

UNITED STATES
DEPARTMENT OF COMMERCE
OFFICE OF THE GENERAL COUNSEL



Records Retention
in the Department of Commerce

OGC
Department of Commerce
January 29, 2007

PRESERVATION OF DEPARTMENT DOCUMENTS

The first step in your review is to determine whether the documentary materials are "records," "nonrecords," or "personal papers," as defined below. Records and nonrecords are subject to Federal laws, including a criminal statute, which may restrict you from removing or destroying them. Personal papers are the property of the individual and are not subject to these preservation rules.

• The three types of documentary materials are as follows:

- Records. All documentary materials, regardless of physical form (e.g., paper, disk, e-mail), made or received by the Department in connection with the transaction of public business, that are preserved, or are appropriate for preservation, as evidence of agency activities or because of the value of the information they contain. A Rule of Thumb: If it was created on official time in response to an official tasking, contains official business or comments, was placed in an agency file, memorializes an official discussion, or was intended to be kept by an employee for the future transaction of official business, it is a record.

- Nonrecords. Documentary materials pertaining to official business that lack record value. You must determine that the document is inappropriate for preservation for its evidentiary or informational value or that its substance is adequately reflected in materials that are preserved as records. Nonrecords include materials made or acquired solely for reference of the possessor and not intended for preservation or distribution. (For example, personal notes taken during a meeting which are not distributed, or draft documents which would routinely be discarded.) Nonrecords also include extra copies of documents preserved only for convenience of reference. In addition, nonrecords include stocks of publications and processed documents, and library or museum materials intended solely for reference or exhibit.

- Personal papers. Materials of a private, nonpublic character pertaining solely to an individual's private affairs which do not relate to or have an effect on agency business.

• Each type of record should be maintained separately in your office, under Department regulation. For example, you may keep records and nonrecords in separate filing cabinets. Some offices may establish a common set of file cabinets for office records, with employees maintaining only nonrecords and personal papers in their individual file cabinets. Records and nonrecords may be kept in a single file cabinet or safe, provided they are placed in separate drawers or folders. The policy of maintaining your personal documents separately facilitates your search for documents responsive to a Freedom of Information Act request or your review upon departure.

For legal advice on records, please contact the Office of the
Assistant General Counsel for Administration
(202) 482-5384

EXAMPLES OF WRITTEN MATERIALS

● Notes/Talking Points/ "Q's & A's" prepared in advance of a meeting -- are generally records because they are usually prepared to guide the course of an official meeting in which public business will be transacted. Such paperwork is prepared by a Government employee on Government time, sometimes reviewed by the author's supervisor, sometimes distributed to one or more participants at the meeting, discussed at length during the meeting, and probably contains a recommendation, or at least some salient points, which were acted upon at the meeting, and then filed with relevant paperwork to record the action taken at the meeting.

● Notes taken during a meeting -- are records if they are intended to be a memorialization of what transpired at the meeting. If they are just personal notes, which are never distributed by the author, and are intended to be thrown away once they are no longer needed (*i.e.*, they serve only as "memory joggers"), then they are nonrecords. There is a broad spectrum of "need" for such notes: are they kept to preserve a record of action or enable the keeper to act upon it (thus creating records), or are the notes kept through mere inadvertence (usually discarded on a somewhat routine basis), with no intention of using them for any official purpose (thus, being non-records).

● Drafts -- are records if they were circulated for formal approval, comment, action, recommendation, or follow-up, or they communicate official business and contain substantive comments. Otherwise, they are nonrecord materials. It does not matter whether a final document was ever prepared; the content of the draft may still reflect an agency action that is worthy of preservation. In the normal process of drafting final documents, most drafts are discarded after the author incorporates comments, style changes, and typographical corrections into a new draft. This is appropriate because the original draft has lost its utility as insight into, or evidence of, the agency's final action. However, if an author intentionally kept, or routinely keeps, a series of drafts for the sole purpose of preserving evidence of how the agency arrived at its final position, then those drafts are records.

● E-mail messages -- can be records if they meet the definition, *i.e.*, made in connection with the transaction of public business and evidence agency activities or contain valuable information.

● Personal activity materials -- materials (including uncirculated desk calendars) concerning activities in which you engage in your personal capacity, such as club memberships or political activities. Even if the activity bears some relationship to your official position, such as membership in a professional society, the materials are personal if you participate in your personal capacity rather than as part of your official duties for the Department.

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REMOVAL OF DEPARTMENT DOCUMENTS UPON YOUR DEPARTURE

Federal officials have no proprietary rights in Government materials. Unlawful destruction or removal of property, records, or copies may subject a person to criminal penalties.

- You may not remove any official agency records.
- You may not remove any materials which contain national security information or other information afforded protection under various statutes or regulations.
- You may remove nonrecord materials and personal papers **only if** prior approval for their removal has been obtained from the head of your operating unit (or designee), as certified on the Department clearance form, Form CD-126, **and** their removal does not conflict with the conditions listed below:
 - relate to any pending or contemplated civil, criminal, or administrative proceeding or other program activity where their release could prejudice the matter;
 - impose substantial handicaps on the efficient, continued functioning of an office or of your successor;
 - diminish the records or other documentary information needed for the official business of the Department;
 - violate the confidentiality of any interest protected by law, such as national security, privacy, trade secrets;
 - exceed normal administrative economies (*i.e.*, impose an unreasonable cost or burden created by copying or removing the materials from the building); or
 - unnecessarily expose, or risk exposing, to the public any internal deliberations, opinions, legal or policy advice, law enforcement materials, or other professional work-product of any officer or employee of the Department.

Records - all documentary materials, regardless of physical form, made or received by the Department in connection with the transaction of public business.

Nonrecords - materials made or acquired solely for reference, or extra copies of documents preserved only for convenience of reference.

Personal Papers - materials pertaining solely to an individual's private affairs that have been kept unofficially in your office (*e.g.*, appointment calendars created solely for your personal scheduling convenience, which have not been routinely distributed to other departmental employees).

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