to be preserved as legal evidence of the [entity]’s activities or as historical reference.”). Within the context of a particular record retention schedule, a “record” might be limited in definition to only those items described by the schedule, other items being “nonrecords,” but even then, the definition does not turn on the medium or format of the item. *See id.* at 3 (defining a “nonrecord” in contrast with an “official record”); *See infra* note 138 and accompanying text.

11. LYBARGER, *supra* note 10, at vii. Lybarger more formally defined “records management” as “the application of systematic analysis and scientific control of business [or governmental] records from their creation through processing, maintenance, protection, and final disposition. It is the management science of controlling the quantity, quality, and cost of records.” *Id.* at 2. Dean Henry Perritt outlined the purposes of RIM and archiving: “to maintain an institutional policy memory; to enhance the body of knowledge in a factual and scientific sense; to maintain official records for possible use as evidence in legal proceedings; to maintain the nation’s history; to promote efficiency and effectiveness of agency operations; and to increase the return on investment from information in government records” Henry H. Perritt, Jr., *Electronic Records Management and Archives*, 53 U. PITT. L. REV. 963, 967 (1992).

retention principally concerns the retention period: that is, the duration of a record's life. Alternatively, records retention's principal concern is the time at which a record reaches its ultimate disposition.¹² Many RIM issues exhibit aspects that relate to management exclusive of retention as well as aspects that relate to retention in particular. For example, a record may be reviewed in anticipation of archival needs. That review may influence the record's classification for retention and thus the duration of the record's life. The review also is integral to the management process and may dictate a record's availability and uses. Similarly, organization and storage protocols serve both to preserve a record for the duration of its life and to make the record adequately accessible and usable. Finally, destruction of a record has a management aspect—trashing? shredding? burning?—and a retention aspect, as the permissibility of destruction necessarily turns on the termination of the applicable retention period.

This distinction between management and retention is but one possible conceptualization of the RIM picture, and any true distinction between the concepts cannot of course be so neat.¹³ But this conceptualization functions well for the purpose of this article, which aims to focus on retention matters.

The body of literature on RIM, on the one hand, is extensive. An alphabet soup of organizations dedicate themselves to the study and practice of RIM, including, but hardly limited to, the Association of Records Managers and Administrators (ARMA) International, the National Association of Government Archives and Records Administrators (NAGARA), the U.S. National Archives and Records Administration (NARA), and the Society of American Archivists (SAA). These organizations, members of these organizations, government officials, scholars, and others have produced volumes of material on RIM. It is neither possible nor desirable for this article to review this body of literature comprehensively, though significant items will be noted.

The literature on records retention as such, on the other hand, is quite limited; it consists principally of primary sources, especially federal and state regulations and retention schedules. It is peculiar that the retention period, such a critical issue in record life-cycle, has received so little critical

12. See LYBARGER, *supra* note 10, at vii.

13. Prolific RIM scholar Donald S. Skupsky, as president of the Information Requirements Clearinghouse, conceptualized records management and records retention as mutually exclusive in a 2003 presentation to the Boston Chapter of ARMA International. Donald S. Skupsky, Legal Requirements for Records Management Programs: Recent Laws and "Hot Issues," PowerPoint Presentation 5, Boston, Mass., Apr. 3, 2003 (copy on file with author) [hereinafter Skupsky, Legal Requirements]. Skupsky defined records management as "[t]he systematic control of records during creation, maintenance and disposition," and records retention as "[t]he systematic determination of when to destroy records and the systematic destruction of records under the program." *Id.*

attention relative to the whole of RIM. The advent of new, electronic technologies—and the speed of technological development as much as the nature of the mechanisms themselves—has spurred interest in this subject,¹⁴ and there has appeared in recent decades as much literature on the particular subject of electronic records retention as existed previously on the subject of records retention at all. The records retention literature, including more comprehensive RIM literature that incidentally takes up the question of retention, falls within the scope of this article.

Besides the distinction between RIM and lesser-included records retention, this article must distinguish between public and private records retention. The focus here is on records retention in government because that is the aspect of retention that is integral to freedom of information. A great deal of literature concerns records retention in business,¹⁵ and this literature has proliferated in recent decades. Interest in the problem of records retention in business was invigorated most recently by two occurrences: First, litigation and intense federal regulatory activity consequent to the scandal-ridden collapse of major companies such as Enron and Arthur Andersen¹⁶ and second, a spate of court rulings condemning private companies for their inability to produce electronic records in civil discovery.¹⁷

14. While interest has undoubtedly been spurred, there is disagreement over whether technological developments spurred interest after a period of neglect, or whether technological developments occurred in tandem with RIM developments, culminating in a flurry of activity in the 1990s. Compare Belden Menkus, *Defining Electronic Records Management*, RECORDS MGMT. Q., Jan. 1996, at 38 (interest following neglect), with Richard J. Cox, *Redefining Electronic Records Management*, RECORDS MGMT. Q., Oct. 1996, at 8 (culmination of gradual development).

15. See Lee R. Nemchek, *Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools*, 93 LAW LIBR. J. 7 (2001); see also Randolph A. Kahn, *Records Management & Compliance: Making the Connection*, INFO. MGMT. J., May/June 2004, at 28; Marilee S. Chan, Comment, *Paper Piles to Computer Files: A Federal Approach to Electronic Records Retention and Management*, 44 SANTA CLARA L. REV. 805 (2004); CTR. FOR TECH. IN GOV'T, MODELS FOR ACTION: PRACTICAL APPROACHES TO ELEC. RECORDS MGMT. & PRESERVATION: PROJECT RPT. 98-1 (1998), http://www.ctg-albany.edu/publications/reports/models_for_action/models_for_action.pdf (last visited May 23, 2005); INT'L RECORDS MGMT. FED'N, RPT. 1: INT'L RECORDS RETENTION SURVEY (1980).

16. See, e.g., Catherine M. Radwan, *Lost in Cyberspace*, GOV'T PROCUREMENT, Oct. 2003, at 26 (obtained without pagination from EBSCO Host Business Source Elite database) (citing Sarbanes-Oxley Act, Securities and Exchange Commission Rule 17, and the Health Insurance Portability and Accountability Act); Skupsky, *Legal Requirements*, *supra* note 13, at 3-4.

17. See *United States v. Arthur Andersen, LLP*, 374 F.3d 281 (5th Cir. 2004), *rev'd*, 125 S. Ct. 2129 (2005); *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243 (SAS), 94 Fair Empl. Prac. Cas. (BNA) 1, 85 Empl. Prac. Dec. 41, 728, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (unpublished opinion on motion); see also Wendy Davis, *The Zubulake Road Show*, ABA J., Feb. 2005, at 22; Radwan, *supra* note 16 (telling "A Cautionary Tale" in which United States District Judge Frederick Motz ordered Microsoft, Inc. to scour its servers and backup tapes for deleted e-mail sought in discovery).

Records retention in the private sector is not wholly separable from records retention in the public sector; indeed, companies operating in the niche market for RIM services are pursuing both private and public clients.¹⁸ The problems that arise from poor records retention—both the lack of corporate accountability to owners and employees, and the lack of litigant accountability to the adversary system—translate well from corporate America to government America.¹⁹ Thus, some literature on the subject of private records retention pertains as well to public records retention, and those sources may be cited when appropriate. Still, private and public records retention are motivated by disparate ideals. Private records retention is motivated by profit maximization, workplace productivity maximization, and avoidance of civil and criminal liability. Public records retention shares those motivations, but is further (and, one might hope, principally) motivated by the ideals that animate freedom of information: namely, official accountability to the general public, governance by democratic norms, and documentation of history. The literature in the two areas diverges accordingly; much of it (for example, research on compliance with federal securities regulations) is not pertinent here.

B. History and the NARA Process

The history of records retention from the Middle Ages to the early twentieth century—or more broadly, the history of archiving during this time²⁰—has been summarized by the Society of American Archivists

18. See, e.g., John T. Phillips, *Information Management in New Business Models*, INFO. MGMT. J., July 1999, at 58.

19. See Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 966–67 (discussing relevance of public sector RIM to private sector).

20. RIM and archiving are distinct concepts—a distinction reflected in or enforced by the division of the National Archives and Records Administration and the General Services Administration, described *infra* this part III.B—though the distinction prior to the 20th century is of no more consequence than the distinction between RIM and freedom of information. For discussion of the view that RIM and archiving should be reunited, see, e.g., Xiaomi An, *An Integrated Approach to Records Management*, INFO. MGMT. J., July/Aug. 2003, at 24. An references Australian national archivist Ian Maclean, who in the 1950s said “records managers were the true archivists.” *Id.* at 25. An attributes to Maclean the modern-day Australian vision, embodied in regulations, of “a records continuum[. . .] ‘a consistent and coherent regime of management processes from the time of the creation of records (and before creation, in the design of recordkeeping systems) through to the preservation and use of records as archives.’” *Id.* (quoting Australian Standard 4390). The continuum model contrasts with the “life cycle” model, under which a record may be managed by different policies or authorities depending on where the record is in its life cycle, from creation to destruction, or to permanent retention. See *id.* at 26–27 (citing *inter alia* Peter Marchall, *Life Cycle Versus Continuum—What is the Difference?*, INFORMATION Q., May 2000, at 20 (publication of the Records Management Association of Australasia)). An is certainly not the only scholar to call for adoption of continuum principles in the United States. See Charles E.

(SAA).²¹ Unsurprisingly, this history springs from the history of public access to government information. The SAA traced archiving to the succession of nations in place of the feudal kingdoms of the Middle Ages.²² Nationhood facilitated the codification of law, which entailed written government documents.²³ “By the time of the French Revolution,” according to the SAA, “it was widely accepted that records were critical because they protected the rights of the people, and that such records must be available for public scrutiny and use.”²⁴

Naturally, the colonists carried the practices of public record-keeping from the Old World to the New World.²⁵ “In 1791, the Massachusetts Historical Society, the first of its kind, was formed to ‘preserve the manuscripts of the present day to the remotest ages of posterity.’”²⁶ Similar organizations at the state and national level subsequently proliferated to preserve documents both of government and of renowned persons. Archival methods—such as an Ohio society’s “‘air-tight metallic cases, regularly numbered and indexed’”—became subjects of study and discussion in the nineteenth century, the first organized efforts of records and information management (RIM).²⁷ The interaction of these organizations led to the formation of the American Historical Association (AHA) in 1884, and archiving theory and practice was moving toward uniform principles by the end of the nineteenth century.²⁸

As RIM developed in the nineteenth and twentieth centuries in the United States, so did the need for it. The 1810 Quincy Committee conducted an early investigation into the proliferation of government paper-

Arp & Joseph C. Dickman Jr., *Information Preservation: Changing Roles*, INFO. MGMT. J., Nov./Dec. 2002, at 54; Philip C. Bantin, *The Indiana University Electronic Records Project: Lessons Learned*, INFO. MGMT. J., Jan. 2001, at 16; Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 965 (“An idea shared widely among information systems professionals is that the best way to ensure retention of electronic records having archival value is to design information systems with inherent archival features.”).

21. Society of American Archivists (SAA), *Description and Brief History (excerpt)*, <http://www.archivists.org/history.asp> (last visited Mar. 25, 2005).

22. *Id.* Of course, the history of documentation, even the history of the library, can be traced much further back, to ancient times. *See, e.g.*, Stella McClenahan, *Growth of School Libraries in America* (1932) (unpublished master’s thesis), at 1, 11–14, 18–37, *cited in* Richard J. Peltz, *Pieces of Pico: Saving Intellectual Freedom in the Public School Library*, 2005 BYU EDUC. & L.J. 103, 109–19 (forthcoming 2005).

23. SAA, *Description and Brief History (excerpt)*, *supra* note 21.

24. *Id.*

25. *Id.*; *see* NARA, NARA & THE DISPOSITION OF FED. RECORDS: LAWS & AUTHORITIES & THEIR IMPLEMENTATION: A REPORT OF THE COMM. ON AUTHORITIES & PROGRAM ALTERNATIVES 10 (1989) [hereinafter NARA & THE DISPOSITION OF FED. RECORDS].

26. SAA, *Description and Brief History (excerpt)*, *supra* note 21.

27. *Id.*

28. *Id.*

work, and similar investigations occurred again in 1877, 1887, 1905, 1910, 1947, and 1953.²⁹ It had been assumed for the first century of the new federal government that government offices would retain their own records indefinitely; of course, that model ultimately proved unworkable.³⁰ As early as 1881, Congress enacted the first records retention legislation, authorizing the disposal of listed and outdated records of the Post Office Department.³¹ Similar legislation for other entities followed in 1882, and by 1887, Congress found it necessary to establish the Committee on the Disposition of Useless Papers.³² The practice of reviewing records for archival value before their destruction followed twenty years later in 1907, when the Committee on the Disposition of Useless Papers began consulting the Library of Congress before authorizing disposal.³³ The NARA dated the first records retention schedule—or, more accurately, records disposal schedule—to 1907 as well, when the committee authorized the Bureau of Forestry to dispose of specified records annually from then on.³⁴

The efforts of the AHA and its progeny, including the SAA, inspired the New Deal Works Progress Administration to create the Historical Records Survey and the Survey of Federal Archives.³⁵ Congress consolidated these entities in 1934 into an independent agency, the National Archives, with an advisory National Archives Council.³⁶ After the creation of the National Archives, legislative and executive efforts in the 1940s tried to balance competing interests by authorizing agency destruction of records without apparent historical significance while encouraging increasing agency cooperation with the National Archives.³⁷ The Archivist was placed

29. Penn, *supra* note 9.

30. NARA & THE DISPOSITION OF FED. RECORDS, *supra* note 25, at 10.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. SAA, *Description and Brief History (excerpt)*, *supra* note 21.

36. *Id.*; Peritt, *Electronic Records Management and Archives*, *supra* note 11, at 1000 (“National Archives Establishment”); NARA & THE DISPOSITION OF FED. RECORDS, *supra* note 25, at 10. For a legislative history of federal records legislation from 1934 to 1984, see NARA & THE DISPOSITION OF FED. RECORDS, *supra* note 25, app. F, and NARA, NARA & FED. RECORDS: LAWS & AUTHORITIES & THEIR IMPLEMENTATION: A REPORT OF THE TASK FORCE ON NARA RESPONSIBILITIES FOR FED. RECORDS & RELATED DOCUMENTATION app. C (1988). An up-to-date table of citations can be found at NARA, Legislative History – NARA Statutes, http://www.archives.gov/about_us/basic_laws_and_authorities/legislative_history.-html (last visited May 24, 2005). For the full text of pertinent statutes and selected executive orders as of 1991, see NARA, NARA Basic Laws & Authorities, http://www.archives.gov/about_us/basic_laws_and_authorities/basic_laws_and_authorities.html (last visited May 24, 2005), or see in print but dated, NARA, BASIC LAWS & AUTHORITIES OF THE NARA (1991).

37. See Peritt, *Electronic Records Management and Archives*, *supra* note 11, at 968–69 (describing the Disposal of Records Act of 1939, ch. 481, 53 Stat. 1219; Act of Sept. 24, 1940, ch. 727, 54 Stat. 958–59 (repealed 1943) (authorizing disposal of microfilm in accor-

into the disposal approval process between the federal agencies and the restructured Committee on the Disposition of Executive Papers.³⁸ Records without “permanent value or historical interest to the Federal Government” were authorized for disposal “by sale, destruction, or by transfer to” a state or territory, or to a university, library, museum, or “patriotic organization.”³⁹ Records with historical value were transferred to the National Archives, which reported its activity to Congress.⁴⁰ In an early application of technology, Congress in 1940 authorized “the disposal of original records that had been photographed or microphotographed on film that met standards specified by the National Bureau of Standards.”⁴¹ Legislation in 1943 gave the NARA language that, even today, serves to define administrative value and authorize the disposal of records that lack it: “records in agency custody ‘that are not needed by it in the transaction of its current business and that do not appear to have sufficient administrative, legal, research, or other value’ to warrant their further preservation by the Government.”⁴² Legislation in 1945 authorized the NARA to develop general schedules for records duplicated across agencies.⁴³

The problem of an ever-burgeoning population of public records proved intractable, in part because of the bureaucratic disposition of the National Archives. In 1949, federal legislation dubbed the National Archives “the National Archives Service” (NARS) and subordinated the entity within the new General Services Administration (GSA).⁴⁴ Ira A. Penn detailed this “[un]happy union,” a collision between the nascent science of archiving and the *property* acquisition and management function of the GSA.⁴⁵ A Federal Records Council took the place of the National Archives Council.⁴⁶ Archivists were spun into decades of discontent, until Watergate found them a sympathetic ear in Congress.⁴⁷ Still, the function of archiving, and of prescribing retention standards, grew without abatement. In 1970,

dance with standards of the National Bureau of Standards); Act of July 7, 1943, ch. 192, 57 Stat. 380 (requiring agencies to submit record schedules to the National Archives and calling on National Archives to promulgate retention regulations); and Executive Order 9784, 3 C.F.R. § 569 (requiring agencies to establish RIM policies)).

38. NARA & THE DISPOSITION OF FED. RECORDS, *supra* note 25, at 10–11.

39. *Id.* at 11.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 12.

44. Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 969, 1000 (describing the Federal Property and Administrative Services Act); *see also* Penn, *supra* note 9; NARA & THE DISPOSITION OF FED. RECORDS, *supra* note 25, at 12.

45. Penn, *supra* note 9; *see also* Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 969 (describing RIM mandate to GSA in 1950 legislation).

46. NARA & THE DISPOSITION OF FED. RECORDS, *supra* note 25, at 12.

47. Penn, *supra* note 9.

Congress delegated its power to authorize records disposal to the GSA, permitting but not requiring consultation with congressional committees.⁴⁸ Other legislation in the 1970s codified the government's RIM priorities⁴⁹ and made application of National Archives retention schedules to agencies mandatory.⁵⁰

The controversy over former President Richard Nixon's papers reached the Supreme Court in 1977; interested spectators included Congress. When President Nixon resigned from office, he entered into an agreement with the GSA governing the disposition of his papers, including 42 million pages of documents and 880 tape recordings.⁵¹ The agreement essentially permitted a grace period for the GSA to access the Nixon library and identify items of historical value; after the grace period, Nixon would regain the right to control—and destroy—any item.⁵² Congress disapproved of the agreement. With serious concerns about both the legality of the conduct of the former President and the preservation of national history, Congress abrogated the agreement with the Presidential Recordings and Materials Preservation Act.⁵³ The Act purported to establish government ownership in the Nixon materials and to ensure the assessment of those materials for archival value.⁵⁴ The Supreme Court upheld the law against challenge by former President Nixon on various theories, including separation of powers.⁵⁵

Following the Court's outline of separated powers in *Nixon v. Administrator of General Services*,⁵⁶ Congress revamped presidential records with the Presidential Records Act of 1978 (PRA).⁵⁷ The PRA firmly established

48. NARA & THE DISPOSITION OF FED. RECORDS, *supra* note 25, at 12.

49. Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 970 (describing the Federal Records Management Amendments of 1976, Pub. L. No. 94-575, 90 Stat. 2723); NARA & THE DISPOSITION OF FED. RECORDS, *supra* note 25, at 13.

50. Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 970 (describing Act of Oct. 10, 1978, Pub. L. 95-440, 92 Stat. 1063); NARA & THE DISPOSITION OF FED. RECORDS, *supra* note 25, at 14.

51. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 430-31 (1977).

52. *Nixon*, 433 U.S. at 431-32. Formally, the tape recordings were treated differently. The agreement transferred their ownership permanently to the United States government, but mandated their destruction in ten years or upon the death of the former President. *Id.* at 432.

53. *Id.* at 432-33 (citing Pub. L. No. 93-526, signed into law by President Ford on Dec. 19, 1974).

54. *See id.* at 433-36.

55. *Id.* at 484. Nixon's other theories were privilege, privacy, First Amendment right of association, and the Bill of Attainder Clause, U.S. CONST. art. I, § 9, cl. 3. *Nixon*, 433 U.S. at 429. The case was consolidated with actions to obtain the Nixon materials under the Freedom of Information Act, 5 U.S.C. § 552. *Nixon*, 433 U.S. at 432-33.

56. 433 U.S. 425 (1977).

57. Pub. L. No. 95-591, 92 Stat. 2523 (1978). *See generally* NARA, NARA & PRESIDENTIAL RECORDS: LAWS & AUTHORITIES & THEIR IMPLEMENTATION: A REPORT OF THE TASK FORCE ON NARA RESPONSIBILITIES FOR FED. RECORDS & RELATED DOCUMENTATION (1988).

presidential records as under government ownership; it precludes executive destruction of records if the National Archivist objects.⁵⁸ The PRA further provided for disclosure of presidential records to the public, dovetailing with the disclosure scheme of the Freedom of Information Act.⁵⁹

By 1984, legislators' concerns over the independence of the National Archives snowballed into the National Archives and Records Administration (NARA) Act—"unofficially," Penn wrote, "the 'Free NARS Act'"—which christened the agency with its present-day name and restored its independent status, effective in 1985.⁶⁰ But liberation of the Archives came at a cost; the GSA jealously retained records management services, carved out of the archival function of the NARA.⁶¹ Penn cited this division as an example of "disaster," "a functional abomination" in federal RIM legislation in the late twentieth century. According to Penn, GSA "top level managers never seemed to be able to grasp the idea that unless you managed records while they were current, you would not have them later on so that they could become archival."⁶² Penn described how RIM subsequently became a neglected orphan within the GSA.⁶³

Besides the GSA and the NARA, the Office of Management and Budget (OMB) arguably has some authority to effect federal RIM, but that authority has gone substantially unused.⁶⁴ Early twentieth-century fretting over burgeoning government paperwork led to the Federal Reports Act in 1942, which charged the OMB with reducing the impact of government information collection on the public by "act[ing] like a junkyard dog to protect the public's interest."⁶⁵ The OMB regulated, but fell down on the job in enforcement.⁶⁶ Congress later attempted to re-empower the OMB through

58. Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 970–71.

59. *Id.* at 971 & n.50 (comparing 5 U.S.C. § 552(b)(1)–(6) (1988) with 44 U.S.C. § 2204(a)(1)–(6) (1988)).

60. Penn, *supra* note 9; Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 1000–01 (further describing procedure for transfer of permanent records from federal agencies to the NARA); NARA & THE DISPOSITION OF FED. RECORDS, *supra* note 25, at 14.

61. Penn, *supra* note 9; *cf. supra* note 20.

62. Penn, *supra* note 9.

63. *Id.*

64. Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 1001. Intentionally or not, the Department of Defense has been an influential government entity in developing RIM standards through the department's *Design Criteria Standard for Records Management Applications*, DoD-STS-5015.2 (1997), developed with input from NARA. See, e.g., Kimberly Barata & Piers Cain, *Records Management Toolkits from Across the Pond*, INFO. MGMT. J., July/Aug. 2003, at 40, 46 (discussing influence of standard in United Kingdom); Stephens, *International Standards and Best Practices in RIM*, *supra* note 9, at 70 (discussing influence of standard at the international level).

65. Penn, *supra* note 9.

66. *Id.* ("[T]he junkyard dog had simply been asleep," a 1973 General Accounting Of-

the Paperwork Reduction Acts of 1980 and 1995, as well as amendments in between.⁶⁷ But whatever the dubious achievements of this legislative browbeating to reduce record-keeping burdens on taxpayers, OMB never became so enchanted with its authority as to stake a claim in government RIM.⁶⁸

Perceived inaction by the GSA, the NARA,⁶⁹ and the OMB led Penn to declare in 1997 that federal RIM "is dead," at least at "a macro level"—*i.e.*, notwithstanding the individual efforts of "[a]gency records managers [who] are generally dedicated souls."⁷⁰ Penn's conclusion certainly remains defensible, as the NARA today has little involvement with the day-to-day operations of the federal government, including the origination and usage of active records.⁷¹

But the NARA has not been idle since its liberation from the GSA. Dr. Richard Cox called the NARA's history with RIM "a flawed legacy," but not without "value."⁷² In a 1988 report, the NARA set out to describe classes of records that agencies should retain:

[records that] facilitate action by agency officials and their successors; make possible scrutiny by Congress and other institutions[,] "and other persons properly and directly concerned" about the manner in which public business has been discharged; protect financial, legal, and other rights of the government and of persons affected by governmental actions; contain essential information on formulation and execution of basic policies and decisions or on major actions; document significant decisions reached orally, face-to-face, by telephone, or in conference; and document important board, committee, or staff meetings, or matters considered at or resulting from such meetings.⁷³

In 1990, the NARA and the GSA issued identical rules on agency management of electronic records.⁷⁴ Electronic records and the demand for

fice study demonstrated).

67. *Id.*

68. *See id.*

69. For a statement of the NARA's mission and values and strategic plan to enter the twenty-first century, see NARA, THE NARA STRATEGIC PLAN FOR A CHALLENGING FED. ENVIRONMENT 1993-2001 (1993).

70. Penn, *supra* note 9.

71. The NARA has promulgated nothing like the "records continuum" model employed in Australia. *See supra* note 20.

72. Richard J. Cox, *Approaches to Electronic Records Management*, INFO. MGMT. J., Jan. 2001, at 2, 3.

73. Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 967-68 & n.10 (quoting and citing NARA, NARA AND FEDERAL RECORDS: LAWS AND AUTHORITIES AND THEIR IMPLEMENTATION: A REPORT OF THE TASK FORCE ON NARA RESPONSIBILITIES FOR FEDERAL RECORDS AND RELATED DOCUMENTATION (1988) ("known informally as the 'CAPA Report'")).

74. Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 1002 (cit-

RIM methods compatible with new and changing technologies continue to provide the NARA with opportunities to establish itself as a RIM leader. Cox wrote in 2001, "Many records managers and archivists in the United States look to NARA for leadership in such matters as electronic records management, especially for scheduling[.]"⁷⁵

Most importantly in the records retention area, the NARA today plays a critical role through both its General Records Schedules (GRS) for records commonly maintained across agencies⁷⁶ and its process for approval of agencies' individual records retention policies. Most famous (or, some would say, infamous) among the schedules is GRS 20, which covers electronic records.⁷⁷ But there are twenty-four different schedules covering a vast range of the routine of agency business, from payroll to motor vehicle maintenance to administrative management.⁷⁸ The NARA estimates that the schedules cover one-third of all federal records.⁷⁹ The schedules are mandatory, but the descriptions—which are general so as to function across agencies—may be adapted to more specific application in an agency's internal schedule.⁸⁰ The NARA encourages agencies to separate routine administrative records, mostly covered by the schedules, from substantive "program

ing 55 Fed. Reg. 19,216 (1990) (revising 36 C.F.R. § 1234) and 55 Fed. Reg. 19,221 (1990) (codified at 41 C.F.R. § 201.45)). The regulations required that agencies obtain NARA approval of record schedules. *Id.* The regulations further urge agencies to consider impermanence and obsolescence when selecting technologies. *Id.* at 1003–04.

75. Cox, *supra* note 72 at 3.

76. NARA, INTRODUCTION TO THE GRS & GRS 1-26 (as transmitted by NARA, Transmittals 8-14 (Dec. 21, 1998 to April 22, 2005), http://www.archives.gov/records_management/ardor/grs_index.pdf (last visited May 23, 2005), or http://www.archives.gov/records_management/records_schedules.html (last visited May 24, 2005); Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 1005 (citing 36 C.F.R. § 1228.22 (1991)). See generally 36 C.F.R. pt. 1234 (2004) (NARA regulations).

77. See *infra* part II.D.

78. The schedules cover: (1) civilian personnel records, (2) payrolling and pay administrative records; (3) procurement, supply, and grant records; (4) property disposal records; (5) budget preparation, presentation, and apportionment records; (6) accountable officers' accounts records; (7) expenditure accounting records; (8) stores, plant, and cost accounting records; (9) travel and transportation records; (10) motor vehicle maintenance and operations records; (11) space and maintenance records; (12) communication records; (13) printing, binding, duplication, and distribution records; (14) information services records; (15) housing records; (16) administrative management records; (17) cartographic, aerial photographic, architectural, and engineering records; (18) security and protective services records; (20) electronic records; (21) audiovisual records; (23) records common to most offices within agencies; (24) information technology operations and management records; (25) ethics program records; and (26) temporary commissions, boards, councils, and committees. NARA, INTRODUCTION TO THE GRS & GRS 1-26, *supra* note 76, at 1–2. GRS 19 is reserved, and GRS 22 (inspector general records) was withdrawn. *Id.* at 2.

79. *Id.* at 15.

80. *Id.*

subject files" that are likely to have longer retention periods, if not permanent archival value.⁸¹ But to the extent that separation is not possible or practical, the NARA advises that the longer programmatic retention period must then supersede the shorter retention period of the administrative record.⁸²

Because agencies may not dispose of records without NARA authorization, the agency has promulgated rules governing a review process for agency records schedules.⁸³ The agency's scheduling process⁸⁴ involves the steps of agency function review, records inventorying,⁸⁵ inventory evaluation,⁸⁶ schedule drafting,⁸⁷ internal and external approval, implementation, and periodic review and updating.⁸⁸

Agencies submit proposed schedules for records not covered on the NARA general schedules.⁸⁹ Proposed schedules must clearly instruct federal employees about which records are subject to retention, transfer, or disposal.⁹⁰ In the evaluation process, agencies are urged to consider records' administrative, fiscal, and legal value.⁹¹ Administrative value might dictate a short or long retention period, depending on practical need; all records have some administrative value.⁹² Records with fiscal value document "financial transactions and obligations"; often, their retention is prescribed by a general records schedule or rules of a fiscally oriented government agency such as the Office of Management and Budget or the General Accounting Office.⁹³ Legal value is determined by "information that may

81. *Id.*

82. *Id.*

83. The review process is outlined plainly on the NARA web site; see NARA, Records Schedule Review Process, http://www.archives.gov/records_management/policy_and_guidance/records_schedule_review_process.html (last visited May 24, 2005) [hereinafter NARA Records Schedule Review Process]. The review process is outlined less plainly (but not poorly) in 36 C.F.R. pt. 1228 (2004); scheduling is addressed specifically in 36 C.F.R. §§ 1228.20-.32. The process is detailed plainly in NARA, Disposition of Federal Records: A Records Management Handbook, http://www.archives.gov/records_management/publications/disposition_of_federal_records/index.html (last visited May 24, 2005) [hereinafter NARA Records Management Handbook]. Authorizing legislation can be found in 44 U.S.C. §§ 3301-14; scheduling is addressed specifically in 44 U.S.C. §§ 3303 & 3303a.

84. See NARA Records Management Handbook, *supra* note 83, ch. 2.

85. See *id.* ch. 3.

86. See *id.* ch. 4.

87. See *id.* ch. 5.

88. This process echoes that described in part II.C, *infra*.

89. 36 C.F.R. §§ 1228.20-.30 (2004); NARA Records Schedule Review Process, *supra* note 83. The submittal form is called an "SF 115," or "Standard Form 115." 36 C.F.R. § 1228.26(a) (2004).

90. 36 C.F.R. § 1228.24(b)(1) (2004).

91. See NARA Records Management Handbook, *supra* note 83, ch. 4.

92. *Id.*

93. *Id.*

be used to support rights based on the provisions of statute or regulation"; consultation with an agency's general counsel is recommended.⁹⁴ Destruction is appropriate for "records that have served their statutory, fiscal, or administrative uses."⁹⁵ Records no longer needed in offices, but not authorized for disposal, may be removed to storage facilities.⁹⁶ Records of "permanent value" must be scheduled for transfer to NARA custody as soon as they are no longer needed in agency operations.⁹⁷

Proposed schedules are reviewed by NARA appraisers to ensure, among other things, that records scheduled for disposal are in fact without value, and that records scheduled for transfer and permanent retention warrant permanent retention.⁹⁸ Upon appraiser approval, records schedules are published in the *Federal Register*, and public comment is invited.⁹⁹ The NARA approves records retention schedules after issues raised in the appraisal and public comment periods are resolved.¹⁰⁰ According to the NARA, this process can take less than six months or as long as a year, depending on the length and complexity of the proposed schedule, with public comment periods occupying much of that time.¹⁰¹

C. General Principles and Points of Practice

According to a Draft Guideline of the Association of Records Managers and Administrators (ARMA), a "retention and disposition program" serves to classify, to assess value, to set duration, and to describe procedures for final disposition.¹⁰² Information Requirements Clearinghouse President Donald S. Skupsky, distinguishing records management from records retention,¹⁰³ focused on the end of record life in defining a "Records Retention

94. *Id.*

95. 36 C.F.R. § 1228.24(c)(1) (2004).

96. *Id.* § 1228.24(c)(2).

97. *Id.* § 1228.24(c)(4). NARA maintains archives in Washington, D.C., and in 12 other cities. NARA Records Management Handbook, *supra* note 83, ch. 2.

98. NARA Records Schedule Review Process, *supra* note 83. "Permanent means forever" and therefore should describe a very few records. LYBARGER, *supra* note 10, at 44.

99. NARA Records Schedule Review Process, *supra* note 83.

100. *Id.*

101. *Id.*

102. ARMA Int'l, Guideline ANSI/ARMA 8-200x: Managing Recorded Information Assets and Resources: Retention and Disposition Program, Draft 10 (2004) (copy on file with author) [hereinafter ARMA Draft Guideline]. This 2004 draft document set out guidance for the development of a record retention policy. The draft was geared to entities in the private sector, but its logic and advice pertain as well to the public sector. The draft contains an informative bibliography at pages 27–30.

103. *See supra* note 13.

Program" as "[t]he systematic determination of when to destroy records and the systematic destruction of records under the program."¹⁰⁴

The ARMA described six interrelated benefits to the adoption of a records retention program.¹⁰⁵ First, improved access to information through uniform classification and a reduction in the quantity of material retained facilitates *efficiency*.¹⁰⁶ A public official with faster access to more accurate information will make better decisions than an official whose access is slower and whose information is less reliable.¹⁰⁷ Second, uniform procedures for retention and disposition attain *consistency*, reducing the risk of "reckless, or inappropriate or accidental destruction of recorded information."¹⁰⁸ Third, credible compliance with established policies facilitates legal and regulatory *compliance*.¹⁰⁹ For example, the Occupational Safety and Health Administration requires, with good reason, that documentation of employees' exposure to hazardous substances be retained for decades.¹¹⁰ Fourth, a retention program ensures *protection* during litigation or government investigation (or an audit in the public sector).¹¹¹ The public entity that cannot produce records for discovery or in response to a freedom of information request will rile the courts and the media.¹¹² Fifth, the systematic disposal of unneeded records, as well as the equipment needed to retain or read them, frees up *space* for storage.¹¹³ And sixth, a retention program achieves "*Cost Containment*" through reduced space and equipment de-

104. Skupsky, Legal Requirements, *supra* note 13, at 5.

105. ARMA Draft Guideline, *supra* note 102, at 11-12; *see also* LYBARGER, *supra* note 10, at 33-38 (published by ARMA) (describing efficiency, cost savings, and security).

106. ARMA Draft Guideline, *supra* note 102, at 11; *see also* Skupsky, *supra* note 13, at 5 ("Improper destruction of records makes your job harder.").

107. Maurice Bisheff & Elizabeth Kiss, *Managers: Do You Know Where Your Public Records Are?*, PUB. MGMT., July 1994, at 15 (obtained without pagination from EBSCO Host Business Source Elite database).

108. ARMA Draft Guideline, *supra* note 102, at 11.

109. ARMA Draft Guideline, *supra* note 102, at 11; *see also* Skupsky, *supra* note 13, at 5 ("Your organization may be subject to adverse legal consequences and costs.").

110. Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 966 & n.7 (1992) (citing 29 C.F.R. §§ 1910.1001 (1991) (asbestos), 1910.1029 (1991) (coke oven emissions), 1910.20 (1991), 1904.6 (1988), 1951.47 (1991)).

111. ARMA Draft Guideline, *supra* note 102, at 12; *see also* Skupsky, *supra* note 13, at 5 ("You may not have the records to defend your case.").

112. Bisheff & Kiss, *supra* note 107. Legal difficulties can arise from "untimely destruction," *e.g.*, subpoenaed records were destroyed before the retention period ran; "selective destruction," *e.g.*, police records in relation to particular cases were destroyed without apparent distinction from records that were retained; "ill-advised retention," *e.g.*, city officials suffered liability and embarrassment from records revealing tortious fault when the retention schedule had not required the records to be retained; and "public access," *e.g.*, a government office wasted staff-hours seeking documents that should have been readily available to meet a reporter's freedom of information request. *Id.*

113. ARMA Draft Guideline, *supra* note 102, at 12.

mands, smarter division between on- and off-site storage, faster information retrieval, and the reduction of duplication.¹¹⁴

The records retention process involves taking a records inventory, developing a retention schedule, and implementing that schedule.¹¹⁵ A review of official functions and interviews with personnel may be employed to devise a complete record inventory.¹¹⁶ Records in the inventory can then be classified by series and assessed.¹¹⁷ ARMA recommended that assessment consider five values:¹¹⁸ operational,¹¹⁹ vital,¹²⁰ legal/regulatory,¹²¹ fiscal,¹²² and historical.¹²³ Values are determined relative to content, not medium;¹²⁴

114. *Id.*; see also Bisheff & Kiss, *supra* note 107 (observing moreover that records not stored must be managed, draining yet more resources). Bisheff & Kiss, *supra* note 107, reported that a records management program saved Flower Mound, Texas, "population 17,500," "more than \$5,200 and generated another \$1,700 in added revenues in [the] first 18 months." East Brunswick, New Jersey, reportedly earns \$210,000 per year by recycling paper records. Bisheff & Kiss, *supra* note 107.

115. See U.S. GOV'T RELATIONS COMM., ARMA INT'L, ESSENTIAL ELEMENTS OF LOCAL GOVERNMENT RECORDS MANAGEMENT LEGISLATION 14 (2000) [hereinafter ARMA ESSENTIAL ELEMENTS]. Unlike the ARMA Draft Guideline, *supra* note 102, ARMA ESSENTIAL ELEMENTS specifically treats the public sector, but it serves the broader cause of records management. In a "how to" format, ARMA ESSENTIAL ELEMENTS offers little in the way of theoretical underpinning.

116. ARMA Draft Guideline, *supra* note 102, at 17.

117. *Id.*

118. *Id.* at 18. Alternatively, the mnemonic "VALUE" is suggested, referring to the values of volume (record size), activity (daily use), legal (requirements), use (operational need), and economy (potential savings in scheduling). LYBARGER, *supra* note 10, at 40 (citing WILLIAM BENEDON, RECORDS MANAGEMENT 34-35 (1969)).

119. "Operational value is assigned to records that document the activities of an organization that are directed toward the substantive purpose for which the organization was created." ARMA Draft Guideline, *supra* note 102, at 18. Lybarger suggested a formula to generate "usage ratio": number of requests for material times 100 divided by number of references filed. LYBARGER, *supra* note 10, at 40. As with all things numeric, statistics offers more reliable and sophisticated analyses for those not faint of heart. See *id.* at 40-41 (citing Roy L. Grover, *The Development of a Decision Model for the Retention of Records Pertinent to Product Liability Defense*, RECORDS MGMT. Q., July 1975, at 20-25, and Aug. 1975)).

120. "Vital records are those records containing information essential to the reconstruction/resumption of business of an organization in the event of a disaster." ARMA Draft Guideline, *supra* note 102, at 18.

121. "Recorded information with legal/regulatory value is that which provides proof of business transactions and demonstrates compliance with legal, statutory, and regulatory requirements." *Id.* at 19.

122. "Recorded information with fiscal value relates to the financial transactions of an organization, especially those required for audit or tax purposes." *Id.*

123. "The historical value of recorded information relates to the historical development of the organization, its mission, programs, products, major achievements, failures, significant events and personalities, and societal relationships." *Id.* at 20.

124. Cf. *infra* note 191 (regarding advisability of medium neutrality in scheduling e-mail retention).

however, medium might have to be considered to determine appropriate "storage location environmental conditions."¹²⁵ Records may also be regarded according to two dimensions described by archivist Charles E. Arp and RIM consultant Joseph C. Dickman Jr.¹²⁶ First, every record has content, the information it contains; structure, "the appearance and arrangement of the content"; and context, e.g., "who created/signed the document, the organization for whom the records were created, the function or activity to which the records relate, or the work processes that created the records."¹²⁷ Second, the preservation of records must take account of reliability and authenticity.¹²⁸ Reliability is a measure of "faith in the record": "we can trust that the record is what it says it is."¹²⁹ Authenticity is a function of reliability and time; "we can trust that the record is still the same as it was when it was created because we can document everything that has happened to the record."¹³⁰

Classification and assessment of the record inventory leads to the development of the records schedule. The schedule names record series,¹³¹ describes them, and sets retention periods for each series.¹³² Myriad factors may contribute to the setting of an appropriate retention period; there is no magic formula. Phyllis Lybarger explained that record disposal involves a calculated risk that the record might be needed again; "[t]his is the price paid for the savings in space and increased efficiency which is generated by the [retention] program."¹³³ Fundamentally, the NARA recommended distinguishing between administrative "housekeeping" records and substantive "program" records.¹³⁴ Lybarger recommended distinguishing between "transaction" records, which "reflect one-time action that is executed and completed," and "reference" records, such as "legal and medical case files,

125. ARMA Draft Guideline, *supra* note 102, at 18.

126. Arp & Dickman, *supra* note 20, at 55.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. A "record series" "is a group of related records arranged under a single filing system or kept together as a unit because they deal with a particular subject, result from the same activity, or have a special form They are records that are filed together as a unit, used as a unit, and which can be transferred, retained or destroyed as a unit. They may be considered individually and handled collectively." LYBARGER, *supra* note 10, at 3.

132. ARMA Draft Guideline, *supra* note 102, at 21. ARMA suggested an "Active Retention Period" for the time a record must remain immediately available to meet operational demands, and an "Inactive Retention Period" to meet long-term needs, when the record may be stored at a less expensive if less accessible off-site location. The "Total Retention Period" sums the active and inactive time periods, thus defining the life of a document prior to its ultimate disposition, *i.e.*, destruction or permanent retention. *Id.*

133. LYBARGER, *supra* note 10, at 43.

134. See *infra* note 186 and accompanying text.

research records, and historical records.”¹³⁵ Of course, housekeeping and transaction records require shorter retention periods, while program and reference records require longer retention periods.

Possibly the best sources for workable retention periods are other, existing retention schedules. Fred Guymon compiled a remarkable, if unfortunately dated, listing of record retention standards for thousands of documents from “41 sources . . . including states, provinces, [twelve] nations, private businesses, [and] national and international associations.”¹³⁶ He further graphed the various retention periods for different record series and derived standard deviations, which offer comfortable ranges to be used in drafting subsequent retention schedules.¹³⁷

A retention schedule may contemplate the handling of electronic records specially, the appropriate storage media for records, the permissible methods of destruction of records, and the proper handling of “nonrecords” (unscheduled records).¹³⁸ Skupsky urged a “functional, relational” model for the records retention schedule, organized by the “business function” of the record—*e.g.*, “accounting, marketing, public relations, legal, and human resources”—and consisting of interrelated tables, rather than an exhaustive, merely word-processed list of records at best organized by department.¹³⁹

RIM consultant David O. Stephens added a helpful definitional understanding to the RIM literature, as he defined and differentiated standards and best practices.¹⁴⁰ Standards may assume a mandatory character, expressing the minimal expectations of a legal system.¹⁴¹ For example, the U.S. Department of Defense (DoD) developed a standard, in consultation with the National Archives and Records Administration (NARA), called the “Design Criteria Standard for Records Management Applications,” or DoD Standard 5015.2.¹⁴² This standard sets “mandatory baseline functional requirements for records management software applications” and provides a binding rule of acquisition for government entities regulated by the DoD.¹⁴³ But DoD Standard 5015.2 has had much broader influence. It has been adopted by other federal agencies, by U.S. and multinational companies, and by foreign governments, and it has set norms for commercial ven-

135. LYBARGER, *supra* note 10, at 41–42.

136. FRED E. GUYMON, NATIONAL & INTERNATIONAL RECORDS RETENTION STANDARDS i (1988).

137. *See id.*

138. ARMA Draft Guideline, *supra* note 102, at 21; ARMA ESSENTIAL ELEMENTS, *supra* note 115, at 84.

139. Donald S. Skupsky, *Applying Records Retention to Electronic Records*, INFO. MGMT. J., July 1999, at 31–32.

140. Stephens, *International Standards and Best Practices in RIM*, *supra* note 9, at 68.

141. *Id.*

142. *Id.* at 70.

143. *Id.*

dors.¹⁴⁴ In this sense, DoD Standard 5015.2 sets best practices: it sets a standard that is desirable and well advised, but not mandatory.¹⁴⁵ Thus "[s]tandards nearly always embody best practices, but best practices are not always standards."¹⁴⁶

Successful implementation of a records retention system might require a statement both of mandatory standards and of voluntary best practices. For example, it might be desirable to set mandatory standards in the retention period applicable to substantive correspondence by e-mail, but to set only voluntary best practices by which persons may segregate that e-mail from e-mail that is not substantive and not subject to a retention requirement. To set voluntary best practices on the former count might defeat the purposes of the retention schedule; a standard must pertain. Meanwhile, although a voluntary standard to aid in classifying e-mail might be helpful to some, a mandatory standard might impose an unnecessarily cumbersome bureaucratic routine upon others. Thus, there are occasions when mandatory standards are needed and occasions when best practices are the better course.

Implementation of a records retention schedule requires decisions on the part of the implementing entity about how best to manage record transfer, removal, and destruction. Lybarger described the perpetual, periodic, and minimum-maximum period methods.¹⁴⁷ The perpetual method involves assessment of record disposition whenever a new unit of records is completed; the method is inappropriate "for files of a continuous nature."¹⁴⁸ The periodic method transfers records to subsequent dispositions at regular intervals; problems might arise, however, when recently created files are transferred at the moment the interval elapses while they are still in active use.¹⁴⁹ The minimum-maximum period method attempts a compromise, such that only inactive materials are transferred to subsequent disposition upon regular intervals.¹⁵⁰ Naturally, automation makes it easier to implement the minimum-maximum period method than it used to be in the era of all paper records.

The best means to dispose of records depends, of course, on the medium. Traditionally, paper records could be destroyed by "macerating,

144. *NARA Endorses DoD 5015.2 for All Federal Agencies*, INFO. MGMT. J., July/Aug. 2003, at 62; Radwan, *supra* note 16; see Stephens, *International Standards and Best Practices in RIM*, *supra* note 9, at 70; *supra* note 64.

145. In fact, even in its scope of mandatory application within the Department of Defense, DoD Standard 5015.2 sets out voluntary best practices as well. Stephens, *International Standards and Best Practices in RIM*, *supra* note 9, at 70.

146. *Id.* at 68.

147. LYBARGER, *supra* note 10, at 47–48.

148. *Id.* at 47.

149. *Id.*

150. *Id.* at 47–48.

burning, shredding, or disintegrating.”¹⁵¹ Paper might also be sold for recycling and generate a profit.¹⁵² Electronic media each pose their specific challenges to effective disposal. Magnetic media might be reusable.¹⁵³

Finally, implementation of a records retention schedule should involve periodic audits, resulting in review and update of the schedule. A number of methods may be employed to assess retention schedule efficacy, not the least effective of which is a common-sense consideration of how many records an agency has after implementation compared with how many it had before.¹⁵⁴ The National Archives and Records Service (NARS) recommended in 1978 deriving a ratio of the gross volume of records to the number of employees generating records.¹⁵⁵ The NARS suggested six cubic feet per employee as a standard; more might mean poor compliance with a records schedule or excessively lengthy retention periods.¹⁵⁶ That precise formula is ill-suited to the electronic era, but the principle, pending development of an appropriate measuring stick, still stands to reason.

D. Problems with Electronic Records

Electronic records pose precisely the sort of challenges that call for best practices guidance. Record retention authorities point generally to content-based but medium-neutral principles in the development of a records retention schedule; the theory is that a record that merits retention—say, for its historical value—merits retention regardless of whether it exists in a paper medium or an electronic medium. A uniform, mandatory standard is appropriate to determine the retention period. But in practice, the implementation of that standard might call for different procedures depending on the medium of the record.

This problem is not new. Paper yellows and becomes brittle over time; preserving historical documents thus poses challenges, including impermanence.¹⁵⁷ Electronic records are also subject to impermanence.¹⁵⁸ To meet

151. *Id.* at 49.

152. *Id.*; see *supra* note 114.

153. LYBARGER, *supra* note 10, at 49.

154. *Id.* at 55.

155. *Id.* at 55 (citing NARS, DISPOSITION OF FED. RECORDS 56 (1978)).

156. *Id.* (citing NARS, DISPOSITION OF FED. RECORDS 56 (1978)).

157. See, e.g., Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 990 (discussing longevity of paper and citing Linda Nainis & Laura A. Bedard, *Preservation Book Survey in an Academic Law Library*, 78 LAW LIBR. J. 243, 258 (1986)).

158. See Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 990–93 (reviewing data on longevity of paper, microfilm, magnetic tape, magnetic cartridges, diskettes, compact disks, and optical disk technologies). Perritt in 1992 reported estimates on the longevity of the compact disk at 20 years, at the outside. *Id.* at 992. The author is relieved to report that his Duran Duran, *Rio* (1982) is still functioning at the time of this writing.

the challenges posed by electronic records, agencies and businesses may have to impose mandatory standards that are contingent on record medium. Sometimes, best practices are adequate to provide needed supplemental guidance.

Researchers have identified many challenges posed specially by electronic records.¹⁵⁹ First, it is easier for an individual to create, modify, or destroy an electronic file than a file in a relatively fixed medium such as paper.¹⁶⁰ Thus, files are more difficult to track, and it is more difficult to maintain reliability and authenticity. Second, electronic records are not as readily subject to uniform naming and filing, absent an effective RIM system.¹⁶¹ For example, one worker might maintain electronic personnel files according to the last name of the employee, within a subdirectory dedicated to personnel, while a second worker might keep electronic personnel files according to the type of job action concerned, scattered through a virtual folder not dedicated to any one subject. It thus becomes more difficult to impose upon both workers a uniform rule for record retention, and more difficult for a RIM officer, RIM software tool, or another worker to locate documents of a desired nature.¹⁶²

159. See *id.* at 979–80. Dean Perritt has written definitively in the law review literature in this area and more generally about the intersection of electronic records, freedom of information, and administrative law and policy. See generally Henry H. Perritt, Jr., *Federal Electronic Information Policy*, 63 TEMP. L. REV. 201 (1990); Henry H. Perritt, Jr., *Recent Development: Electronic Freedom of Information*, 50 ADMIN. L. REV. 391 (1998); Henry H. Perritt, Jr., *The Electronic Agency and the Traditional Paradigms of Administrative Law*, 44 ADMIN. L. REV. 79 (1992).

160. Skupsky, *Applying Records Retention to Electronic Records*, *supra* note 139, at 30; Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 989–90. This problem is especially prevalent in relation to e-mail, as it is used so readily for formal, professional, and final communications on the one hand, and informal, personal, and draft communications on the other hand. E.g., Donald S. Skupsky, *Discovery and Destruction of E-mail*, in COMPUTER LAW ASS'N, THE INTERNET AND BUSINESS: A LAWYER'S GUIDE TO THE EMERGING LEGAL ISSUES (1996), <http://www.cla.org/RuhBook/chp5.htm> (last visited Mar. 23, 2005); Donald S. Skupsky, *Establishing Retention Periods for Electronic Records*, RECORDS MGMT. Q., Apr. 1993, at 40 (obtained without pagination from EBSCO Host Academic Search Elite database). A corollary problem derives from the proliferation of unnecessary duplicates of electronic files, for example, when one person sends a draft document to a dozen others for their review.

161. Julie Gable, *Records Management for Electronic Documents*, RECORDS MGMT. Q., Oct. 1997, at 15 (obtained without pagination from EBSCO Host Academic Search Elite database). This problem, of course, has a traditional, paper analog. (Many of these problems do.) But the proliferation of computers dedicated to individuals makes it much less likely that multiple workers would be compelled to conform to a uniform filing system. See Patricia T. Fletcher, *Electronic Records Management in State Government: Planning for the Information Age*, RECORDS MGMT. Q., Oct. 1990, at 26 (obtained without pagination from EBSCO Host Business Source Premier database).

162. See Gable, *Records Management for Electronic Documents*, *supra* note 161, at 15.

Third, electronic records may be stored in media or forms that become inaccessible through obsolescence.¹⁶³ As to medium, for example, a record player with a functional needle is required to listen to the twelve-inch record that was prevalent a quarter-century ago. Will there still be compact disk players in 2030? Electronic formats become outdated even more quickly. Some software devices cannot even recognize documents created by earlier versions of the same software. Today, the portable document format (PDF) is a standard for document imaging, but will the software to open a PDF file be commercially available twenty-five years from now?¹⁶⁴

Sometimes the obsolescence problem can be overcome by conversion from electronic medium to a human-readable format in a medium with which preservationists are better skilled, such as paper.¹⁶⁵ But such conversions create a fourth problem: the preservation of electronic attributes and

163. See, e.g., Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 993; Bruce V. Spiva & Jerald A. Jacobs, *Reducing Risks Posed by Electronic Records*, ASS'N MGMT., May 1999, at 111, 112 (obtained without pagination from EBSCO Host Academic Search Premier database).

164. See Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 993 ("There is a report, perhaps apocryphal, that there are only two computers left in the world that can read 1960 census data, one in Japan and one in the Smithsonian Institution."); cf. Andreas Engel & Michael Wettengel, *The DOMEA Concept: From Project to Practice*, INFO. MGMT. J., July/Aug. 2003, at 49, 53–54 (describing German government's adoption of the tagged image file format (TIFF) for images because of "stab[ility] and widespread" acceptance). See generally Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 1008–12 (discussing standards). A Kansas government report outlined the evolving standards for various protocols, classifying them as "twilight," "current," and "emerging." KANSAS STATEWIDE TECHNOLOGY ARCHITECTURE § 20.7, at 20 (no date) (Internet publication withdrawn for alleged security concerns, available at <http://da.state.ks.us/itab/erc/reports/architecture.htm> (last visited May 25, 2005); copy available from Kansas State Historical Society). For example, in "data syntax," the data interchange format (DIF) is listed in "twilight," comma-separated valued form (CSV) is listed in "current," and extensible markup language (XML) is listed in "emerging." *Id.* at 22–23.

165. Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 994 (observing that recopying overcomes problems of both impermanence and obsolescence). The NARA rejected the proposal of a NARA advisory committee to convert all electronic records into human-readable forms as a permanent solution to the obsolescence problem; the NARA preferred to believe that future technology will render hardware and software incompatibilities obsolete. *Id.* at 993–94. The NARA itself might make the needed innovations. The NARA has awarded contracts to Lockheed Martin and Harris Co. to develop an Electronic Records Archives (ERA) that is hardware- and software-independent and that can store all archived electronic records of the federal government indefinitely. NARA, National Archives ERA – Moving from Concept to Design (Aug. 3, 2004), <http://www.archives.gov/era/acquisition/design-contract-award.html> (last visited October 2, 2005). For an overview of the ERA project, see ERA Program Director Kenneth Thibodeau's June 2004 presentation to the National Digital Strategy Advisory Board of the Library of Congress, available at http://www.archives.gov/electronic_records_archives/pdf/-era_program.pdf (last visited May 24, 2005). See generally NARA, ERA Main Page, <http://www.archives.gov/era> (last visited Oct. 22, 2005).

metadata. There are advantages to electronic documents, of course, including the ease of searching and reorganizing electronic documents. For example, a virtual folder containing 1000 documents might be organized by document title or type at the click of an icon, or a user might easily search the full text of all of those documents for a particular word. When the documents are printed out and converted to hard copy, those attributes are lost. That loss might be a necessary concession to preservation, but that policy determination must be made in light of many considerations—such as the diminished ability of a journalist to ferret out documented wrongdoing or the diminished ability of the researcher to reconstruct historical events.

Similarly, when documents are printed out, metadata can be lost.¹⁶⁶ For example, a printout of a word-processed document does not ordinarily reveal the identity of the user who created the document; the date the document was created, last accessed, and last modified; or the hidden text and comments that authors or readers placed within the document deliberately. If the electronic document is destroyed upon the printout, then all of that data is lost. Such a risk posed the crux of the problem in *Armstrong v. Bush*.¹⁶⁷ The United States District Court for the District of Columbia held that printouts of government e-mails did not satisfy the retention requirements of the Federal Records Act because metadata, such as the listed recipients of a widely distributed e-mail, were not preserved.¹⁶⁸

166. See Arp & Dickman, *supra* note 20, at 59. "Metadata is data or information about information or records." *Id.* A corollary problem derives from the existence even of authentic duplicates in different media. See David O. Stephens, *Electronic Records Retention: Fourteen Basic Principles*, INFO. MGMT. J., Oct. 2000, at 38, 49–50.

167. 721 F. Supp. 343 (D.D.C. 1989), *aff'd in part & rev'd in part on other grounds*, 924 F.2d 282 (D.C. Cir. 1991), *on remand sub nom.*, *Armstrong v. Executive Office of the President*, 810 F. Supp. 335 (D.D.C. 1993), *aff'd*, 1 F.3d 1274 (D.C. Cir. 1993). *Armstrong* arose from a request for electronic records under the Freedom of Information Act, 5 U.S.C. § 552 and dispute over the disposition of records under the Federal Records Act, 44 U.S.C. §§ 2101-2118, 3101-3107, 3301-3324. See generally Catherine E. Pasterczyk, *Federal E-Mail Management: A Records Manager's View of Armstrong v. Executive Office of the President and its Aftermath*, RECORDS MGMT. Q., Apr. 1998, at 10 (obtained without pagination from EBSCO Host Business Source Premier database) (thoroughly explaining the technical background of *Armstrong* and critically assessing the case outcome).

168. *Armstrong*, 810 F. Supp. at 341; see also Mike Feinsilber, *Feds Losing the Document Paper Chase*, ROCKY MOUNTAIN NEWS (Denver, Colo.) Apr. 5, 1998, at 6A, 1998 WL 7935290 (describing NARA's struggle to keep up with mounting volume of both paper and electronic records). A related problem is the lack of skilled personnel to handle the volume of electronic records being created. See, e.g., *Report Says NARA Lacks E-Records Skills*, INFO. MGMT. J., Sept./Oct. 2003, at 7 ("NARA expects to receive almost 11 petabytes worth of records by 2014."); see also Cynthia Launchbaugh, *E-Records Management: A Sad State of Affairs or Golden Opportunity?*, INFO. MGMT. J., May/June 2004, at 20 (fearing failure of information technology professionals to comprehend RIM values).

Additional problems arise in regard to the security of electronic records, such as their peculiar vulnerability to tampering without leaving a "paper trail," and in regard to the vulnerability of electronic records to inadvertent destruction through means that do not threaten traditional paper records, such as power loss or electromagnetic disturbance.¹⁶⁹ The ephemeral and non-discrete nature of Internet web pages as records poses yet more challenges to retention programs.¹⁷⁰

Stephens proposed various principles to address these and other problems in the development of a records retention schedule that can accommodate electronic records.¹⁷¹ Generally, his suggestions echoed the process in developing any records retention schedule. For example, in devising a records inventory, Stephens urged cooperation with information technology professionals as well as end users.¹⁷² He urged readers to watch out for automated processes by which records might migrate or be deleted.¹⁷³ Whereas traditional retention periods might account for active and inactive time periods, Stephens suggested online, "nearline," and offline retention periods for electronic records.¹⁷⁴ He urged special consideration of the problem of duplicate records in multiple media, and that whether or to what extent a retention period might be medium-dependent should turn on the particular needs and access requirements of the organization.¹⁷⁵ Stephens urged high selectivity in the designation of electronic records as fit for permanent retention, taking into account the problems of obsolescence, and the adoption of hardware tools well-suited for longevity to accommodate those records that must be preserved for the long term in an electronic medium.¹⁷⁶

169. See Arp & Dickman, *supra* note 20.

170. Perritt presciently forecasts such problems. See Perritt, *supra* note 11, at 981–84. See generally Charles R. McClure & J. Timothy Sprehe, Guidelines for Electronic Records Management on State and Federal Agency Websites (Jan. 24, 1988), <http://www.ii.fsu.edu/~cmccclure/guidelines.html> (last visited May 23, 2005). One persistent problem has been the capture, for archival purposes, of web pages. The NARA has undertaken to archive something of the online presence of the federal government by taking a periodic "web harvest," or "web snapshot." See NARA, The NARA Web Harvest and Web Snapshot Information, <http://www.archives.gov/records-mgmt/policy/web-harvest-snapshot.html> (last visited Oct. 2, 2005).

171. Stephens, *Electronic Records Retention: Fourteen Basic Principles*, *supra* note 166, at 40.

172. *Id.* at 41–42.

173. *Id.* at 48.

174. *Id.*

175. *Id.* at 49–50.

176. *Id.* at 50–51.

The NARA's GRS 20,¹⁷⁷ the inter-agency, general records schedule for electronic records, which was litigated in *Armstrong v. Bush*, does not solve all the challenges of electronic records, but it does contemplate the proper disposition of the myriad transient electronic files that today arise in every facet of government (and private) business. GRS 20 does not cover exclusively electronic records—it often refers also to hard copies or printouts of the same content as routinely found in electronic records—and the schedule does not purport to cover all electronic records, some of which, such as e-mail, appear also in other schedules.¹⁷⁸ Rather, GRS 20 describes records that are peculiarly electronic in medium and transient in nature. For example, GRS 20 authorizes the disposal of data extractions from scheduled databases when free of qualitative alteration; of electronic backup files when the scheduled masters are disposed of or otherwise secured; of temporary electronic files used only to generate printouts otherwise scheduled; and of electronic files only technically reformatted from scheduled masters.¹⁷⁹ Generally, GRS 20 orders the retention of these transient records only for as long as they are needed.¹⁸⁰ As to e-mail, which is contemplated as well in other schedules, GRS 20 authorizes deletion of senders' or recipients' copies only upon transfer "to a recordkeeping system."¹⁸¹ Undoubtedly cognizant of *Armstrong*, NARA further specifies that "the recordkeeping system must capture the names of sender and recipients and date . . . and any receipt data when required."¹⁸² NARA guidance implementing GRS 20 warned agencies that electronic records are not subject to relaxed RIM requirements, that in fact electronic records might require special handling to satisfy generally applicable requirements, and that RIM should be a consideration in initial design of information systems.¹⁸³

The GRS 20 provisions governing word processing files and email withstood a legal challenge in *Public Citizen v. Carlin*.¹⁸⁴ Librarians, jour-

177. NARA, GRS 20 (as transmitted by NARA, TRANSMITTAL NO. 8 (Dec. 21, 1998), <http://www.archives.gov/records-mgmt/policy/grs-transmittal-8.html> (last visited Oct. 22, 2005)) [hereinafter GRS 20]. See generally Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 1005–06.

178. See GRS 20, *supra* note 177, intro.

179. See GRS 20, *supra* note 177, §§ 5–8.

180. "Delete when the agency determines that they are no longer needed for administrative, legal, audit, or other operational purpose." GRS 20, *supra* note 177, §§ 5–7. The retention period for backups states, "Delete when the identical records have been deleted, or when replaced by a subsequent backup file," or when masters are transferred to NARA if so scheduled. GRS 20, *supra* note 177, § 8.

181. GRS 20, *supra* note 177, § 14.

182. *Id.*

183. Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 1005–06 (citing NARA Bulletin 87-5).

184. 184 F.3d 900 (D.C. Cir. 1999) (citing GRS 20, §§ 13-14, 60 Fed. Reg. 44,643, 44,649/1 (1995)).

nalists, researchers, and historians took issue with the NARA's authorization of the destruction of email and electronic word processing files after the files are copied to paper or to an electronic recordkeeping system; the plaintiffs challenged GRS 20 as an arbitrary and capricious implementation of the Federal Records Act and Records Disposal Act.¹⁸⁵ The plaintiffs would have had the NARA distinguish between "so-called 'program' records" and "'housekeeping' or administrative records," retaining the former, and would have had the NARA order retention of word processing files and email for some time after their transfer to a recordkeeping system.¹⁸⁶ The court disagreed with both contentions, declining to recognize on either count an unreasonable risk that substantive information might be lost in the NARA disposition system.¹⁸⁷ The court acknowledged the plaintiffs' primary concern—that electronic records would, through conversion or transfer, lose the attributes, such as the capacity to be searched, that make electronic records especially valuable—but nonetheless held GRS 20 within the NARA's discretion and within the contemplation of Congress.¹⁸⁸ Moreover, the court rejected the plaintiffs' reliance on *Armstrong*, citing the provisions of GRS 20 that endeavor to ensure that all data and metadata are preserved.¹⁸⁹

Professor David A. Wallace derived three conclusions from *Armstrong* and *Public Citizen*.¹⁹⁰ First, the status of e-mail as comprising "records" potentially capable of substantive content was, despite earlier government protestations, firmly established.¹⁹¹ Content reigns over medium. Second, the suitability of printouts in substitution for electronic mail records was cast into serious doubt, as a matter of policy if not law.¹⁹² The *Armstrong* litigation had revealed that in discovery, the Government had resorted to electronic searches even after taking the position that properly filed printouts served as adequate substitutes for electronic files.¹⁹³ The law might not require the preservation of electronic records in electronic media, and reduction to paper might even make practical sense, but certainly something is

185. *Id.* at 901 (citing 44 U.S.C. § 3303a(d) (Records Disposal Act), 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-24 (more broadly, the Federal Records Act)).

186. *Id.* at 903.

187. *Id.* at 906-07.

188. *Id.* at 909-10.

189. *Id.* at 910-11.

190. David A. Wallace, *Electronic Records Management Defined by Court Case and Policy*, INFO. MGMT. J., Jan. 2001, at 4.

191. *Id.* at 10-12 ("recordness" of e-mail). *Cf.* NAT'L ELEC. COMMERCE COORDINATING COUNCIL, MANAGING E-MAIL 8, 15-27 (2002), http://www.ec3.org/Downloads/2002/-managing_email.pdf (last visited May 24, 2005) ("suggest[ing] that all e-mail be categorized based on its value as a transient, reference, programmatic, administrative or policy/program development record," and positing a model retention schedule and user's manual).

192. Wallace, *supra* note 190, at 12.

193. *Id.*

lost in the conversion.¹⁹⁴ Third, the cases firmly established the importance of complete and consistent RIM policies in the electronic era.¹⁹⁵

E. Records Retention in the States

The states on the whole have not been as proficient in RIM as the federal government.¹⁹⁶ Using archives as a measure, the states collectively manage close to the same volume of records as the NARA—1.77 million cubic feet in the states to 1.8 million cubic feet in the National Archives in 1994—and do so with fewer personnel—“1,700 archivists, records managers, and other staff working in the state archives” to 2900 on the 1995 NARA staff.¹⁹⁷ Worse for the states, a 1996 report showed them spending \$90 million collectively on archives and records management, as compared to the NARA’s \$195 million annual budget.¹⁹⁸ Nonetheless, the states are grappling with the same problems of proliferating electronic records and new technologies that are testing the limits of federal RIM.¹⁹⁹

Dean Henry Perritt reported in 1992 that “[n]o model electronic records program has emerged at the state level because state archivists tend to look to each other for solutions and no one has taken the lead.”²⁰⁰ Perritt’s statement today is surely less accurate than it was in 1992, but it still is not off the mark. A 1994 survey found fifteen of forty-nine responding states with centralized information resources management (IRM).²⁰¹ Nine states

194. *Id.*

195. *Id.* at 12–14. This conclusion is more easily reached in theory than in practice. A 1992 GAO report described how “data processing began as a back-room function, supporting activities such as personnel and payroll.” GAO, INFO. MGMT. & TECH. ISSUES 16 (1992) (publication no. GAO/OCG-93-5TR). Thus the failure of upper-level administrators to accept RIM as an important aspect of their strategic planning has been an impediment to the implementation of coherent RIM strategies across government. *See id.* at 12–18.

196. Local government, see generally ARMA Essential Elements, *supra* note 115, is omitted from this discussion for the sake of simplicity, but it is a vital player in the big picture, VICTORIA IRONS WALCH, MAINTAINING STATE RECORDS IN AN ERA OF CHANGE: A NATIONAL CHALLENGE: A REPORT ON STATE ARCHIVES AND RECORDS MANAGEMENT PROGRAMS 5 (1996), <http://www.coshrc.org/reports/1996rpt/96rpt-narrative.pdf> (last visited Oct. 22, 2005) (preface by Richard Cameron, National Historical Publications and Records Commission). Irons’s report was third in a series published by the Council of State Historical Records Coordinators (COSHR) in partnership with the National Association of Government Archives and Records Administrators (NAGARA). *Id.* at 8. Prior to the first report of the COSHR in 1991, the most recent assessment of state archives and records management programs was in ERNST POSNER, AMERICAN STATE ARCHIVES (1964). *Id.* at 3.

197. WALCH, *supra* note 196, at 5 (Cameron preface).

198. *Id.* (Cameron preface).

199. Perritt, *Electronic Records Management and Archives*, *supra* note 11, at 1018.

200. *Id.* at 1018–19.

201. WALCH, *supra* note 196, at 20 (Alaska, Colo., Conn., Del., Fla., Ga., Ky., Miss., N.H., N.C., Tenn., Vt., Va., Wash., Wis.). NAGARA and COSHR surveyed archives and

reported no centralization of IRM.²⁰² Other results were inconsistent with prior data, suggesting confusion about what “IRM” entails.²⁰³ A 1996 report generated by the survey amounted to an exhortation to states to “meet[] the challenge” of electronic records management.²⁰⁴ State archives were surveyed again in 2003 to assess their handling of electronic records.²⁰⁵ While only thirteen of forty-two responding state archives said they were actively soliciting electronic records,²⁰⁶ and only thirteen said they had an active program to ensure the long-term preservation of electronic records,²⁰⁷ thirty state archives said they had taken custody of electronic records in the previous five years.²⁰⁸ Witnessing this apparent disconnect between state archives’ readiness to take responsibility for electronic records and the fact that they were accessioning them nonetheless, the survey report once again concluded that state archives must be better prepared to meet the challenges of electronic records preservation.²⁰⁹

The surveys demonstrate the difficulty both of assessing state performance in RIM and retention and of describing the patchwork of state experi-

records management offices in the 50 states, the District of Columbia, and the United States territories, except that only one survey went to Arkansas, which had no records management official. *Id.* at 8. In six states, the records management official did not respond, but the archives did. *Id.* (Idaho, Iowa, Mont., Neb., N.D., Ohio). No responses were received from Louisiana, the District of Columbia, or the United States territories. *Id.* “IRM” in this context appears to be broader than and to encompass records management, or RIM. *Cf. supra* note 9.

202. WALCH, *supra* note 196, at 20 (Ark., Haw., Mo., Neb., Ohio, Okl., R.I., S.D., Wyo.).

203. *Id.*; *cf. supra* note 201.

204. *See* WALCH, *supra* note 196, at 34–38. In other survey results, Arkansas ranked 27 of 43 in state archives and records management budgeting (\$860,690 as a percentage (0.016%) of total general expenditures (\$5,455,006,000). *Id.* app. B, at 4 (Table 1). Arkansas reported zero records management staff and 19 archives staff (one administrative, seven professional, two technical, and nine clerical) and ranked 26 of 43 for archives and records full-time equivalents (FTEs) per 1000 state FTEs (0.35). *Id.* at 6, 7 (Table 3 and 4). Arkansas was one of eight surveyed jurisdictions (fifty-one) reporting no statewide general records schedule. *Id.* at 31 (Table 22).

205. COMM. ON ELEC. RECORDS & INFO. SYS. OF THE NAT’L ASS’N OF GOV’T ARCHIVES & RECORDS ADMIN’RS, STATUS OF THE PRESERVATION OF ELEC. RECORDS BY STATE ARCHIVES 2 (Apr. 23, 2004), http://www.nagara.org/news/ceris_report.pdf and http://www.nagara.org/news/ceris_responses.pdf (apps.) (last visited May 24, 2005)

206. *Id.* (Ala., Del., Idaho, Ky., Md., Mich., Miss., N.Y., N.C., Or., Wash., Wis., Wyo.).

207. *Id.* at 3 (Ky., La., Md., Minn., Miss., Mo., N.J., N.Y., N.C., Pa., Utah, Wash., Wyo.).

208. *Id.* at 2–3 (Ala., Ariz., Colo., Del., Ga., Idaho, Ky., La., Md., Mich., Minn., Miss., Mo., Neb., N.H., N.J., N.Y., N.C., Ohio, Okl., Or., Pa., S.C., Tenn., Tex., Utah, Va., Wash., Wis., Wyo.). The Arkansas History Commission responded in the negative to all three questions. *Id.* app. 1, at 1; *id.* app. 2, at 3.

209. *See id.* at 6. The report further suggested that to overcome the financial and technical obstacles to developing fifty separate archival structures, the states might cooperate on a nationwide electronic architecture. *Id.*

ments underway to manage records. The development of general records schedules across state government, an advisable undertaking that might be modeled on the NARA GRS program, might logically be charged to any number of state entities. And, in fact, state RIM has been viewed differently by different states. Even if RIM were charged uniformly to state archives, the 2003 survey showed that the archives are not uniformly placed within state government. A plurality of responding states reported that their archives were located within the province of the secretary of state, but eight other supervising state entities turned up in the survey too, including departments of education, commerce, and parks and tourism.²¹⁰ RIM functions were jointly administered by state archives in most, but not all, states; those with distinct RIM authorities reported three different parent agencies: departments of general services, of administration, and of management and budget.²¹¹ The electronic age has witnessed the advent of the chief information officer and information technology branches of state government; it remains to be seen how many of these offices might merge information services with interrelated RIM and archiving functions.²¹²

The general records retention schedules of Texas²¹³ and Connecticut²¹⁴ may be examined as models and compared.²¹⁵ Both were promulgated by the state libraries; in Texas, the State Library and Archives Commission work in tandem.²¹⁶ Both schedules assert their binding nature.²¹⁷ The Texas schedule cautions that "any litigation, claim, negotiation, audit, open re-

210. WALCH, *supra* note 196, app. B, at 37 (Table 28). The Arkansas History Commission is within the Arkansas Department of Parks and Tourism. *Id.*

211. *Id.* at 38 (Table 29).

212. See Peritt, *Electronic Records Management and Archives*, *supra* note 11, at 1019 (suggesting that the role of archivist might change in the electronic era from document custodian to information systems architect and reference librarian). As will be discussed in part III, *infra*, Arkansas charged its present records retention project to the Chief Information Officer and Office of Information Technology, and not to the Arkansas History Commission or the Arkansas State Library, even though records retention pertains to traditional paper records besides electronic records, and the latter entities surely have superior expertise in the management of traditional media.

213. Texas State Library and Archives Commission, Texas State Records Retention Schedule (2d ed. eff. Jan. 1, 1998), <http://www.tsl.state.tx.us/slrn/recordspubs/rrs2.html> (last visited Aug. 17, 2004) [hereinafter Tex. Schedule].

214. Connecticut State Library, Records Retention Schedule for State Agencies (last rev. Sept. 11, 2002), <http://www.cslib.org/Retstate.htm> (last visited June 29, 2004) [hereinafter Conn. Schedule].

215. These two schedules were chosen because they are the only state general records schedules that were employed nearly in whole as models for the Arkansas project. Parts of policies and schedules from other states were employed, see *infra* part III, and individuals consulted other-state sources that were not made part of official project files.

216. Conn. Schedule, *supra* note 214; Tex. Schedule, *supra* note 213.

217. Conn. Schedule, *supra* note 214, pt. K; Tex. Schedule, *supra* note 213 (Caution, Introduction).

cords request, administrative review, or other action involving the record" supersedes scheduled disposal.²¹⁸ Both schedules endeavor to describe records commonly maintained across state agencies and to set minimum retention periods for those records;²¹⁹ the Texas schedule further recommends that the minimum retention periods be employed as maximum retention periods, though it clarifies that longer retention periods dictated by federal or state law or recommended by agency counsel override the scheduled retention periods.²²⁰

The Connecticut schedule divides records into seven categories.²²¹ Four categories cover administrative, personnel, and fiscal records, and "electronic data processing records."²²² Three other categories contemplate records of post-secondary educational institutions and of "health information management records and case files."²²³ The schedule is organized in a table, identifying, by column, an item number, a record series title and descriptions, a minimum required retention period, and final disposition.²²⁴ Most final dispositions are "destroy"; some are "permanent/archival."²²⁵

Records are classified by content rather than medium, with some exceptions; the separate category for electronic data processing records contemplates not electronic records generally, but rather records used specially by information technology professionals, such as systems documentation, application source code and master files, and computer inventories and repair logs.²²⁶ Retention periods for these specialized electronic files range from none (storage media use records, such as a contents listing) to permanent (data processing certificate of compliance).²²⁷ Many other record retention period descriptions are employed as well, such as these selected examples:²²⁸

218. Tex. Schedule, *supra* note 213 (Caution).

219. Conn. Schedule, *supra* note 214; Tex. Schedule, *supra* note 213.

220. Tex. Schedule, *supra* note 213 (Introduction).

221. Conn. Schedule, *supra* note 214.

222. *Id.*

223. *Id.* These categories were not considered for the Arkansas project.

224. *Id.*

225. *Id.*

226. *Id.* § 6 (items 65, 110). In other words, "electronic" in the category name modified "data processing," not "records."

227. Conn. Schedule, *supra* note 214.

228. *Id.* (items 10, 35, 40, 75, 90, 100).

Application System ... Documentation	Retain until one year after last remaining machine readable filed by a superseded or discontinued system has been erased or destroyed.
Application Transac- tion Files	Retain until completion third update or backup cycle
Computer Hardware Maintenance Records	Retain for life of equipment and until audit re- quirements are met.
. . . . Reports of com- puter job runs	13 months
Computer Hardware Utilization Records	3 years, or until audited, whichever comes later

Records found in more than one category in the Connecticut schedule are cross-listed. For example, records of disaster recovery activity are per-

manent administrative records, but are cross-listed as permanent electronic data processing records.²²⁹

The administrative category includes records such as correspondence, hearing transcripts, meeting minutes, policies, publications, and voice-mail.²³⁰ Retention periods range from none (e.g., voicemail), two weeks (security surveillance tapes) to ten years (accident records), or permanent (e.g., annual reports).²³¹ Most final dispositions are “destroy”; final disposition of records scheduled for permanent retention may call for transfer to the State Archives or for continued maintenance by the agency.²³² “Correspondence,” whether electronic or paper, is divided into “routine” and “policy” and scheduled for two years’ or permanent retention, respectively.²³³ E-mail is treated in its own right and divided by description into “transitory messages,”²³⁴ “less than permanent,”²³⁵ and “permanent or permanent/archival,”²³⁶ with the middle category assigned the same retention period as “required for equivalent hard copy.”²³⁷ Transitory messages have no retention requirement, and “permanent” messages may be “delete[d] when transferred to paper or microfilm.”²³⁸

Personnel and fiscal records include the array of record series one might expect, most scheduled for retention for one, two, three, or five years and destruction thereafter.²³⁹ Worth mention are the longer retention periods for personnel records of lasting significance, such as medical, leave, retirement records, and employment histories; they are scheduled for thirty years’ retention after employment terminates.²⁴⁰ Correspondence, the administrative record series divided into routine and policy, is cross-listed under personnel records.²⁴¹ Fiscal records are broken into eleven categories, including budget, payroll, procurement, and audit.²⁴² The vast majority of

229. *Id.* § 1 (item 85), § 6.

230. *Id.* § 1.

231. *Id.* (items 10, 30, 245, 265).

232. *Id.* § 1 & nn.1–2.

233. Conn. Schedule, *supra* note 214, at § 1 (items 65, 70).

234. Listed examples of “Transitory messages” are “junk mail, publications, notices, reviews, announcements, employee activities, routine business activities, casual and routine communications similar to telephone conversations.” *Id.* (item 110).

235. The phrase is not defined and presumably includes any e-mail message that is neither “transitory” nor “permanent.” *See id.* (item 110).

236. Listed examples of “Permanent or permanent/archival” e-mails that “document[] state policy or process, protection of vital public information.” *Id.* (item 110).

237. *Id.* (item 110).

238. *Id.* (item 110).

239. Conn. Schedule, *supra* note 214, at § 2.

240. *Id.*

241. *Id.*

242. *Id.* § 3. Other categories of fiscal records are accounting, disbursements, garnishments, miscellaneous, procurement, property control, revenue, and transfer lists. *Id.*

fiscal records are scheduled for retention for the later of three years or audit.²⁴³ Contracts of purchase are retained until audit and contract expiration.²⁴⁴

The Texas schedule is similarly divided into categories of administrative, personnel, fiscal, and electronic data processing records; there is an additional category for "support services records."²⁴⁵ As in the Connecticut schedule, content controls over medium; the electronic data processing category refers specifically to computer applications, hardware, software, operations, and support.²⁴⁶ The Texas schedule is not organized in a table, but rather as a narrative list, and quick consultation of the schedule is therefore more difficult.²⁴⁷ Each entry in the Texas schedule includes a record series number, title, and description; a retention period; and yes-no classifications as "vital" and "archival," with comments as needed.²⁴⁸ "Vital records" are defined as "those that are essential to resume business or continue an organization, to recreate an agency's financial or legal position, or to preserve the rights of employees and citizens."²⁴⁹ "Archival" records are those "that must be transferred, or evaluated, for archival preservation."²⁵⁰ A number of useful abbreviations are adopted to describe retention periods.²⁵¹

AC	After Closed
AV	As Long as Administratively Valuable
CE	Calendar Year End (Dec. 31)

243. *Id.*

244. *Id.* (items 825, 855, 875).

245. Tex. Schedule, *supra* note 213 (Table of Contents).

246. *Id.* § 2.

247. See Tex. Schedule, *supra* note 213. An index of record series titles helps some. See *id.* app.

248. *Id.*

249. *Id.* (Explanation of Fields). The definition further states that the vital designation is not mandatory and may be added or removed to a record series upon the judgment of an agency official. *Id.*

250. *Id.* (Explanation of Fields).

251. *Id.* (Explanation of Codes—Retention Codes).

FE	Fiscal Year End (Aug. 31)
LA	Life of Asset
PM	Permanent
US	Until Superseded

The Texas schedule does not specify within each entry, but appears to presume a “destroy” disposition for records where transfer to (code “A”) or assessment by (code “R”) the State Library and Archives Commission is not specifically indicated.²⁵²

Administrative records include series similar to those in Connecticut; further specified are legal opinions and advice, litigation files, press releases, open records requests, proposed legislation, speeches and papers, and “transitory information.”²⁵³ Legal opinions and advice other than litigation records are scheduled for AV retention, though they are subject to archival review before disposal.²⁵⁴ Litigation files, including advice concerning potential litigation, are scheduled for AC retention plus one year, also subject to archival review.²⁵⁵ Proposed legislation gets AV retention with no archival review.²⁵⁶ Press releases, speeches, and papers all get two years’ retention with archival review.²⁵⁷ Open records requests are divided into those approved—AC plus one year—and those denied—AC plus two years—and require no archival review before disposal.²⁵⁸

252. *See id.* (Explanation of Codes—Archival Codes).

253. Tex. Schedule, *supra* note 213, at §§ 1.1.014, .019-.021, .027, .040, .048, .057.

254. *Id.* § 1.1.014.

255. *Id.* § 1.1.048.

256. *Id.* § 1.1.027.

257. *Id.* §§ 1.1.019, .040.

258. *Id.* §§ 1.1.020-.021.

"Transitory information," a series title peculiar for its seeming reference to utility rather than content, and for its potential breadth, appears to be a catch-all. The series title describes:

[r]ecords of temporary usefulness that are not an integral part of a records series of an agency, that are not regularly filed within an agency's recordkeeping system, and that are required only for a limited period of time for the completion of an action by an official or employee of the agency or in the preparation of an on-going records series.²⁵⁹

Examples are offered:

routine messages (can be recorded on any medium, such as . . . on e-mail and voice mail); internal meeting notices; routing slips; incoming letters or memoranda of transmittal that add nothing of substance to enclosures; and similar routine information used for communication, but not for the documentation, of a specific agency transaction.²⁶⁰

Furthermore, suggesting that the series is indeed a catch-all, the schedule wisely cautions that this record series should not be construed to include records that fit better elsewhere.²⁶¹ The AC retention period pertains to transitory information, with negative vital and archival designations, but AC is specially defined: "Purpose of record has been fulfilled."²⁶² The schedule further advises that transitory information scheduled for disposal may be destroyed without the usual paperwork and centralized authorization, though an agency's internal record management plan should specify consistent procedures.²⁶³

As in Connecticut, correspondence comprises an administrative record series, in Texas divided into "administrative" (an unfortunate duplication of the term) and "general."²⁶⁴ Administrative correspondence is "[i]ncoming/outgoing and internal correspondence, in any format[]"—thus again including e-mail, which Texas does not list separately—"pertaining to the formulation, planning, implementation, interpretation, modification, or redefinition of the programs, services, or projects of an agency and the administrative regulations, policies, and procedures, that govern them[]": retention for three years, vital status, and subject to archival review.²⁶⁵ In contrast, general correspondence is "[n]on-administrative incoming/outgoing and internal correspondence, in any media, pertaining to or

259. Tex. Schedule, *supra* note 213, at § 1.1.057.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* §§ 1.1.007-.008.

265. Tex. Schedule, *supra* note 213, at § 1.1.007.

arising from the routine operations of the policies, programs, services, or projects of an agency[]”: retention for one year, non-vital, non-archival.²⁶⁶

Personnel, fiscal, and electronic data processing records are similar to their Connecticut counterparts.²⁶⁷ Payroll records appear under personnel rather than fiscal.²⁶⁸ Unlike Connecticut, Texas does not require decades’ extended retention of any personnel records; periods tend to be defined by duration of employment, or coded as AC, FE, or US, plus one to five years, with negative vital and archival designations.²⁶⁹ Fiscal record retention periods tend to be coded for FE plus three years, also with negative vital and archival designations.²⁷⁰ Electronic data processing records tend to be coded for AC retention, but are augmented with technical variations similar to those in Connecticut;²⁷¹ for example, for “master files,” AC is defined generally as “[c]ompletion of third update cycle.”²⁷²

The support services category in Texas carves out the routine and clerical from what might otherwise be administrative records.²⁷³ Included divisions are facility management, purchasing, risk management, telecommunications, and vehicle records, as well as a “general” division that embraces the painfully mundane, such as postage records and photocopier logs.²⁷⁴ Codes AV, AC, FE, LA, and US are scattered through the support services category, and rare is the record with an affirmative vital or archival designation.²⁷⁵

Though the Texas schedule occasionally contemplates archival review, it is extremely sparing—far more so than the Connecticut schedule—in its use of the permanent and archives-transfer designations. Remarkably, these designations are bestowed *only* upon meeting agendas and minutes (in the administrative category).²⁷⁶ Overall, the Texas retention periods tend to be less conservative—that is, shorter—than their Connecticut counterparts. Thus while the two schedules overlap considerably in the sorts of records to which they pertain, they diverge considerably in both facial format and in the conclusions they reach about appropriate terms for record retention.

266. *Id.* § 1.1.008.

267. *Id.* §§ 2–4.

268. *Id.* § 3.2.

269. *See id.* § 3.

270. *See id.* § 4.

271. Tex. Schedule, *supra* note 213, at § 2.

272. *Id.* § 2.1.002.

273. *See id.* § 5.

274. *Id.* Telecommunications disappointingly refers to content, not medium, for example, telephone bills. *Id.* §§ 5.5.001, .006.

275. *See id.*

276. *Id.* § 1.1.058.

III. RECORDS RETENTION IN ARKANSAS

This Part concerns records retention in Arkansas. Part III.A describes the recent history of records retention law in Arkansas, through the enacted—then vetoed—legislation of the 2003 General Assembly. Part III.B describes the records retention program developed by a state workgroup during the 2003-05 biennium, from the workgroup's genesis by gubernatorial action to the 2005 legislative decision to implement the program.

A. Recent History

The Arkansas Code established the Arkansas State Library within the Department of Education²⁷⁷ and the Arkansas History Commission within the Department of Parks and Tourism.²⁷⁸ The library is charged with serving as the "official depository for state and local documents,"²⁷⁹ and with offering advice and services to state agencies.²⁸⁰ But it is not empowered to capture documents in the possession of state agencies or to govern records management.²⁸¹

The History Commission, which dates to the first decade of the twentieth century,²⁸² is largely charged with a similarly passive role in state records management.²⁸³ Its authority might more easily be construed broadly,²⁸⁴ but the Commission has been reluctant to extend its reach without specific authorization and funding from the General Assembly. That authorization, in varying degrees, was granted to the Commission by statute

277. ARK. CODE ANN. § 13-2-203 (Lexis Repl. 2003). The code dates the library only back to its incarnation under the prior iteration of the code. *Id.* (citing ARK. STAT. ANN. § 6-301 (1947)).

278. 1971 Ark. Acts 38.

279. ARK. CODE ANN. § 13-2-210 (Lexis Repl. 2003).

280. *Id.* § 13-2-207.

281. *See id.* The broadest statement of library authority could not easily be construed so emphatically. *See id.* § 13-2-207(10) ("Perform all other functions and services that are common to the purposes and objectives of a state library."). Conceivably, the library could employ its power to contract with state agencies to extract from the agencies voluntary obligations to undertake records management programs. *See id.* § 13-2-207(9)(B).

282. ARK. HISTORY COMM'N, THE HISTORICAL RECORDS OF ARK. (1984-85) (on file with the Arkansas History Commission) (non-paginated front matter) (citing 1909 Ark. Acts 304) [hereinafter ARK. HISTORICAL RECORDS]. The Arkansas Code traces the commission only to 1911. ARK. CODE ANN. § 13-3-101 (history) (citing 1911 Ark. Acts 355, §§ 1-2).

283. ARK. CODE ANN. § 13-3-104 ("receive," "classify," "collect," "preserve," "destroy," "exchange," "cooperate"). The initial mission for the commission was potentially broader, but the commission was restricted to archival functions by 1963 Ark. Laws Act 207. ARK. HISTORICAL RECORDS, *supra* note 282, at 17.

284. ARK. CODE ANN. § 13-3-104(b)(6) ("Contract and be contracted with"), (b)(7) ("Take such other action, not inconsistent with law, as it shall deem necessary in the performance of any of its functions.").

from 1973 to 2001, but adequate funding never ensued. Lacking authority for most of its life to set mandatory records management policy for government agencies, the Commission has depended for its collection development largely on the benevolence of contributors and the ingenuity of commission leadership. The History Commission has nevertheless taken the lead in archiving Arkansas history.

The archiving fever that captivated the federal government in the 1970s had a trickle-down effect in the states, and Arkansas was no exception. In the early 1970s, a Public Records Commission studied the records management efforts underway in other states and solicited the advice of the National Archives and Records Service.²⁸⁵ The Commission's work led to the 1973 enactment of the Arkansas Public Records Management and Archives Act,²⁸⁶ an attempt "to set up a comprehensive records management program."²⁸⁷ In 1975, the Governor created the state Historical Records Advisory Board, coordinated by the director of the History Commission, to contend for federal funding for records management development.²⁸⁸

In the early 1980s, Arkansas won a \$25,000 grant from the State Historical Records Assessment and Reporting Project of the National Historical Publications and Records Commission.²⁸⁹ Pursuant to the grant, the Arkansas History Commission produced, in 1984-1985, a comprehensive report on the disposition of state government records, local government records, state historical repositories, and statewide functions and services.²⁹⁰ The Commission held twelve public hearings in 1984 around the state to gain public input and provide public education about state records management.²⁹¹ The report made several recommendations to improve state records management: these included that the commission should strive for status as an independent agency, that the state records management program should be expanded to include all state and local government records, and that the History Commission should have a formal say in the development of agency retention schedules.²⁹²

At least one of those goals—the expansion of the state records management program—should already have been accomplished under the 1973 act, which contemplated a comprehensive records management program for

285. ARK. HISTORICAL RECORDS, *supra* note 282, at 17.

286. 1973 Ark. Acts 24 (repealed 1995).

287. Op. Att'y Gen. No. 94-085 (1994) (citing ARK. CODE ANN. §§ 13-4-101, *et seq.* (1987 & Cum. Supp. 1993)).

288. ARK. HISTORICAL RECORDS, *supra* note 282, at ii.

289. *Id.*

290. *Id.* at 2. The report is ARK. HISTORICAL RECORDS, *supra* note 282.

291. *Id.* at 3.

292. *Id.* at 4, 6.

state and local government records, including court records.²⁹³ The 1973 act charged each agency with the development of a records schedule according to standards set by the History Commission and in cooperation with the State Historian, a position created by the act.²⁹⁴ A State Records Committee was established and charged with approving, disapproving, amending, or modifying schedules generated by the agencies and the State Historian.²⁹⁵ A parallel process was established at the local level, where local government records committees would review policies generated by agencies of local government, including cities, towns, counties, and school districts.²⁹⁶ The act provided for the disposal or transfer to archives of records at the end of their scheduled retention periods within agencies²⁹⁷ and for misdemeanor prosecution of deviation from lawful records management practices.²⁹⁸

But the program envisioned by the 1973 legislation never reached full-scale implementation because of lack of funding.²⁹⁹ Implementation began in 1976 with only two dedicated employees.³⁰⁰ Despite a dearth of resources, one-third of state agencies had records retention schedules after five years, and some 93,000 cubic feet of records were removed to the archives or disposed of.³⁰¹ The Office of Records Management within the History Commission published guidance documents in 1976 and 1981 instructing agencies in record inventorying, appraisal, and disposition scheduling according to principles of administrative, fiscal, legal, and historical value.³⁰² Upon the occasion of the annual conference of Arkansas Archivists and Records Managers (AARM) in 1980, Governor Bill Clinton proclaimed November 2-8 "Arkansas Archives and Records Management Week."³⁰³ By 1984, the Commission had aided in the development of internal records schedules for forty to forty-five percent of state agency records.³⁰⁴

293. 1973 Ark. Acts 24, § 2 (repealed 1995), *reprinted in* ARK. HISTORY COMM'N, ARK. RECORDS MGMT. MANUAL 23 (1981) (on file with the Arkansas History Commission).

294. *Id.* § 5.

295. *Id.* § 6.

296. *Id.* § 7.

297. *Id.* § 8.

298. *Id.* §§ 9-10.

299. Op. Att'y Gen. No. 94-085 (1994) (citing JOHN J. WATKINS, THE ARKANSAS FREEDOM OF INFORMATION ACT 15 (2d ed. 1994)).

300. ARK. HISTORY COMM'N, ARK. RECORDS MGMT. MANUAL (1981) (on file with the Arkansas History Commission) (non-paginated foreword) [hereinafter 1981 GUIDANCE].

301. *Id.* It was estimated in 1976 that Arkansas created more than 500,000 cubic feet of records annually. ARK. HISTORY COMM'N, ARK. RECORDS INVENTORY HANDBOOK i (1976) (on file with the Arkansas History Commission) [hereinafter 1976 GUIDANCE].

302. 1981 GUIDANCE, *supra* note 300, at 4-5; 1976 GUIDANCE, *supra* note 301, at 1-2.

303. AARM, Newsletter no. 5, Jan. 1981, at 2 (on file with the Arkansas History Commission) [hereinafter AARM Newsletter].

304. ARK. HISTORICAL RECORDS, *supra* note 282, at 4, 24.

Still, in 1984, eleven years had passed since the program was enacted. Fewer than half the state records and none of the local records had been scheduled. Worse, records fever was dying out in the 1980s. Russell Baker, incoming AARM president, wrote presciently in the organization's January 1981 newsletter:

This will be a year of trial for the members of AARM, as well as the public and private institutions they represent. The once abundant supply of money which until recently flowed into our respective repositories seems to be on the verge of drying up. This is occurring just as the American public is in the process of discovering "archives" and demanding more services from them. . . . Prospects for the next few years seem to hold little relief.³⁰⁵

Despite attempts at a legislative fix,³⁰⁶ the History Commission continued to receive inadequate funding to implement the 1973 act, and agencies were left largely to their own discretion to retain records or not.³⁰⁷

In 1993, the History Commission engaged Governor Jim Guy Tucker with the idea of revamping state records management policy.³⁰⁸ The Governor established a Task Force on the Retention of Historic State Records "to study the State's public records retention, preservation, storage, and maintenance systems, and to make . . . recommendations," accompanied by a cost analysis.³⁰⁹ The Governor acknowledged that Arkansas then lacked any "effective system of public records retention," and declared that a records management program "is essential to the efficient and orderly operation of the State's business," and "to future generations."³¹⁰ The task force

305. AARM Newsletter, *supra* note 303, at 7.

306. Op. Att'y Gen. No. 94-085 (1994) (referencing a 1987 amendment to the 1973 act). There is also a record in the files of the History Commission of failed legislation in 1977. Records of Governor's Task Force on the Retention of Historic Records, 1994, Folder 9, in the Manuscript Collection of the Arkansas Historical Commission [hereinafter 1994 Task Force Records]. Among the changes apparently contemplated from the 1973 act was the omission of local government entities from the program. *See id.* The records of the 1977 effort include a letter from the Department of Finance and Administration criticizing the legislation as still "too ambitious, especially in the . . . budgeting" and recommending instead a "more austere" mission for the History Commission, confined to the storage rather than the organization of records. *Id.*

307. *Id.*

308. The *Arkansas Democrat-Gazette* got behind the idea too, urging the Governor to act. Editorial, *Amnesiac Arkansas: Where's Our Past?*, ARK. DEMOCRAT-GAZETTE, Jan. 29, 1994, at 6B, copied in 1994 Task Force Records, *supra* note 306, Folder 8.

309. Proclamation, Gov. Jim Guy Tucker, May 20, 1994, original in 1994 Task Force Records, *supra* note 306, Folder 8.

310. *Id.*

included academics, public officials, and the director of the History Commission.³¹¹

The work of the task force³¹² resulted in 1995 legislation,³¹³ another Arkansas Public Records Management and Archives Act.³¹⁴ The legislation was sponsored by then-Senator Jodie Mahony, who later sponsored the 2005 legislation from the House of Representatives.³¹⁵ Agencies covered by the 1995 act included the courts of appeals "and any state office, department, bureau, division, board, or commission" created for the purpose of performing one . . . or more functions of state government."³¹⁶ But unlike the 1973 act, the 1995 act did not reference local governments and exempted "public institutions of higher education."³¹⁷ The act reestablished the State Records Commission and State Historian.³¹⁸ The State Records Commission was empowered to promulgate rules for a State Records Management and Archive Program within the Office of Records Management, which in turn was placed within the Department of Finance and Administration.³¹⁹ The program would entail not only retention schedules, but also centers for record storage and procedures to integrate retention and archives.³²⁰ Agencies were again charged with developing and implementing their own record management solutions with guidance from the State Histo-

311. Members were Ben Johnson, Southern Arkansas Community College; Ann Pryor Clements, Secretary of State Office; Ernest Dumas; Cal Ledbetter, University of Arkansas at Little Rock; Sheery Dahlstrom; Raphael Lewis, Philander Smith College; Kenneth Startup, Williams Baptist College; Bobby Coker, Harding University; Nancy Davis, Finance and Administration Department; John Ferguson, History Commission; Charlotte Jones; Jennifer Wayne, University of Arkansas at Fayetteville; Ron Lester, Information Systems; and Emmett A. Presley. Attachment to Letter from Governor Jim Guy Tucker to John Ferguson, June 24, 1994, *original in* 1994 Task Force Records, *supra* note 306, Folder 6.

312. Task Force minutes can be found in 1994 Task Force Records, *supra* note 306, Folder 7.

313. The 1995 legislation was derived substantially from the failed 1977 bill, *see supra* note 306. An apparently first draft of the 1995 legislation contained in the files of the History Commission actually is the 1977 bill with "1977" crossed out and "1995" penciled in, and other changes written in. 1994 Task Force Records, *supra* note 306, Folder 2.

314. 1995 Ark. Acts 905 (repealed 2001). Drafts of the legislation can be found in 1994 Task Force Records, *supra* note 306, Folder 2.

315. *See infra* part III.B.5.

316. ARK. CODE ANN. § 13-4-103(1) (Lexis 2000) (repealed 2001).

317. One can surmise that the omission of local governments was intended to scale back the ambitious 1973 program. *See supra* note 306. But the author found no record explaining the addition of a higher education exemption. To the contrary, a copy of the draft 1995 legislation in the History Commission files marked "Rep. Jodie Mahoney[sic] suggested revision," "Sept. 19, 1994," and initialed "JLF" has the higher education language circled and the word, "why?" written in the margin. 1994 Task Force Records, *supra* note 306, Folder 2. The writer also queried whether the inclusion of the courts conflicted with court policies. *Id.*

318. ARK. CODE ANN. §§ 13-4-103(13), -105(a) (repealed 2001).

319. *Id.* §§ 13-4-105(c)(1), -106(c) (repealed 2001).

320. *Id.* §§ 13-4-106(b), -107, -109 (repealed 2001).

rian and to the satisfaction of the State Records Commission.³²¹ Enforcement of the act was again backed by threat of prosecution for a class A misdemeanor.³²²

However, the 1995 act, like its predecessor, went unfunded. It was repealed outright in 2001.³²³ In 2003, the General Assembly tried to revive statewide records management by empowering the Executive Chief Information Officer (ECIO) to promulgate rules governing records management.³²⁴ House Bill 2681 called on the ECIO to develop records management procedures and retention schedules for records “in any medium” in consultation with the heads of state agencies, that is, state departments, boards, and commissions.³²⁵ A general schedule would have pertained to records “common in most state agencies,” and regulations would advise agencies in the development of internal schedules.³²⁶

House Bill 2681 passed the House 94-0 with six not voting, and the Senate 35-0, but was vetoed by the Governor on April 29, 2003. Governor Mike Huckabee in his veto message described the bill as “laudable” in intent, but “an onerous unfunded mandate” in a time of “fiscal distress.”³²⁷ According to the Governor, House Bill 2681 did not “adequately address[] the financial or logistical issues surrounding the records retention questions.”³²⁸

B. The Emerging Program: 2003-05

Governor Huckabee’s veto did not signify a rejection in principle of a records retention program for Arkansas. To the contrary, the Governor, by letter of May 5, 2003, charged the Office of the Executive Chief Information Officer (ECIO Office) with “defining rules and regulations for records retention.”³²⁹ Part II.B.1 describes the consequent formation of a workgroup by the ECIO Office, the project charter of the workgroup, and its first steps. Part II.B.2 further describes the workgroup process in terms of its most substantial final product, a proposed records retention schedule.³³⁰

321. *Id.* § 13-4-108 (repealed 2001).

322. *Id.* § 13-4-112 (repealed 2001).

323. 2001 Ark. Acts 1252; *see* WATKINS & PELTZ, *supra* note 3, at 23–24 n.73.

324. 2003 Ark. H.B. 2681.

325. *Id.* §§ 3(b), 4.

326. *Id.* § 4(c)-(d).

327. WATKINS & PELTZ, *supra* note 3, at 24 n.73 (quoting Governor’s veto message).

328. Letter from Governor Mike Huckabee to Executive Chief Information Officer Carolyn Walton, May 5, 2003, at 2 (copy on file with author) [hereinafter Governor’s Charge].

329. *Id.* at 1.

330. At the time of this writing, September 1, 2005, the ECIO Office has formed a second, formal workgroup pursuant to 2005 Ark. Laws Act 918, *see infra* note 332. Details on the work of the second group are posted at <http://www.techarch.state.ar.us/domains/>

Parts II.B.3 and II.B.4 briefly explain the workgroup's other final products, a reiteration of best practices for electronic records management and for records schedule compliance, and a cost estimate report.³³¹ Part II.B.5 explains the legislative process undertaken in 2005 to implement the records retention program.

1. *Formation, Charter, and First Meetings*

Within the ECIO, the job of facilitating the workgroup fell to technical architect Drew Mashburn.³³² Mashburn, who holds a doctorate in educational leadership, brought administrative talents as well as technical expertise to the project. A records retention program could not succeed without the commitment of the state agencies³³³ to which it would apply, so Mashburn set about assembling a workgroup of representatives and experts from a broad range of state agencies, as well as concerned organizations from both public and private sectors.³³⁴ In the end, the Record Management Cross Functional Workgroup included twenty-one representatives of eighteen state agencies,³³⁵ seven partners from the private sector,³³⁶ and six partners from the public sector.³³⁷

information/working_group/records/main.htm (last visited Sept. 1, 2005). The second workgroup, facilitated by Drew Mashburn of the ECIO Office, *see infra* note 332, consists of 78 officials representing 42 state entities with no public or private partners. The second workgroup has formulated a revision of the first workgroup's general records schedule, electronic records management guidelines, and records schedule compliance guidelines. The second workgroup sent those revised proposals to the ECIO Council for review in anticipation of submission for a 30-day public comment period and desired implementation by year's end. Because the second-workgroup products might yet undergo substantial revision before ultimate promulgation, this article will describe the products of the first workgroup, in which the author participated and is therefore better informed. However, footnotes will signal significant departures in the second-workgroup products from the first-workgroup products. The second-workgroup products cited in these notes were dated August 17, 2005, and were downloaded from the second-workgroup web page on September 1, 2005 (copies on file with author). Unfortunately, it is sometimes difficult to discern why changes to the first-workgroup proposal were made; the second-workgroup minutes routinely refer to revisions having been adopted by a second-workgroup subcommittee, but provide no explanation.

331. *See supra* note 322.

332. Interview with Drew Mashburn, Chief Information Officer, Arkansas Office of Information of Technology (Feb. 11, 2005). The author expresses his appreciation to Drew Mashburn, who never failed to make himself available to answer questions and to provide documentation in support of this research.

333. Henceforth the term "agencies" will describe all of those entities covered by the retention schedule, namely, "state agencies, boards, and commissions," except in discussion of the implementing legislation, *infra* part III.B.5, where the precise definition of the schedule scope is pertinent to the discussion.

334. Mashburn, *supra* note 332.

335. Members were Dan DeLaughter, Parks and Tourism Department; Morris Jenkins, Dori Wong, and Stacey Zeigler, Economic Development Department; Lynn Ewbank and

Mashburn drafted a Project Charter for consideration at the workgroup's first meeting. The charter set out two objectives.³³⁸ First, the workgroup would "[p]roduce a practical records retention schedule for common categories of public records."³³⁹ The schedule would address e-mail and would harmonize itself with existing federal and state retention laws.³⁴⁰ Second, the workgroup would "[p]roduce electronic record management guidelines and requirements for use by all state agencies, boards, and commissions,"³⁴¹ including provisions for the "creation, protection, preservation, disposal, and other functional requirements for electronic records," specifically addressing e-mail.³⁴² The charter was guided by the Governor's charge, which had expressed particular concern over the disposition of electronic records.³⁴³ However, the charge and thus the charter's first priority went further, contemplating a records retention schedule appli-

Jane Hooker, History Commission and Archives; Brian Stewart, Highway Department; Danna Erwin, Information Systems Department; Sally Hawke, State Library; Robert Gage, Environmental Quality Department; Ragenea Thompson Hodge and James Winningham, Insurance Department; Jerry Perkins, Health Department; Bill Clinton, Crime Information Center; Richard Wyatt and Oren Wright, Human Services Department; Peggy Wakefield, Workforce Education Department; Ken Williams, Finance and Administration Department; Kendall Woods, South Arkansas Community College; Sharon Robinette, Workforce Investment Board and Employment Security; Mike Lar, Education Department; Linda Pine, University of Arkansas at Little Rock; and Mashburn, Paula Swaim, and Gary Johnson, ECIO Office. PROPOSED SCHEDULE, *infra* note 368, at 30; ECIO Office, Record Management Cross Functional Workgroup Members and Partners (undated copy obtained from Mashburn, *see supra* note 332, and on file with author, updated by author's personal experience).

336. Private-sector partners were Debbie Nye, Mitchell, Williams, Selig, Gates & Woodyard; Mac Norton, Wright Lindsey & Jennings; David Ivers, Mitchell, Blackstock, Barnes, Wagoner, Ivers & Sneddon; Scott Shively, Arkansas Bar Association Health Law Section; Jim McCall, Arkansas Broadcasters Association; and Tom Larimer and Milton Scott, Arkansas Press Association. PROPOSED SCHEDULE, *infra* note 368, at 17.

337. Public-sector partners were Matthew Miller, Legislative Research; Randy Wilcox and Milton Fines, Governor's Office; Nicky Sherman, Attorney General's Office; Rep. Jodie Mahony, D-El Dorado, General Assembly; and the author. *Id.* at 17.

338. ECIO Office, Project Charter (undated one-page handout distributed at workgroup meeting, Mar. 31, 2003, and on file with author) [hereinafter Project Charter].

339. *Id.* The word "public" was deleted from the charter by later amendment, presumably so that the purview of the workgroup could not be misconstrued as limited to records subject to public disclosure. ECIO Office, Minutes of Records Management Workgroup, June 15, 2004, at 1 (copy on file with author) [hereinafter Minutes, June 15, 2004]. Besides her substantive participation as a key member of the workgroup, the ECIO Office's Paula Swaim took meticulous and lucid minutes of often chaotic discussion.

340. Project Charter, *supra* note 338.

341. *Cf. supra* note 333.

342. *Id.*

343. Governor's Charge, *supra* note 328, at 1 ("I believe the public should always have easy access to public records, but I'm also aware that all states are dealing with the conversion of paper to electronic storage issues."); Mashburn, *supra* note 332.

cable to all records.³⁴⁴ To impose standards on agencies for the management of traditional paper records exceeded the scope of the ECIO's legislative authority, which extended only to the electronic realm;³⁴⁵ thus, to realize that larger objective, legislation would be required.³⁴⁶ The charter contemplated a final product delivery date of October 15, 2004.³⁴⁷ That deadline was not met, but an accelerated schedule in December triggered a final product at year's end, in time for the 2005 legislative session.³⁴⁸

The workgroup first met on March 31, 2004.³⁴⁹ Mashburn outlined the problem. Previous efforts at records retention had failed for lack of funding, and no statewide document retention system was in place.³⁵⁰ As example of the magnitude of the problem, the largest Arkansas agency had some 7,000 employees and generated millions of e-mails a year with no working program to capture electronic messages that might have ongoing operational or historical value.³⁵¹ Mashburn introduced the five categories of the Texas general records schedule³⁵² for the group's consideration, and he initiated the schedule-creation process by asking group members³⁵³ to consider the functions of their various offices, the records they create, and what records might be common across agencies.³⁵⁴ Creation of a common record inventory, he said, would be the next step.³⁵⁵

344. See Project Charter, *supra* note 338.

345. See ARK. CODE ANN. § 25-33-104(a)(2)(B) (2005) ("electronic records").

346. See *infra* Part III.B.5.

347. Project Charter, *supra* note 338.

348. Present members of the workgroup voted unanimously to approve the record retention schedule and electronic records guidelines—pending incorporation of final changes and addition of the cost estimate report—for delivery to the Governor on December 15, 2004. Minutes of Records Management Workgroup, Dec. 15, 2004, at 2 (copy on file with author) [hereinafter Minutes, Dec. 15, 2004]. Cost estimate tools were returned to the ECIO Office for compilation by January 5, 2005. See *id.*

349. The author was present for most workgroup meetings. Assertions henceforth about what took place at those meetings derive from the author's notes and memories when not cited otherwise.

350. ECIO Office, Minutes of the Records Management Workgroup, Mar. 30, 2004 (copy on file with author).

351. See Governor's Charge, *supra* note 328, at 2 ("The largest state agency in Arkansas has 7,000 employees. If each employee sent or received only 25 e-mails in a given day that creates 3,500,000 e-mails in any given month, and those are only the e-mails for one of 53 state agencies.").

352. See *supra* part II.E.

353. "Members" will be used informally in this context to refer collectively to "members" and "partners" of the working group when the formal distinction between the two is unimportant. Only formal members of the workgroup held voting power. But partners were permitted to participate vigorously, and the workgroup never took a final vote that was close.

354. See also Minutes, June 15, 2004, *supra* note 339, at 1.

355. See also *id.* at 2.

To assess how well members of the workgroup might problem-solve, Mashburn proposed the problem of e-mail retention specifically and asked the group to decide, in the abstract, whether e-mail should be managed by content rather than medium, i.e., on the same criteria as paper records; or whether e-mail should be treated as its own record series, subject to a blanket retention period.³⁵⁶ From that point, the meeting could have gone better; discussion revealed wide and sometimes heated disagreement on the question. Representatives of the media made the case for extended retention periods, while representatives of agencies argued that the transient and informal nature of e-mail made immediate deletion the wisest approach. Technical experts bemoaned the problems of harvesting and storing e-mail. Managers worried about how much personnel time would be consumed with the meticulous classification of routine messages. Group members had a difficult time staying focused on Mashburn's question, and Mashburn struggled in vain to confine the discussion to a choice between the alternative approaches he had suggested.³⁵⁷

The experience of the first meeting clearly demonstrated that the full workgroup would not be able to construct the general records schedule as a committee of the whole; there was too much disagreement over fundamentals to get the project off the ground without more centralized decision-making.³⁵⁸ At the second meeting of the workgroup, in June 2004, the workgroup agreed on the appointment of a subgroup to draft the inventory of commonly held records.³⁵⁹ The volunteer subgroup later evolved into a subcommittee that played a crucial role, providing draft text at every step of the process.³⁶⁰ Also at that June meeting, the workgroup agreed to adopt the definition of "record" from the Arkansas Freedom of Information Act (FOIA): "writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any [format or] medium."³⁶¹ The FOIA's definition is famously expansive.³⁶²

356. See ECIO Office, Agenda: Records Retention Work Group (Mar. 31, 2003) (copy on file with author).

357. The minutes suggest that the group tended to favor the former, medium-neutral, content-dependent approach to e-mail over the latter, unique-series approach. See Minutes, Mar. 20, 2004, *supra* note 350. Such was the case, though one could hardly say there was a consensus.

358. Mashburn, *supra* note 332.

359. Minutes, June 15, 2004, *supra* note 339, at 2.

360. Ultimately the subcommittee consisted of Hooker, Mashburn, Pine, Swaim, Hodge, Winningham, and Ziegler. Mashburn, *supra* note 332.

361. ARK. CODE ANN. § 25-19-103(5)(A) (2005), *quoted in* Minutes, June 15, 2004, *supra* note 339, at 2; Minutes of Records Management Workgroup, Sept. 29, 2004, at 5 (copy on file with author) [hereinafter Minutes, Sept. 29, 2004]. The full FOIA definition states:

writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any [format or] medium that are kept or otherwise kept, and which constitute

By mid-July 2004, the workgroup subcommittee had developed categories for the common record inventory, analogous to the Texas and Connecticut models and building on previous Arkansas records management legislation: administrative, fiscal, legal, personnel, and historical.³⁶³ Whereas the other states placed legal within the administrative category, the workgroup followed the example of earlier Arkansas practice and embodied legal in its own category.³⁶⁴ "Automated systems," akin to the other states' electronic data processing, was subordinated within the administrative category. The historical "category," later renamed "Records to Consider for Permanent Retention,"³⁶⁵ was added, but it is not a category in the same sense as the others. The "permanent" category is intended to provide guidance to state officials in identifying across all other categories, and among unscheduled records, the archival records that are suitable for permanent retention.³⁶⁶ The workgroup also saw the need to develop a glossary, to ensure uniformity in word choice.³⁶⁷

With at least the tentative establishment of record categories, work began on defining the record series titles, descriptions, and retention periods. Under the leadership of the subcommittee, the pace picked up. The workgroup had draft text to consider and was less likely to be bogged down in theoretical discussion. The general records schedule took shape.

2. *General Records Schedule*

The final proposal for a retention schedule, along with the report of the workgroup, was transmitted to the Governor in January 2005, in time for the

a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.

ARK. CODE ANN. § 25-19-103(5)(A) (2005). Excluded is "software acquired by purchase, lease, or license." *Id.* § 25-19-103(5)(B) (2005).

362. See WATKINS & PELTZ, *supra* note 3, at 82 ("a broad presumption in favor of open records").

363. ECIO Office, Minutes of Records Management Workgroup, July 14, 2004, at 1 (copy on file with author) [hereinafter Minutes, July 14, 2004]. Different subcommittee members were tasked with responsibility for the various categories: Mashburn for administrative, except for automated systems, which would be developed by Zeigler; Pine for fiscal; Hodge for legal; and Swaim for personnel. *Id.*; Mashburn, *supra* note 332.

364. See *supra* note 302 and accompanying text.

365. ECIO Office, Minutes of Records Management Workgroup, Aug. 18, 2004, at 4 (copy on file with author) [hereinafter Minutes, Aug. 18, 2004].

366. Minutes, July 14, 2004, *supra* note 363, at 1.

367. ECIO Office, Minutes of Records Management Workgroup, July 28, 2004, at 1 (copy on file with author) [hereinafter Minutes, July 28, 2004].

2005 legislative session. The proposed schedule retained the originally conceived categories of administrative, personnel, fiscal, and legal records, with automated system records within the administrative category and with permanent records guidelines set apart.³⁶⁸ The following parts detail the proposed schedule, the issues that arose in its development, and their resolution.³⁶⁹ Part III.B.2.a examines the schedule introduction and overarching issues. Parts III.B.2.b to III.B.2.f examine the schedule categories for administrative, automated systems, personnel, fiscal, and legal records. Part III.B.2.g briefly addresses the guidelines for identifying archival records, and part III.B.2.h briefly addresses the glossary.

a. Introduction and overarching issues

A number of issues that overarch the categories of the schedule arose in the development process and were ultimately addressed in the introduction to the final proposal. Specifically, the issues of record creation, maximum or conflicting retention periods, medium- and format-neutrality, duplicate retention, and draft retention are addressed here.

The introduction first makes clear that an agency is not required to create records that are listed on the general schedule if the agency does not already possess them.³⁷⁰ This issue first arose in the context of automated systems records, as the first draft of that part of the schedule was quite detailed and surely included records that not every agency maintained.³⁷¹ The common records inventory endeavors to describe records that already exist across agencies, but of course exceptions occur. Record origination, or creation, is a function of records management, but not records retention.³⁷²

The introduction establishes the retention periods as minimum time periods only.³⁷³ The introduction does state that agencies may establish longer retention periods than those stated in the schedule.³⁷⁴ Unlike the Texas schedule, the retention periods are not explicitly recommended as maximum time periods, though an agency striving for efficiency might readily draw

368. ECIO OFC., A PROPOSED ARK. STATE GOV'T RECORDS RETENTION SCHEDULE (Jan. 2005) (copy on file with author) [hereinafter PROPOSED SCHEDULE]. The revised proposal as of this writing, *see supra* note 332, removes administrative meeting and administrative automated system records into their own categories. A new record category has been added for grant-related records. Additionally, the permanent records guidelines have been moved from the general records schedule to the retention compliance guidelines.

369. *See supra* note 332.

370. *Id.* at 370.

371. Minutes, July 14, 2004, *supra* note 363, at 4; Minutes, July 28, 2004, *supra* note 367, at 3.

372. *See supra* part II.A.

373. PROPOSED SCHEDULE, *supra* note 368, at 4.

374. *Id.*

that inference.³⁷⁵ The introduction makes clear that retention periods in federal and state law “take precedence” over those in the schedule.³⁷⁶ That statement might be read to permit disposal when a shorter-than-scheduled statutory retention period has expired, but this is not the usual effect of a conflict provision. Rather, an agency obligated by conflicting statutory retention periods must adhere to the longer of the two.³⁷⁷

The introduction to the proposed schedule stated that “[t]he minimum retention requirement is determined by content, not by format or media.”³⁷⁸ This issue from the workgroup’s first meeting over the proper classification of e-mail³⁷⁹ reared its head from time to time, but the subcommittee’s proposals, built on the format- and medium-neutral inventories of other states, left little room for an alternate theory. The decision to develop a medium- and format-neutral inventory was made formally at the workgroup’s meeting in late July 2004.³⁸⁰ Discussion of the question hardly ceased after that time, but the conclusion was probably inescapable. It would have made little sense to permit the rapid destruction of an e-mail that, for example, communicated a critical agency policy interpretation, simply because the medium chosen for communication was electronic rather than paper. Best practices might dictate that important matters, including those of potential historical significance, should be documented in hard copy. But that would be a question for best practices and fit better with the workgroup’s second charter objective—electronic records management guidelines—than the first, a general records retention schedule. Moreover, the workgroup had already adopted the medium- and format-neutral FOIA definition of a record.³⁸¹ The workgroup followed the FOIA example in reaching its July decision.³⁸²

Duplicates, or copies, of records, other than the official version, are not covered by the schedule and are not subject to a retention period. The workgroup discussed the difficulties in defining originals and copies distinctly, especially in the electronic era.³⁸³ Workgroup members discovered

375. Moreover, a proposed guidance document produced by the workgroup warns that “random undocumented divergence [from the retention schedule, i.e., by prolonged retention] may expose your organization to legal risks.” PROPOSED PROCEDURES, *infra* note 450, at 4.

376. *Id.*

377. *See, e.g., supra* note 220 and accompanying text.

378. PROPOSED SCHEDULE, *supra* note 368, at 2. The principle is reiterated in the retention periods for general administrative correspondence. *See id.* at 3–4.

379. *See supra* part III.B.1.

380. Minutes, July 28, 2004, *supra* note 367, at 2.

381. *See supra* part III.B.1.

382. *See* Minutes, July 28, 2004, *supra* note 367, at 2 (quoting ARK. CODE ANN. § 25-19-103(5)(A)).

383. *Id.*

that the first draft of the common record inventory had been inconsistent in the use of the words “original,” “copy,” and “duplicate.”³⁸⁴ The workgroup agreed to make the language consistent and to apply the schedule only to originals.³⁸⁵ Where the distinction between an original and a copy is unclear, the entity that created the record is said to possess the original and to be responsible for its disposition according to the schedule.³⁸⁶ Because the schedule is medium- and format-neutral, a record need not be retained in multiple media.³⁸⁷ And the “official” designation may be transferred to a copy.³⁸⁸ Thus as long as all content—including metadata³⁸⁹—is preserved, a record might be transferred between media or formats as long as a designated “official version” is preserved.

Finally, concern arose initially in connection with administrative records over the disposition of draft documents.³⁹⁰ Arguably, for example, a draft could be found within the definition of substantive administrative correspondence or within the definition of administrative transitory records—a crucial distinction given the different retention periods that would later apply to each title. The record series description for transitory records ultimately settled the question, as the series embraces records “required only . . . in the preparation of an on-going records series,” such as a “[r]ecord[] that ha[s] been superseded by another record.”³⁹¹ Transitory records are scheduled for retention only “[u]ntil the purpose of [the] record has been fulfilled.”³⁹²

b. Administrative records—general, meeting, and records management

The administrative records category was developed primarily by Drew Mashburn. Mashburn initially proposed dividing administrative records into sections of general, meeting, and records management records, in addition to the subcategory of automated systems records, which was developed separately. The records management section ultimately was dispensed with,

384. *See id.*

385. *Id.*

386. *Id.*

387. *See* PROPOSED SCHEDULE, *supra* note 368, at 2.

388. *Id.* at 19 (defining “official version” in glossary).

389. *Cf. supra* part II.D.

390. Minutes, July 14, 2004, *supra* note 363, at 3.

391. PROPOSED SCHEDULE, *supra* note 368, at 5.

392. *Id.* “Transitory records” do not appear in the revised proposal as of this writing, *see supra* note 332. Presence of the record series provided guidance to help agencies distinguish drafts from scheduled final documents. However, omission of the series makes little practical difference if the contemplated retention period was only “[u]ntil the purpose of [the] record has been fulfilled.”

and the final proposal divided administrative records into three sections: general, meeting, and automated systems.³⁹³ The series included in each subcategory derived substantially from the Texas general records schedule, but were severely pared down in the final proposal.³⁹⁴

General administrative records include records such as appropriation requests, press releases, state publications, presentations, and strategic plans.³⁹⁵ Retention periods tend to run one to four years, or to be a function of administrative value, file closure, or supersedure.³⁹⁶ One exception is a final audit report of the Bureau of Legislative Audit; the final report must be retained for ten years from closure.³⁹⁷ Administrative records concerning meetings include four record series: agenda and minutes (permanent), audio or visual recordings (approval plus ninety days), notes (approval plus ninety days), and supporting documentation (one year).³⁹⁸ The schedule notes that recordings may be retained permanently as substitutes for minutes.³⁹⁹

The final proposal for general administrative records includes two record series covering correspondence, one for "substantive" correspondence and one for "non-substantive" correspondence. Concern arose early over the definition of "correspondence" and the Texas-inspired distinction between correspondence of the "administrative" and "general" varieties; the matter was further complicated by a proposed series title for "transitory records," derived from the peculiar "transitory information" title in Texas.⁴⁰⁰ The divisions in the Texas and Connecticut policies demonstrate

393. PROPOSED SCHEDULE, *supra* note 368, at 3–7. The revised proposal as of this writing, *see supra* note 332, removes meeting and automated system records into categories of their own.

394. Compare Texas Schedule, *supra* note 213, § 1 with Minutes, July 14, 2004, *supra* note 363, at 2, and PROPOSED SCHEDULE, *supra* note 368, at 3–6.

395. PROPOSED SCHEDULE, *supra* note 368, at 3–5. The revised proposal as of this writing, *see supra* note 332, removes appropriation requests to the fiscal records category.

396. *See* PROPOSED SCHEDULE, *supra* note 368, at 3–5. Retention periods in the revised proposal as of this writing, *see supra* note 332, run one year only. Exceptional was a final audit report of the Bureau of Legislative Audit, which the workgroup designated for retention for ten years from closure. That record series does not appear in the revised proposal.

397. PROPOSED SCHEDULE, *supra* note 368, at 3.

398. *Id.* at 6. The audio or visual recordings series does not appear in the proposed revision as of this writing, *see supra* note 332, and notes are scheduled for retention only until approval of formal minutes. The first-workgroup product noted that recordings could be retained permanently in substitution for minutes; the omission of this note seems then to permit the immediate destruction of audio or visual recordings of a meeting if there was no expectation that minutes would be taken.

399. *Id.*

400. Minutes, July 14, 2004, *supra* note 363, at 2–3. The subcommittee draft dubbed general correspondence "communication – general," generating further confusion. *Id.* at 2. A distinction between correspondence and communication had been drawn earlier by the Arkansas History Commission in its 1981 *Arkansas Records Management Manual*. *Id.* at 3. Communication was broadly defined as "a process by which information is exchanged be-

that confusion in this area is typical; the problem is that correspondence of a routine and transient nature (such as a meeting reminder or a transmittal memo, which warrants a minimal retention period) is difficult to distinguish from correspondence of a substantive nature (such as a memorandum opinion on a question of law, which merits long-term retention).⁴⁰¹ Ultimately the workgroup settled on the substantive vs. non-substantive distinction, analogous to the distinctions drawn in Texas and Connecticut, but the definitions and examples given in these record descriptions were subject to relentless fine-tuning.⁴⁰² Finally, the peculiarity of “transitory records” was relieved somewhat by clarifying, in the series title itself, that the series includes only records “Not Otherwise Classified.”⁴⁰³

c. Administrative records—automated systems

An “automated system” is a “[c]omputer configuration that, with all necessary hardware and software, performs or can be used to perform necessary business applications.”⁴⁰⁴ The automated systems category was primarily developed by Stacey Zeigler of the Department of Economic Devel-

tween individuals through a common system of symbols, signs, or behavior,” while correspondence was more narrowly defined as “written communications, consisting primarily of letters and memoranda that are created, executed or received by an agency in connection with the transaction of official business.” *Id.* (quoting ARK. RECORDS MGMT. MANUAL).

401. At one point, the workgroup considered adding a third, middle category, but decided against it for fear of creating yet more confusion. Minutes, Aug. 18, 2004, *supra* note 365, at 2.

402. *E.g., id.* at 1–2; Minutes of Records Management Workgroup, Sept. 8, 2004, at 3 (copy on file with author) [hereinafter Minutes, Sept. 8, 2004]; Minutes, Sept. 29, 2004, *supra* note 361, at 2. The workgroup had recurrent difficulty with distinguishing the charter objective of a retention schedule from the doctrinally distinct policy on public records embodied in the FOIA. For example, the concern was raised more than once that the retention of substantive correspondence would “keep individuals from expressing their thoughts or questions, thereby restricting discussion that could enhance organizational decisions.” Minutes, Aug. 18, 2004, *supra* note 365, at 2; Minutes, Sept. 8, 2004, *supra* note 402, at 3. The implication is that a public official would document embarrassing-if-disclosed thoughts in a public record only with the comforting knowledge that the record could be destroyed before anyone asked to see it. Such an action of course would subvert the FOIA and is properly a concern of public records policy, not records retention policy. The perception that public scrutiny is not normatively desirable because it will discourage public officials’ inventiveness is well known in the FOIA context. *See, e.g., Harris v. City of Ft. Smith*, No. 04-485, 2004 WL 2476444 (Ark. Nov. 4, 2004) (observing “laudable purpose” of city board desirous of secret meeting to set confidential maximum bid for auction, but reluctantly respecting legislative policy choice to require openness).

403. Minutes, July 28, 2004, *supra* note 367, at 3. “Transitory records” do not appear in the revised proposal as of this writing, *see supra* note 332. *See supra* note 394.

404. PROPOSED SCHEDULE, *supra* note 368, at 19 (glossary). An earlier, draft definition stated, “any automated device that can process on its own.” Minutes, July 14, 2004, *supra* note 363, at 3.

opment. Record series titles were derived substantially from the Kentucky General Schedule for Electronic and Related Records⁴⁰⁵ and from *Control Objectives for Information & Related Technology*,⁴⁰⁶ a statement of best practices in information technology management that is employed by the Arkansas Division of Legislative Audit.⁴⁰⁷ Automated system records retention periods tend to run short, from 90 days to a year, or as a function of supersedure, backup processes, or system life.⁴⁰⁸

Workgroup members disagreed over the extent to which prior versions of programming should be retained when changes are made.⁴⁰⁹ On the one hand, an error that emerges in modified programming is easier to track and correct when prior, error-free versions are available; on the other hand, the administrative burden of maintaining so many copies of superseded programming code might overwhelm the modest benefits. Ultimately the workgroup acknowledged both concerns and settled on a compromise position. Source code—that is, programming—was deleted from the schedule as a category of its own; “production source code,” a narrow class of programming instructions, was added to the description of the record series title, “systems and applications development records,” and the retention period was reiterated flexibly as “until no longer useful for tracking system changes, or until transfer of system data to a new operating environment.”⁴¹⁰ This arrangement takes account of the fact that superseded code, even if it

405. Kentucky Department of Libraries and Archives, General Schedule for Electronic and Related Records (June 2002), <http://www.kdla.ky.gov/recmanagement/schedules/-erecordsgeneral.pdf> (last visited May 27, 2005). Kentucky general records schedules are very sophisticated, and though set out in separate documents, they can be read together as a coherent whole. See Kentucky Department of Libraries and Archives, State Records Retention Schedules, <http://www.kdla.ky.gov/recmanagement/stateschedule.htm> (last visited May 27, 2005) (listing, inter alia, auditor of public accounts, governor’s office, insurance department, judicial branch, law department, secretary of state, veterans’ affairs). The state government schedules are integrated as well with a series of local government schedules, which cover a number of specific offices. See Kentucky Department of Libraries and Archives, State Records Retention Schedules, Local Records Retention Schedules, <http://www.kdla.ky.gov/recmanagement/localschedule.htm> (last visited May 27, 2005) (listing, inter alia, county attorney, county clerk, county coroner, county judge, county sheriff, county treasurer, jailer, library district, health department, municipal government, public school district).

406. IT GOVERNANCE INSTITUTE, COBIT (3d ed. 2000).

407. Minutes, July 28, 2004, *supra* note 367, at 3.

408. See PROPOSED SCHEDULE, *supra* note 368, at 7. The shortest retention period in the revised proposal as of this writing, see *supra* note 332, is seven days.

409. Minutes of Records Management Workgroup, Oct. 20, 2004, at 2 (copy on file with author) [hereinafter Minutes, Oct. 20, 2004].

410. Minutes of Records Management Workgroup, Dec. 1, 2004, at 1 (copy on file with author) [hereinafter Minutes, Dec. 1, 2004]; PROPOSED SCHEDULE, *supra* note 368, at 6 (altered for stylistic consistency).

can be preserved efficiently, does not necessarily remain usable when underlying system changes have occurred.⁴¹¹

d. Personnel records

The personnel records category was developed primarily by Paula Swaim of the ECIO Office, who developed record titles with reference to several sources,⁴¹² including: the personnel record schedule of the Colorado State Archives;⁴¹³ two web sites⁴¹⁴ constructed by Auxillium West, a human resources firm serving small and mid-sized companies;⁴¹⁵ and an overview of personnel files prepared by the Department of Finance and Administration.⁴¹⁶ Swaim recommended that retention periods mandated by law be explicitly tied in the inventory to their legislative sources.⁴¹⁷

The personnel record series necessarily includes a great many records that are cross-referenced with the legal category, such as Equal Pay Act and Family and Medical Leave Act records; retention periods are harmonized.⁴¹⁸ Retention periods in the personnel category tend to run one to five years.⁴¹⁹

411. See Minutes of Records Management Workgroup, Nov. 10, 2004, at 3 (copy on file with author) [hereinafter Minutes, Nov. 10, 2004].

412. Minutes, July 14, 2004, *supra* note 363, at 5–6; Interview with Paula Swaim, ECIO Office in Little Rock, Ark. (Mar. 1, 2005). The author is indebted to Paula Swaim for her time in answering questions and in generously sharing her files.

413. Colorado State Archives, Records Management Manual – State Government Agencies: Schedule 11 – Personnel Records (last modified Jan. 26, 1999), <http://www.colorado.gov/dpa/doit/archives/rm/rmman/sch11.htm> (last visited June 29, 2004).

414. Auxillium West, Legal Issues (2004), <http://www.auxillium.com/legal.shtml> (last visited May 27, 2005) (listing “major laws impacting Human Resources Management”); Auxillium West, Recordkeeping (2004), <http://www.auxillium.com/records.shtml> (last visited May 27, 2005) (listing records required to be kept by federal law, and federal statutory retention periods, with reference to, inter alia, Americans with Disabilities Act, Age Discrimination in Employment Act, Equal Pay Act, Family and Medical Leave Act, Fair Labor Standards Act, Rehabilitation Act, Civil Rights Act of 1964 Title VII, Immigration Reform and Control Act, Occupational Safety and Health Act, Employee Retirement Income Security Act).

415. Auxillium West, About Auxillium West and Our Mission (2004), <http://www.auxillium.com/about.shtml> (last visited May 27, 2005).

416. E-mail from Charles Angel, Ark. Dep’t Fin. & Admin., to Paula Swaim, ECIO Office, Dec. 8, 2004 (copy on file with author) (citing in state law, ARK. CODE ANN. §§ 11-4-217 (wage and hour), 11-4-612 (equal pay), 11-9-529 (workers’ compensation for injury accidents), 11-10-318 (unemployment), 16-46-101 (photocopies of business and public records as evidence), 19-4-1108 (accounting procedures)).

417. Minutes, July 14, 2004, *supra* note 363, at 6; see PROPOSED SCHEDULE, *supra* note 368, at 8–10.

418. PROPOSED SCHEDULE, *supra* note 368, at 8–10. Presumably to avoid duplication, these record series have been omitted from the personnel category in the revised proposal as of this writing, see *supra* note 332.

419. PROPOSED SCHEDULE, *supra* note 368, at 8–10. The latter end of that range runs six

One issue that arose in connection with personnel records was the proper duration of the retention period for records documenting employment history. Following the example of Connecticut, the workgroup believed a lengthier than usual retention period should apply,⁴²⁰ as state entities are often called upon to verify facts of employment after an employee's separation. The workgroup contemplated a period as long as fifty years from separation for records documenting employment history,⁴²¹ but ultimately settled on separation plus ten years.⁴²²

e. Fiscal records

The fiscal records category was developed primarily by Linda Pine of the University of Arkansas at Little Rock, who derived record series from a survey of fiscal records maintained by states.⁴²³ She focused on the data collected from states with biennial legislative processes like those in Arkansas.⁴²⁴ Pine observed that the widespread adoption of a limited number of accounting software packages has rendered fiscal record-keeping surprisingly uniform across states.⁴²⁵ The fiscal categories, and the proposed retention periods considered later, were developed with an eye to maintaining records long enough for audit compliance, but not longer than necessary.⁴²⁶ After the example of other states,⁴²⁷ fiscal retention periods generally run to audit plus three years, or upon the authorization of Legislative Audit.⁴²⁸ Moreover, the workgroup recommended that the Arkansas Code be amended to accord with that retention period.⁴²⁹ One exception is agency

years in the revised proposal as of this writing, *see supra* note 332.

420. Minutes, Nov. 10, 2004, *supra* note 411, at 4.

421. *Id.*

422. PROPOSED SCHEDULE, *supra* note 368, at 8. The revised proposal as of this writing, *see supra* note 332, pares this period back to separation plus five years.

423. Minutes, Nov. 10, 2004, *supra* note 411, at 4. The author thanks Linda Pine for taking the time to answer questions via e-mail in support of this research. Linda Pine is Head of Archives & Special Collections, UALR Library.

424. *Id.*

425. *Id.*

426. *Id.*

427. *See supra* notes 243, 270, and accompanying text.

428. PROPOSED SCHEDULE, *supra* note 368, at 11–13. The revised proposal as of this writing, *see supra* note 332, changes this period simply to authorization by legislative auditor, which is consistent with statute, *see infra* note 432.

429. *See* PROPOSED SCHEDULE, *supra* note 368, at 11–13 (citing Ark. Code Ann. § 19-4-1108(a)). The code states, "These documents shall be kept in a safe place subject to audit and shall not be destroyed until authorization is given for their destruction by the Legislative Auditor." Ark. Code Ann. § 19-4-1108(a). Under the conflict provision, *see supra* note 376 and accompanying text, a promulgated three-year retention period would have no effect without amendment to the code. However, this workgroup recommendation will be obviated if the revised proposal as of this writing, *see supra* note 332, is accepted. *See supra*

budgets, which document revenues and expenditures; they are designated for permanent retention.⁴³⁰

f. Legal records

The legal records category was developed primarily by Ragenea Thompson Hodge of the Arkansas Insurance Department, and record series were derived from a review of legal documents that state entities had posted online,⁴³¹ as well as from schedules of various other states and of the federal government.⁴³² Though it does not appear on the face of the legal records proposal, the Texas cautionary statement was adopted in workgroup discussion: “A state record may not be destroyed if any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the record is initiated before the expiration of [a] retention period . . .”⁴³³

The removal of legal from the administrative record category might have been a logical improvement over the Texas and Connecticut models, but it was not trouble-free. Hodge acknowledged that there is significant overlap between legal and other categories.⁴³⁴ This problem—which might be exaggerated in comparing administrative and legal records, but is certainly not confined to legal records—compelled the workgroup to consider how to handle records that a schedule user might expect to find in one category or another, depending on context. It was decided that each record series would be listed only once, “in the category that met best with the business organization of an agency,” but that cross-references would point users to other relevant titles.⁴³⁵

note 431.

430. PROPOSED SCHEDULE, *supra* note 368, at 11. The revised proposal as of this writing, *see supra* note 433, limits this retention period to “current biennial budget cycle + previous biennium.”

431. The FOIA requires that state agencies, boards, and commissions post online a description of their organizations and operations; a general description of records held; substantive regulations, rules of procedure, opinions, and written statements of policy or interpretations; contested adjudicatory decisions; and copies of records frequently requested under the FOIA or anticipated to be frequently requested under the FOIA. ARK. CODE ANN. § 25-19-108 (2002).

432. Minutes, July 14, 2004, *supra* note 363, at 4; Interview with Ragenea Thompson Hodge, Arkansas Insurance Department, in Little Rock, Ark. (Feb. 11, 2005). The author expresses his appreciation to Ragenea Thompson Hodge for her time in providing thorough and thoughtful responses to questions in the course of this research.

433. Minutes, July 14, 2004, *supra* note 363, at 4; *see* Texas Schedule, *supra* note 213; *cf. supra* note 218 and accompanying text.

434. Minutes, July 14, 2004, *supra* note 363, at 4–5.

435. *Id.* at 5. In the revised proposal as of this writing, *see supra* note 332, a considerable number of record series have been omitted, especially where duplication might have

Retention periods in the legal category tend to run from one to six years, or as a function of supersedure or administrative value.⁴³⁶ Retention of FOIA documentation turns on the disposition of the request: two years from request for access granted; six years from reply for access denied in whole or in part; and six years from adjudication for access denied and appealed.⁴³⁷ Copies of court opinions “that set legal precedent or exhibit historical value” are scheduled for indefinite retention if not reversed by later precedent.⁴³⁸

g. Permanent records⁴³⁹

The permanent records guidelines, developed by James Winningham of the Arkansas Insurance Department, were conceived as a classification that cuts across all categories. Relying in part on a South Carolina model,⁴⁴⁰ Winningham initially developed four divisions of permanent records: permanent operating records, permanently required records, agency historic records, and cultural historic records; the latter two were folded together.⁴⁴¹ The decision to describe permanent records more broadly than those with historical value dictated changing the name of the category. Ultimately the schedule explained that some permanent records are those scheduled for permanent retention in the administrative, fiscal, legal, and personnel categories, while giving schedule users guidance, through a list of categories, to identify other permanent records that are agency-specific.⁴⁴² The guidance categories overlap with scheduled documents—for example, press releases

occurred. Accordingly, cross-references are no longer employed.

436. PROPOSED SCHEDULE, *supra* note 368, at 14–16. In the revised proposal as of this writing, *see supra* note 332, retention periods in the legal category tend to run three or five years, or as a function of administrative value, but not of supersedure.

437. PROPOSED SCHEDULE, *supra* note 368, at 15. The revised proposal as of this writing, *see supra* note 332, eliminates this distinction and requires retention of FOIA documentation simply for three years.

438. *Id.* This record series is omitted in the revised proposal as of this writing, *see supra* note 332. Presumably these documents are retained by the judiciary.

439. In the revised proposal as of this writing, *see supra* note 332, the permanent records guidelines are removed from the general records schedule, appropriately, to the retention compliance guidelines document.

440. Interview with James Winningham, Arkansas Insurance Department, in Little Rock, Ark. (Feb. 25, 2005); *see* South Carolina Department of Archives and History, State Archives Collecting Policy (Mar. 9, 2001), <http://www.state.sc.us/scdah/armcollectplcy.htm> (last visited May 27, 2005); Evidential/Accountability Criteria for South Carolina State Government Records, <http://www.state.sc.us/scdah/armcollectevidence.htm> (last visited May 27, 2005); State Government Historical Documentation, <http://www.state.sc.us/scdah/armcollectevidence.htm> (last visited May 27, 2005). The author appreciates James Winningham’s generous allocation of time to discuss this research.

441. Minutes, Aug. 18, 2004, *supra* note 365, at 3.

442. PROPOSED SCHEDULE, *supra* note 368, at 17–18.

are listed as general administrative records for two years' retention, and are listed also as permanent administrative records—highlighting that the “permanent” category is only a recommendation for an agency’s careful consideration when reviewing each record.⁴⁴³ The distinguishing characteristic of permanent records is that they have “perpetual usefulness to agency operations, [an] external requirement for their perpetual retention, or their usefulness to the study of history.”⁴⁴⁴

h. Glossary of terms

The glossary⁴⁴⁵ was developed by Sally Hawkes of the Arkansas State Library. The 1981 Arkansas History Commission publication, *Arkansas Records Management Manual*, served as a starting point.⁴⁴⁶ Glossary terms such as “copy,” “official version,” “format,” and “medium”⁴⁴⁷ demonstrate the resolution of issues discussed above in relation to the development of the schedule.

3. Advisory Policies

The workgroup’s second charter objective was to develop the electronic records management guidelines. The workgroup produced two documents of best practices in records management. These documents developed late in the process and were approved with little discussion or amendment.⁴⁴⁸ The first document, *Proposed Electronic Records Management Guidelines for Arkansas State Government*,⁴⁴⁹ is discussed in part III.B.3.a, and the second, *Proposed Records Procedural Handbook for Arkansas State Government*,⁴⁵⁰ is discussed in part III.B.3.b.

443. Minutes, Oct. 20, 2004, *supra* note 409, at 6; *see also* Minutes, Nov. 10, 2004, *supra* note 411, at 3.

444. PROPOSED SCHEDULE, *supra* note 368, at 17.

445. *Id.* at 19.

446. Minutes, Aug. 18, 2004, *supra* note 365, at 3; Interview with Sally Hawkes, Arkansas State Library, in Little Rock, Ark. (Mar. 14, 2005). The author thanks Sally Hawkes for her generous allocation of time in meeting to answer questions and to provide background for this research.

447. *See* PROPOSED SCHEDULE, *supra* note 368, at 19.

448. Ragenea Thompson Hodge of the Insurance Department took the lead in developing these documents. They were derived in part from the work of the 1994 Task Force.

449. ECIO OFC., PROPOSED ELEC. RECORDS MGMT. GUIDELINES FOR ARK. STATE GOV'T (Jan. 2005) (copy on file with author) [hereinafter PROPOSED GUIDELINES].

450. ECIO OFC., PROPOSED RECORDS PROCEDURAL HANDBOOK FOR ARK. STATE GOV'T (Jan. 2005) (copy on file with author) [hereinafter PROPOSED PROCEDURES].

a. Electronic records management guidelines

The electronic records management guidelines aim to harmonize FOIA compliance with records retention and management.⁴⁵¹ The guidelines stress the values of efficient storage and retrieval and of public access for the duration of a record's retention period.⁴⁵² In the context of system selection, the guidelines stress the values of authenticity and reliability.⁴⁵³ The guidelines also encourage storage formats that are not hardware or software dependent, but to the extent such dependence is inevitable, conversions are recommended to maintain accessibility.⁴⁵⁴ Also recommended are tests, frequent backups, adequate security, and disaster planning.⁴⁵⁵

The guidelines address e-mail specifically. They reiterate the public-record nature of e-mail⁴⁵⁶ and compare it with a telephone call, which might be transient in nature and "immediately discardable," or substantive in nature and worthy of documentation and preservation.⁴⁵⁷ The guidelines distinguish between "E-mail messages" and "Non-Substantive (or transitory) E-mail messages."⁴⁵⁸ Unlike the substantive/non-substantive correspondence distinction of the general records schedule, with respect to e-mail the former category encompasses the latter. Non-substantive e-mail is e-mail that particularly has

short-lived or no administrative value. Non-substantive messages *do not* set policy, establish procedures, certify a transaction, become a receipt, or otherwise reflect a decision or direct official action or inaction. The informal tone . . . might be compared to a communication that might take place during a telephone conversation or conversation in an office hallway.⁴⁵⁹

451. The revised proposal as of this writing, *see supra* note 332, stresses electronic records management and omits some express references to the FOIA.

452. PROPOSED GUIDELINES, *supra* note 449, at 4, 6.

453. *Id.* at 6; *cf.* notes 126–130 and accompanying text. Express references to these values are omitted from the revised proposal as of this writing, *see supra* note 332.

454. PROPOSED GUIDELINES, *supra* note 449, at 4–5, 7.

455. *Id.* at 6. These detailed admonitions are omitted from the revised proposal as of this writing, *see supra* note 332.

456. PROPOSED GUIDELINES, *supra* note 449, at *Id.* at 8–9 (citing and quoting Arkansas State Records Management and Archives Act of 1995, ARK. CODE ANN. § 13-4-103 (defining a record "regardless of physical form"), *repealed by* 2001 Ark. Laws Act 1252, § 1) (citation omitted from revised proposal, *see supra* note 332); *id.* at 9–10 (quoting FOIA, ARK. CODE ANN. § 25-19-103(5)).

457. PROPOSED GUIDELINES, *supra* note 449, at 8.

458. *Id.* at 9 (Definitions). This distinction and the definitions as described in this paragraph are unfortunately omitted from the revised proposal as of this writing, *see supra* note 332.

459. PROPOSED GUIDELINES, *supra* note 449, at 9 (original emphasis).

Substantive e-mail can be defined by inference, and e-mail that meets the FOIA definition of a public record must be retained in accordance with the content of the message and its treatment under the general records retention schedule.⁴⁶⁰ Non-substantive e-mails might well meet the FOIA definition of a public record,⁴⁶¹ but might at the same time be scheduled for nearly immediate disposal under the transitory records series of the general administrative records schedule.⁴⁶² The guidelines thus close the loop between the FOIA and records retention by making records subject to the FOIA subject to retention, just as records subject to retention are subject to the FOIA.

A perennial concern of computer users working under a records retention schedule is determining who bears responsibility for retaining e-mail. The guidelines make clear that all state employee users of e-mail bear responsibility for ensuring that the e-mail for which they are responsible, just as the paper records for which they are responsible, are organized to facilitate government use and public access and to comply with records retention requirements.⁴⁶³ But it is not necessary for two persons to maintain identical copies of a communication. Consistently with the general records schedule, one e-mail is an "official version" and one is a "copy," and only the former is subject to retention under the schedule. According to the guidelines, "it is a generally accepted practice that the sender's copy is designated as the official [version]. . . . to which any retention requirements would apply."⁴⁶⁴ Copies may "be disposed of at will."⁴⁶⁵ However, the general rule does not apply when a state official receives an e-mail from

460. *Id.* at 10.

461. Non-substantive e-mails also might not meet the FOIA definition of a public record if they do not "constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds." ARK. CODE ANN. § 25-19-103(5)(A) (Supp. 2005). For example, personal correspondence, such as "Can I catch a ride home[?]," is at least in its content likely not a record of official performance or the lack thereof. PROPOSED GUIDELINES, *supra* note 448, at 11; *see also* State v. City of Clearwater, 863 So. 2d 149, 155 (Fla. 2003) (holding personal e-mail outside state public records definition for failure to reflect transaction of official business); Tiberino v. Spokane County, 13 P.3d 1104, 1110 (Wash. Ct. App. 2000) (holding fact and metadata, but not contents, of voluminous personal e-mail subject to disclosure under state public records law as reflection of official misfeasance).

462. PROPOSED GUIDELINES, *supra* note 448, at 10–11. *Compare id.* at 9 (defining "transitory e-mail") with PROPOSED SCHEDULE, *supra* note 368, at 5 (describing "transitory records"). For example, these sorts of e-mails generally may be deleted immediately: "mailing list messages, announcements regarding departmental bake sales and other agency memos without legal, administrative, fiscal, or historical value," and "[n]on-state publications" such as "unsolicited promotional material ('spam')." PROPOSED GUIDELINES, *supra* note 448, at 11.

463. PROPOSED GUIDELINES, *supra* note 449, at 12–13.

464. *Id.* at 14.

465. *Id.*

outside the state government, for in that case, the sender is not bound by state access and records retention laws; the government recipient then bears the burden to assess such e-mails for retention and to maintain them accordingly.⁴⁶⁶

Finally, the guidelines take account of the *Armstrong* implications of format- and medium- neutrality.⁴⁶⁷ E-mail need not be retained in its original format and medium, and "official version" status may be transferred upon a format or medium conversion, such as printing out the records.⁴⁶⁸ But care must be taken to preserve metadata, including the e-mail names and addresses of senders and recipients, the message subject line, and the dates and times of transmission and receipt.⁴⁶⁹

The guidelines urge state agencies to develop internal e-mail management programs.⁴⁷⁰

b. Records procedural handbook

The proposed handbook aims to guide state agencies to comply with the general records schedule and in the development of internal records

466. *Id.*

467. See *supra* notes 167–68 and accompanying text.

468. See *supra* notes 387–89 and accompanying text.

469. PROPOSED GUIDELINES, *supra* note 449, at 13–14.

470. *Id.* at 14. This express admonition is omitted from the revised proposal as of this writing, see *supra* note 332. All the same, the future of e-mail might be considerably more systematic. In February 2005, representatives of Mobius Management Systems, Inc., conducted a presentation on their services for interested members of the workgroup. Presentation of Kraig Kleeman & Philip Nguyen, Mobius Management Systems, Inc., to Records Management Workgroup, Little Rock, Ark., Feb. 11, 2005. The author was present for the presentation and observed the following. Mobius offers powerful e-mail (and document) archiving facilities at a central electronic repository under Mobius custodianship. Systems can be engineered per client specifications to automatically capture and archive files from users' systems. For example, all state employees could be unified on a single e-mail system, and the Mobius software set to harvest any e-mail three days old for addition to the state repository. Fields could be created for users' e-mail interface in accordance with the state archiving needs such that users could easily mark individual e-mails according to their archival character. Thus, for example, with the click of a virtual button, a user could identify one e-mail as personal, another e-mail as substantive correspondence, and another as an employment history record; the Mobius system would capture only the latter two e-mails and automatically retain them for their scheduled Arkansas retention periods. A system administrator could identify e-mail pertinent to a legal action and suspend it from scheduled deletion. Mobius has both private and public sector clients. However, it did not appear that Mobius was well prepared to handle the liberal Arkansas FOIA system for the rapid disclosure of public records maintained by a private contractor; FOIA compliance would be an important consideration in contracting private electronic records services. Cf. ARK. CODE ANN. § 25-19-105(g) (LEXIS Supp. 2005) ("Any computer hardware or software acquired by an entity [subject to the FOIA] . . . shall not impede public access to records in electronic form.").

schedules. The handbook dispels several anticipated misconceptions about the general records schedule: that it provides retention periods for unscheduled documents, that it identifies documents as confidential and not subject to public disclosure, that it dictates how documents are to be disposed of, and that it requires the creation of documents.⁴⁷¹ The handbook touts the benefits of a records retention program, including efficiency through cost, space, and time savings and preservation.⁴⁷² The handbook outlines four steps to using the general records schedule: (1) identifying records, (2) determining whether a record is an “official version,” (3) observing the retention period, and (4) considering exceptions to the retention period—for example, requirements to retain records longer to comply with other laws, to comply with audit requirements, or to comply with outstanding FOIA requests.⁴⁷³ Finally, the handbook urges agencies to bear in mind the ultimate disposition of records at the time that they are created.⁴⁷⁴

4. *Cost Estimate Report*

Cognizant that previous record retentions efforts had failed because of the expense of implementation, the workgroup remained concerned about cost.⁴⁷⁵ Concerns about cost drove one fundamental decision about the proposed schedule: It would apply only prospectively: that is, it would only apply to records created after an effective date.⁴⁷⁶ State entities would be encouraged but not required to invest the substantial resources needed to classify records created before the date the schedule would take effect.⁴⁷⁷

The workgroup approved a cost assessment tool: i.e., a survey of agencies to assess the potential cost of implementing a prospective general records schedule.⁴⁷⁸ All workgroup members who worked for state agencies that would be required to comply with the schedule were asked to conduct the survey and report back results, which were compiled in the ECIO Office.⁴⁷⁹ The survey asked agencies to anticipate the costs and savings that might be achieved by implementation of a records retention schedule in the first and subsequent years.⁴⁸⁰ The survey asked whether “ultimately” sav-

471. PROPOSED PROCEDURES, *supra* note 450, at 4.

472. *Id.* at 5.

473. *Id.* at 5–8.

474. *Id.* at 9; *cf. supra* note 20 (discussing records continuum model).

475. *See, e.g.,* Minutes, Sept. 8, 2004, *supra* note 402, at 1.

476. Minutes, Dec. 1, 2004, *supra* note 410, at 2; ECIO OFC., EXECUTIVE SUMMARY OF THE RECORDS RETENTION REPORT 3 (Jan. 2005) [hereinafter EXECUTIVE SUMMARY].

477. Minutes, Dec. 1, 2004, *supra* note 410, at 2; EXECUTIVE SUMMARY, *supra* note 476, at 3.

478. Minutes, Dec. 15, 2004, *supra* note 348, at 2.

479. *Id.*

480. ECIO OFFICE, IMPACT STATEMENT TOOL FOR THE ARK. RECORD RETENTION

ings would occur for the agency or for agency "customers"; whether the proposal would conflict with agency technology or business practice, or with agency mission or legislative mandates, or with agency contracts; and whether the policy would improve or impair service delivery or efficiency.⁴⁸¹

Twelve agencies participated, and the reported sum of anticipated net costs in the first three years of the records retention program as proposed was \$1,083,000.⁴⁸² Of the seven completed surveys reviewed in the course of this research,⁴⁸³ the large Department of Human Services unsurprisingly reported the largest cost estimate, \$201,250 for the first year and \$25,200 for each year thereafter. The Department of Information Systems reported a substantial cost estimate of \$64,470 in the first year, but surprisingly high costs in subsequent years (\$53,800 annually for "floor and disk space"); other agencies' recurring costs were much lower.⁴⁸⁴ Agencies were apparently skeptical that records retention saves anything at all. Only the Office of Information Technology (OIT) anticipated cost savings, and that for "intangible[s]" such as operational efficiency, the elimination of duplicate records, and other factors such as increased productivity; all in total were estimated at a value of \$400 annually, compared with \$750 in ongoing annual costs. However, of the seven agency responses reviewed, four indicated anticipated improvements in service, including the OIT.⁴⁸⁵ None indicated anticipated diminution in service, or any conflict with agency mission, legislative mandate, or contracts. Only the Crime Information Center indicated a conflict with existing technology or business practice, but the center did not explain the asserted conflict.

Following the lead of a comment on the OIT survey response, the workgroup proposed that efficiency in implementation might be improved, if not cost savings achieved, by implementation of a centralized program to train agency personnel in schedule compliance, as well as by purchase of records management software through a statewide contract.⁴⁸⁶

SCHEDULE (Dec. 2005) (copy on file with author).

481. *Id.*

482. EXECUTIVE SUMMARY, *supra* note 476, at 2.

483. Only results from seven agencies were available for review for this research: the Crime Information Center, the Department of Human Services, the Department of Information Systems, the Department of Workforce Education, the Employment Security Division, the History Commission, and the Office of Information Technology (copies of these completed surveys on file with author and not individually cited hereafter).

484. However, agencies reporting smaller cost estimates in the first year did tend to report a higher proportion of those costs as ongoing. For example, the History Commission reported a \$1,055 estimate for the first year and \$955 for each year thereafter.

485. Others indicating improvements were the History Commission, the Department of Human Services, and the Department of Workforce Education.

486. EXECUTIVE SUMMARY, *supra* note 476, at 2.

5. Legislation

The records retention schedule needed legislation in order to be mandatory, given the repeal of prior frameworks. Legislation was also needed to empower the ECIO to promulgate rules⁴⁸⁷ concerning traditional paper records, as statutory ECIO authority was limited to electronic records management.⁴⁸⁸ The workgroup realized as early as September 2004 that the best approach in the General Assembly would be a short and sweet authorizing statute.⁴⁸⁹ Given the difficulty the workgroup had in hashing out the terms of the general records schedule, inviting the General Assembly to tinker with the minutiae of records management could be an invitation to failure. And practically, a records retention schedule is a living document requiring ongoing assessment and fine-tuning.⁴⁹⁰ The biennial legislature is ill-suited to such a task, but the regulatory system allows for more flexible and continuing refinement.⁴⁹¹

In the 2005 legislative session, Representative Jodie Mahony, D-El Dorado, sponsored House Bill 1514, which became Act 918 on March 21.⁴⁹² The act compels the ECIO to “direct the development of rules and guidelines for the retention of public records commonly found in most state agencies,” thus bringing traditional paper records within ECIO authority for this purpose.⁴⁹³ The ECIO authorizing statute was amended accordingly.⁴⁹⁴

487. The word regulation has been used heretofore and is the author’s preference to describe the duly promulgated mandates of administrative agencies. However, the Arkansas convention, albeit spottily adhered to, is to refer only to “rules.” The author will endeavor to adhere to the Arkansas convention in this part III.B.5.

488. See *supra* note 345 and accompanying text.

489. See Minutes, Sept. 8, 2004, *supra* note 402, at 1.

490. See *supra* part II.C.

491. Minutes, Sept. 8, 2004, *supra* note 402, at 1.

492. 2005 Ark. H.B. 1514, enacted as An Act Concerning the Retention of Public Records by State Agencies, 2005 Ark. Laws Act 918, codified at ARK. CODE ANN. §§ 25-18-601 to -605 (Supp. 2005), and amending ARK. CODE ANN. §§ 25-33-104 (Supp. 2005). The bill passed the House on March 4, 2005, with 88 yeas, 12 nays, and none opposed. The bill passed a unanimous Senate (35 yeas) on March 16, 2005. Representative Mahony was a public sector partner on the workgroup, see *supra* note 337, but he did not participate actively; Matthew Miller of the Bureau of Legislative Research kept Representative Mahony apprised of workgroup activity and consulted him as the workgroup required.

493. ARK. CODE ANN. § 25-18-604(a)(1) (LEXIS Supp. 2005). The language might be under-inclusive as drafted insofar as the ECIO is not empowered to draft guidelines that might aid agencies in developing internal retention procedures for records that are not commonly held.

494. 2005 Ark. Laws Act 918, § 2, amending ARK. CODE ANN. § 25-33-104(a) (charging the ECIO with responsibility, in new subsection (a)(16), to “[d]evelop and promulgate rules and guidelines governing the retention and management of public records commonly found in most state agencies). Cf. *supra* note 493.

Rules are to be promulgated by January 1, 2006, in accordance with the Arkansas Administrative Procedure Act and in consultation with the CIO Council.⁴⁹⁵ Agencies must comply with rules by July 1, 2007, or as specified in a legislative appropriation specifically to effect compliance.⁴⁹⁶ The ECIO is further expressly charged with subsequent refinement of the rules.⁴⁹⁷

An enacted statement of legislative intent recognized that a records retention program is an essential companion to the FOIA and also serves state interests in operational efficiency and historical preservation.⁴⁹⁸ The act expressly excluded from its scope "city, county, [and] local government entities."⁴⁹⁹ The principle of prospective-only application, incorporated into the proposals of the workgroup,⁵⁰⁰ was enacted into law upon amendment to the Mahony bill.⁵⁰¹ The principle of federal and state laws overriding regulatory record retention requirements also was enacted.⁵⁰² The act defined the "[s]tate agencies" that would be covered by the general records schedule as "all state departments, boards, and commissions," excluding "elected constitutional officers and their staffs, the General Assembly and its committees and staffs, the Supreme Court, the Court of Appeals, the Administrative Office of the Courts, and public institutions of higher education with respect to academic, research, health care, and existing information and technology applications and underlying support."⁵⁰³

The act defines "public records" by cross-reference with the FOIA.⁵⁰⁴ Superfluously, the act prohibits retention rules from requiring disclosure of FOIA-exempt public records.⁵⁰⁵

495. ARK. CODE ANN. § 25-18-604(a)-(b) (LEXIS Supp. 2005) (citing ARK. CODE ANN. § 25-15-201 to -218). The CIO Council is appointed by the Governor and has representatives of state, county, and city government, and of public education. *Id.* § 25-33-105 (2002).

496. *Id.* § 25-18-604(c) (Supp. 2005). The date was set deliberately to allow agencies one biennium to assess costs and request appropriate funding from the General Assembly, and for the General Assembly in turn to have another bite at the apple in case the program does not proceed toward implementation as anticipated. Mashburn, *supra* note 332. Agency representatives participating in the workgroup agreed that agencies would need twelve months to prepare and implement the proposed records retention schedule upon its promulgation. EXECUTIVE SUMMARY, *supra* note 476, at 3.

497. ARK. CODE ANN. § 25-18-604(d) (Supp. 2005).

498. *Id.* § 25-18-601(b).

499. *Id.* § 25-18-602(a).

500. See *supra* notes 475-477 and accompanying text.

501. Compare 2005 Ark. H.B. 1514 (as engrossed Feb. 10, 2005) (copy on file with author) [hereinafter Original Bill] with ARK. CODE ANN. § 25-18-602(b) (LEXIS Supp. 2005).

502. ARK. CODE ANN. § 25-18-605(a) (LEXIS Supp. 2005).

503. *Id.* § 25-18-603(4).

504. *Id.* § 25-18-603(3) (citing *id.* § 25-19-105(A)).

505. *Id.* § 25-18-605(b).

Only one significant issue, concerning the appropriate reach of the records retention schedule, arose in the course of legislative debate.⁵⁰⁶ When the bill came before the House State Agencies and Governmental Affairs Committee, Representative Betty Pickett, D-Conway, asked why the proposed records retention schedule would not apply to public institutions of higher education.⁵⁰⁷ Would (for example) records of enrollment, she asked, have to be retained?⁵⁰⁸ Representative Mahony responded that the many statutes and state and federal regulations governing higher education probably would require retention of such records, though they would be outside the proposed retention schedule (both because higher education is not covered and because they are not common records across state agencies).⁵⁰⁹ The author of this article testified that the reach of the bill was deliberately narrow because “baby steps” were required to implement a record retention program.⁵¹⁰ The political reality was that the program would meet certain defeat in the legislature if its reach were so broad as to invite a cavalcade of testimonials declaring the program infeasible, excessively costly, and a danger to government efficiency.⁵¹¹ By keeping the reach limited to “state de-

506. House legislators also asked (1) about cost, for the Department of Human Services for example, (2) about the definition of public records, (3) about the meaning of “common” records, and (4) whether e-mail would be included. Rep. Mahony and Drew Mashburn responded: (1) about \$200,000 for the first year after the effective date, (2) the definition from the FOIA, (3) records not unique to any state agency, and (4) yes. *House Comm. on State Agencies & Gov’tal Affairs*, 85th General Assembly (Ark. Mar. 2, 2005) [hereinafter *House Hearing*]. The author and Milton Scott were present for and served as witnesses in support of the bill at the hearing in the House. The bill passed the committee with unanimous approval. Events from the house hearing are drawn on the author’s notes and memory and are recounted here without additional citation.

At the hearing before the Senate Committee on State Agencies and Governmental Affairs on March 10, 2005, also for which the author was present, the bill was presented by Senator Jim Argue, D-Little Rock. Senators asked (1) whether an amendment to the FOIA was required; and (2) whether the Department of Human Services and the Department of Finance and Administration were on board with the bill. Drew Mashburn responded (1) no, urging a doctrinal distinction between access and retention; and (2) yes and yes. Opposition testimony was invited, and there was none. The bill passed the committee with unanimous approval.

507. House Hearing, *supra* note 506.

508. *Id.*

509. *Id.*

510. *Id.* (author’s testimony).

511. *Id.* (author’s testimony); *cf.* text accompanying *supra* note 334. Indeed, in a pre-hearing legislative meeting called by Representative Mahony, inviting concerns about H.B. 1514 to be expressed, a representative of the Education Department asked that the department be extended the same exemption from ECIO rules that the bill afforded to “[p]ublic institutions of higher education with respect to academic, research, health care, and existing information and technology applications and underlying support,” ARK. CODE ANN. § 25-18-603(4) (Supp. 2005). *Cf.* discussion *infra* this part III.B.5. No action was taken on the request.

partments, boards, and commissions,”⁵¹² the program would have a chance to prove itself, and it might later be expanded to reach other entities of both state and local government.⁵¹³

Representative Pickett might have misunderstood the purpose of a *general* records schedule, but her question nevertheless raised a salient point about the reach of the statute. The language, “state departments, boards, and commissions,”⁵¹⁴ as well as the exempting language for, *inter alia*, constitutional officers, the courts, and “[p]ublic institutions of higher education . . .,” derives from the original scope of the 2001 statute that authorized the ECIO to promulgate “retention schedules for control, preservation, protection, and disposition of the *electronic* records of state agencies.”⁵¹⁵ The definition of “state agencies” in the 2001 statute is the same as the definition in the 2005 statute.⁵¹⁶ The definition is strangely arranged. It purports to exempt from rule application only those records of higher education that concern “academic, research, healthcare, and . . . technology applications,” but the definition does not clearly embrace higher education to begin with. The same can be said for constitutional officers, the General Assembly, and the Supreme Court, which are not encompassed by “state departments, boards, and commissions.”⁵¹⁷

512. ARK. CODE ANN. § 25-18-603(4) (LEXIS Supp. 2005).

513. House Hearing, *supra* note 506 (author’s testimony).

514. ARK. CODE ANN. § 25-18-603(4) (LEXIS Supp. 2005).

515. *Id.* § 25-33-104(a)(2)(B) (emphasis added). Other aspects of ECIO authority reach “state departments, boards, commissions, and public institutions of higher education.” *See, e.g., id.* § 25-33-104(b)(1). The 2001 ECIO authority in turn appears to have been drawn from earlier records management legislation. *See supra* notes 306, 317, and accompanying text.

516. Compare ARK. CODE ANN. § 25-18-603(4) (LEXIS Supp. 2005) with ARK. CODE ANN. § 25-33-102(10) (2002).

517. The scope of the FOIA is of course broader, reaching “all . . . organizations within the state of Arkansas, . . . supported wholly or in part by public funds or expending public funds,” under the open meetings act, *id.* § 25-19-103(4), and the records of “a government agency, or any other agency wholly or partially supported by public funds or expending public funds,” using “agency” in a loose sense, in the open records act, *id.* § 25-19-103(5)(A). But parts of the FOIA do refer to narrower classes of entities. For example, the affirmative Internet publication requirement of the FOIA applies only to “state agenc[ies], board[s], and commission[s].” *Id.* § 25-19-108(b)(1). That limitation was intentional. REPORT OF ELECTRONIC RECORDS STUDY COMM’N 23 (2000) (copy on file with author) (“The Commission considered extending the requirements of new Section [25-19-108] to all entities subject to the FOIA but decided not to recommend this step because small cities, counties, and school districts would have difficulty complying at the present time.”). At the same time, examinations administered only by “boards and commissions for purposes of testing applicants for licensure by state boards and commissions” are exempt from disclosure under the FOIA. ARK. CODE ANN. § 25-19-105(b)(14) (2002 & LEXIS Supp. 2005). Would an examination administered by a *department* thus be subject to disclosure? The FOIA’s narrow construction rule, *see* WATKINS & PELTZ, *supra* note 3, at 7, suggests so.

Excluding that which is not included risks statutory ambiguity. The reason for the anomaly is unknown, though one might suspect that it emerged from pre-engrossment negotiations in 2001 about the scope of authority for the proposed ECIO.⁵¹⁸ In any event, the ECIO Office has not exercised authority over public institutions of higher education. One can safely conclude that while the 2005 law expanded ECIO authority to reach traditional paper records, the ECIO's reach into state agencies was intended to remain unchanged from the 2001 law. If the records retention program is to be broadened in the future to other entities of state government, further legislative action will be required.

IV. ANALYSIS

The 1970s provided a golden (but missed) opportunity for Arkansas to develop a comprehensive records management program, following up on the freedom of information movement of the late 1960s. The failure to seize that opportunity left an unfortunate legacy; states such as Kentucky that took early advantage of federal funding opportunities from that era maintain robust programs today. By the time Arkansas received its bit of federal support, Watergate-era public enthusiasm for records management and retention at the state and national level was waning. The valiant accomplishments of a very few state officials were fated to dissipate.

The window of opportunity closed, and the 1973 act became a biennial albatross around the neck of the General Assembly. In time the legislature distanced itself from its 1973 commitment, and records management took a starkly divergent path from that of the 1967 Freedom of Information Act (FOIA). The 1995 and 2003 records management acts represented hollow, if well-intentioned, renewals of interest, as they lacked sufficient financial commitment. The legislature's 2001 repeal of the 1995 act and the Governor's 2003 veto together represent perhaps the most honest—if disappointing—assessments of records management in Arkansas. State records management policy fell prey to the common state syndrome of spiraling costs, characterized by a project inadequately funded at its inception and fated to a tantalizing race toward a retreating goal.

After more than thirty years, however, Cinderella might at last be dressing for the ball. The advent of common electronic records and state-wide electronic record-keeping methods, and the myriad technological problems that come with electronic records—problems *perceived* as new, although upon examination they prove to be highly analogous to age-old,

518. See *supra* note 515. The language in the 2001 ECIO authorizing statute, including the reference to research, etc., is not exactly the same as the 1977 records management bill or the 1995 records management act, so some conscious tinkering must have taken place.

known problems of management and preservation—have served as the primary impetus for a renewed interest in the statewide records management. It is no coincidence that scholarly and governmental interest in records management and retention issues has exploded in the last ten years, and the Internet has moved records and management projects online, where they can be witnessed, examined, and employed by everyone.

The stars are also aligned in other respects. The ECIO Office has dedicated personnel and resources to the project in a way that the History Commission previously could not, as the commission was historically burdened with responsibilities in excess of resources. The realist might conjecture that the nascent ECIO Office, even unconsciously, is trying to establish its domain in the tangled jungle of state administrative agencies and has happily discovered a prefecture gone to seed. As a political reality, the ECIO Office, executive agency in charge of all things shiny, new, and technologically miraculous, brings to the legislative table an avant-garde esprit and twenty-first-century cachet that the History Commission, with its century-old political baggage and reputation of fondness for all things moldy, simply cannot muster. As a matter of fact, and for whatever reason, the ECIO Office, in the persons of Drew Mashburn and Paula Swaim, took Governor Huckabee's charge and ran with it, building a coalition of state agencies broader than previously attempted and shepherding the fruits of that labor through the legislative process. The ECIO is now overseeing records retention almost entirely as an administrative process, with bare legislative authorization and no complex statutory scheme. This approach will insulate the process henceforth from legislative wrangling and move the policy development game, for the first time, firmly into a friendly home court of the administrative state.

The work of the ECIO Office and the records management workgroup echoed the principles and processes dictated by federal example and scholarly instruction. The concept of a general records schedule, as a starting point, follows the example of the National Archives and Records Administration (NARA) and of other states. Perhaps counterintuitively, a centralized schedule for common records makes a better starting point for a statewide program than does the sort of grassroots effort contemplated by the 1973 and 1995 acts, which called for the simultaneous internal development of an array of agency-specific policies. The centralized program establishes leadership, sets a pattern for internal policymakers to follow, and gets the ball rolling with famously unstoppable bureaucratic momentum. A general records schedule delineates public values and subsequently guides internal agency policymakers.

The workgroup followed the established processes of records inventorying, records appraisal, and disposition scheduling. The workgroup inventorying, conducted with input from the range of public officials and representatives engaged in the process, paid homage to the NARA delineation of

administrative, fiscal, legal, and permanent values, or alternatively to the analogous Association of Records Managers and Administrators (ARMA) delineation of operational and vital (administrative and personnel), legal/regulatory, fiscal, and historical (permanent) values. In the appraisal phase, the workgroup strived vigorously to streamline the general records schedule, cutting duplicative series and terms, combining overlapping categories, and paring down series titles to the necessarily common. Workgroup members disagreed and argued but ultimately reached consensus over key distinctions such as that between substantive and non-substantive correspondence, which is to say that the workgroup tackled the difficult distinction between housekeeping and programming records, or transaction and program records, as reflected in the experience of other states, such as Texas and Connecticut. The format for the proposed records schedule, pioneered by the subcommittee, follows the easier-to-use model of an interrelated table rather than a simple list; hot links for glossary terms and cross-references should follow in an electronic version of the schedule. The general records schedule can be subject to further refinement and updating through ongoing administrative processes.

Finally, the workgroup provided best practices guidance for permanent record identification, for electronic records management, and for subsequent records schedule development, besides the standards contained in the general records schedule itself. The electronic records policies conceived by the workgroup and proposed through both standards and best practices are consistent with the electronic-inclusive, content-based (medium- and format-neutral), and metadata-conscious principles that were derived from the federal experience in regulation and case law, and that already have been incorporated into the state freedom of information system pursuant to the conclusions of the Arkansas Electronic Records Study Commission.

In short, the ECIO process was a model of records retention policy development, and the proposed schedule that resulted is praiseworthy. Still, even assuming promulgation of the schedule as conceived, there is still much work to be done.

For all the work that has gone into the present project to manage public records in Arkansas, its scope is modest. First, the program promises only a *general* records schedule. Statutory ECIO authority to set policy for “retention and management” might be stretched to management issues not yet contemplated, such as in-agency record organization, access and use, storage and destruction, and even creation. But the statutory authority is plainly limited to “common records.” Nothing is contemplated like the critical NARA system for internal agency schedule development with NARA guidance and approval, nor any incarnation of the analogous Arkansas State Records Commission system. To create a functional and successful model, the workgroup proposed a bare-bones general records schedule, but the meat of agency business is surely in the voluminous agency-specific files.

Public accountability and historical preservation ultimately require the systematic scheduling of records within agencies as well as across agencies.

Second, ECIO statutory authority is limited both horizontally and vertically. Horizontally, ECIO authority is limited to state departments, boards, and commissions; the courts and, oddly, higher education are excluded. Vertically, ECIO authority is limited to state government, as against local government. ECIO authority is arguably necessarily limited to permit a confident first step in statewide records retention, but such limited authority cannot effect a satisfactory conclusion to the story of records retention in Arkansas. The reach of records retention must, in the end, be as broad as that of its companion, the FOIA. The FOIA is an important device to achieve public accountability in the administration of the courts, in the public higher education system, and most strikingly, at the local government level, where the ordinary citizen is most likely to employ the FOIA, and where governmental decisions can have the most powerful and immediate impact on people. This FOIA vitality suggests that records retention is needed in these critical components of Arkansas governance and society both to serve public accountability and to ensure historical preservation. If the limited experiment of the modest 2005 act is successful, records retention in Arkansas should develop along the well-marked path of more comprehensive state models, such as Kentucky's, as envisioned by the parallel local government system in the 1973 Arkansas act.

Third, the Arkansas retention system falls short on the disposition end of the process, because the History Commission and State Archives are still left out in the cold. The permanent records guidelines of the proposed general record schedule are a critical first step to identify documents worthy of long-term preservation because of historical value. But what is to become of these records? They might be transferred by agencies to the State Archives; indeed, the agencies would likely be pleased to relieve themselves of permanent records without continuing operational value. But the History Commission and State Archives currently lack the resources to manage a continuing flow of inbound permanent records; the commission has focused its limited resources instead on organizing the already existing collection. Moreover, the History Commission lacks adequate statutory authority to promulgate standards for uniform procedures in document review, storage, and transfer or destruction, as were contemplated by and partially implemented under the 1973 act. And even if personnel and procedures were in place to manage the flow of permanent records, there is the simple matter of space; the History Commission's Capitol Mall office is ill-suited to the job of a comprehensive state records center, or centers, as envisioned by the 1973 act. Even setting aside public accountability, this want of a records management process upon final disposition, and the omission of the History Commission from the loop, must be corrected if the state records management system is to accomplish the objective of historic preservation.

In sum, the present records retention program, as enacted by the 2005 General Assembly and as proposed by the records management workgroup for administrative consideration, marks an important first step in the overdue development of a records retention program for Arkansas. This step is being taken with laudable objectives in mind, including those delineated by the ARMA—efficiency, consistency, compliance, protection, space, and cost containment—and, more broadly, to facilitate public accountability and historic preservation. But to attain those objectives, this experiment will have to be broadened beyond common records to all public records; beyond horizontal and vertical limitations to all public entities; and beyond retention and disposition to archiving.

V. CONCLUSION AND GOING FORWARD

Arkansas is now on its way to the creation of a long-overdue records retention system that will serve as an essential counterpart to freedom of information and historical preservation. This project has been undertaken with both a determination and a breadth of support that have not before coincided in Arkansas history. These circumstances suggest that, at long last, an enduring foundation might be laid for a statewide records management program worthy of a state with a strong commitment to freedom of information and with great pride in its history.

The administrative process contemplated by the General Assembly is now unfolding.⁵¹⁹ With the result of that process in hand, state agencies in 2006 will gear up to implement the first statewide general records schedule, twenty-three years after statewide records management was first contemplated in state law. This program has the potential to serve as a model for a comprehensive public records management system that will improve the operational efficiency of Arkansas government and save Arkansas taxpayers money, while rendering Arkansas government more accountable to its people than at present, and ensuring the preservation of Arkansas history for future generations. This program differs from its predecessors because this program is more needed, better conceived, and more likely to succeed. This program differs from its predecessors because the 2005 Act Concerning the Retention of Public Records by State Agencies is, ultimately, sexier than it sounds.

519. Progress may be witnessed at the home page of the reincarnated working group, http://www.techarch.state.ar.us/domains/information/working_group/records/main.htm (last visited Sept. 1, 2005). See *supra* note 332.

