

UNITED STATES DEPARTMENT OF COMMERCE

DOCUMENT PRESERVATION FOR DEPARTING EMPLOYEES



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ETHICS LAW AND PROGRAMS DIVISION
OFFICE OF THE GENERAL COUNSEL
UNITED STATES DEPARTMENT OF COMMERCE

PRESERVATION AND REMOVAL OF DEPARTMENT DOCUMENTS

Prior to your departure from the Department, you will need to review the documentary materials in your office or under your control in order to determine which documents you may take with you, and to facilitate the proper disposition of those documents that you will leave behind.

The first step in your review is to determine whether the documentary materials are “records,” “nonrecords,” or “personal materials,” as defined below. Documentary materials may be in forms other than paper, such as emails, photographs, and electronic files. 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. We have summarized these restrictions in four rules, set forth in Section III, below.

I. TYPES OF DOCUMENTARY MATERIALS

The three types of documentary materials are as follows:

1. **RECORDS.** Records include all recorded information - regardless of form or characteristic (including in digital or electronic form) - made or received by the Department under Federal law or in connection with the transaction of public business, that is preserved, or is appropriate for preservation, as evidence of agency activities or because of the informational value of data in it.
2. **NONRECORDS.** Nonrecords are documentary materials pertaining to official business that lack record value. You must determine that the material 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 library or museum materials intended solely for reference or exhibit and duplicate copies of records preserved only for convenience.
3. **PERSONAL MATERIALS.** Personal materials consist of 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 documentary material should be maintained separately in your office, under Department regulation. For example, you may keep records and nonrecords in separate (physical or electronic) folders. Some offices may establish a common set of folders for office records, with employees maintaining only nonrecords and personal materials in their individual folders. The policy of maintaining your personal materials separately facilitates your search for materials responsive to a Freedom of Information Act request or your review upon departure.

II. EXAMPLES OF WRITTEN MATERIALS

Notes/Talking Points/ "Q's & A's" Prepared in Advance of a Meeting – Materials produced 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 material 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 materials to record the action taken at the meeting.

Notes Taken during a 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 (that is, 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 – Drafts of final documents 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.

Email Messages or other forms of electronic documentation – Emails or other forms of electronic documentation are records if they meet the definition, i.e., are made or received in connection with the transaction of public business and evidence agency activities or contain valuable information. Purely personal emails or other personal electronic files/documentation may be forwarded to a personal account or destroyed.

Personal Materials – Personal materials (including uncirculated desk calendars) are materials 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. Purely personal materials may be removed or destroyed by you.

III. RESTRICTIONS ON DESTRUCTION AND REMOVAL OF RECORDS AND NONRECORDS

Records and nonrecords are the property of the Government, and they are subject to the rules set forth below concerning destruction and removal. Personal materials are the property of the individual and are not subject to these rules. 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, memorialized an official discussion, or was intended to be kept by an employee for the future transaction of official business, it is a record and it cannot be destroyed by you except according to #1 below.

It is sometimes difficult to determine the proper category for particular documentary materials. The determination may depend on how your office organizes and maintains its records, and how the particular record is used or has been used in the past. If there is any doubt as to the proper category, and you determine that removal or destruction of the materials is desirable, you should consult your Records Management Officer. A list of Records Officers by bureau can be found here:

<http://www.archives.gov/records-mgmt/agency/departments/commerce.html>.

The following four rules apply:

1. Records may not be destroyed by a departing employee, except as authorized by your agency's records control schedule or the Government-wide General Records Schedules.
2. Records may not be removed by a departing employee. Extra copies of records are considered nonrecords, and may only be removed in accordance with the rules for destruction or removal of nonrecords, set forth below.
3. Nonrecords may be destroyed as soon as they have served their purpose or are no longer needed. HOWEVER, nonrecords may not be destroyed where the materials are within the scope of a pending civil, criminal, or administrative proceeding, or other similar action such as a Congressional inquiry or Freedom of Information Act request. You should obtain advice in such circumstances from the Office of the General Counsel prior to destroying the materials.
4. Nonrecords may be removed only with prior approval from the head of your operating unit (or designee), as certified on the Department clearance form, Form CD-126. Approval will not be granted if any of the materials:
 - contain national security information or other information afforded protection under various statutes or regulations, such as privacy information or trade secrets;
 - relate to any pending or contemplated civil, criminal, or administrative proceeding or other program activity where their release could prejudice the matter;
 - if removed, would hinder the efficient, continued functioning of an office or of your successor;
 - if removed, would diminish the records or other documentary information needed for the official business of the Department;
 - if removed, would violate the confidentiality of any interest protected by law, such as national security, privacy, trade secrets; or
 - if removed, would exceed normal administrative economies (i.e., impose an unreasonable cost or burden created by copying or removing the materials from the building).

Please be advised, however, that merely because a document does not fall into any of the above categories, it does not necessarily mean that the document may be removed. There are

many additional considerations that the Department may take into account in a particular instance that are not readily apparent to you. For example, the Department may choose not to approve removal of records that would not normally be released to a third party under the Freedom of Information Act if it is determined that removal would 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.

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