

Statement of  
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Before the  
Information, Policy, Census, and National Archives Subcommittee  
of the Committee on Oversight and Government Reform

“History Museum or Records Access Agency?  
Defining and Fulfilling the Mission of the National Archives  
and Records Administration”

December 16, 2009

Mr. Chairman, Ranking Member McHenry, and Members of the Subcommittee, thank you for the opportunity to testify today about the mission of the National Archives and Records Administration (NARA) at this critical time.

I am Chief Counsel for Citizens for Responsibility and Ethics in Washington (CREW), a non-profit, non-partisan organization. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Many of CREW's actions flow from the principles that transparency is a cornerstone of our democracy and government accountability is achieved through government transparency. Because proper record preservation and management lie at the heart of achieving these principles, CREW has been pushing NARA for years to assume the leadership role the Federal Records Act (FRA) envisions for the agency and to elevate government-wide the importance of proper record-keeping for all government records.

Today NARA is at a critical juncture. The appointment of a new archivist, David Ferriero, and the dedication of the administration to a transparent and accountable executive branch present NARA with unique opportunities to re-examine its mission and priorities and establish a new roadmap for how to achieve them. Most importantly, the archivist must decide whether NARA will continue to elevate its role as a museum of the nation's history over its role as a records access agency. We at CREW hope the answer to the question posed by this Committee is that NARA will become a records access agency first, a role it has ignored for far too long by placing undue emphasis and resources on its museum functions. This juncture also affords Congress an opportunity to re-examine the laws that govern record-keeping in the executive branch and whether the archivist needs additional legislative authority.

Let me turn to the priorities and roles CREW believes NARA and Mr. Ferriero should adopt and the changes to the culture at NARA that will be required.

First, the most pressing issue NARA faces is the dismal state of electronic record keeping across nearly all agencies in the federal government. In April 2008, CREW issued a report: *Record Chaos: The Deplorable State of Electronic Record Keeping in the Federal Government*,<sup>1</sup> documenting the federal government's severe mismanagement of its federal records and the failure of NARA to affirmatively and effectively assist agencies in developing and implementing effective records management policies. Two months later, the U.S. Government Accountability Office (GAO) issued a report, *National Archives and Selected Agencies Need to Strengthen E-Mail Management*,<sup>2</sup> echoing CREW's findings. Specifically, the GAO reported that despite the responsibility NARA has for overseeing agency records and records management programs and practices, it has performed only limited oversight activities. NARA has not, for example, conducted inspections of agency records management programs since 2000, or performed any other kind of comprehensive evaluations of agency records management. As a result, according

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<sup>1</sup> This report is available at <http://www.citizensforethics.org/recordchaos>.

<sup>2</sup> This report is available at <http://www.gao.gov/items/d08742.pdf>.

to the GAO, “NARA has limited assurance that agencies are appropriately managing the records in their custody and that important records are not lost.”<sup>3</sup>

Unfortunately federal agencies still have not measurably improved how they manage their electronic records, and their ever-increasing dependence on electronic media – from emails to social networking – presents an exponentially higher risk of losing important records. The vast majority of agencies have yet to implement management systems that preserve and allow ready access to electronic records, most particularly emails. As a frequent Freedom of Information Act (FOIA) requester, CREW all too often is told by a wide range of agencies, from the Department of Homeland Security to the Department of Education, they have no way to identify potentially responsive emails, much less produce them in response to CREW’s requests.

The GAO has been prodding NARA for years to take on the enforcement mantle conferred by Congress. For example, in a June 2002 report, the GAO criticized NARA’s decision to replace agency evaluations with more targeted assistance, concluding this approach was no substitute for systematic inspections and evaluations of federal records programs. As the GAO pointed out, NARA’s preferred approach of “targeted assistance” meant NARA was evaluating only those agencies that already appreciated the importance of records management.<sup>4</sup> In a follow-up report issued in July 2003, the GAO documented NARA’s continued refusal to “fully address[] the need to assess and improve agency records management programs, and develop an implementation plan . . .”<sup>5</sup> Absent the “revitalized inspection program” urged by the GAO, NARA lacks the critical information it needs “to improve its guidance and to support its redesign of federal records management.” *Id.* Five years later, the GAO reported once again on NARA’s continued failure to conduct comprehensive agency records management evaluations,<sup>6</sup> a failure that continues to pose an unacceptable risk that important federal records will be lost forever.

Although these electronic record keeping failures have reached a crisis point, NARA continues to abdicate its statutory responsibilities and fails to recognize the urgency of the situation. Charged by Congress with assisting federal agencies to maintain adequate and proper documentation of their policies and transactions, including conducting inspections of their records management programs and practices, NARA has opted time and again for a more passive

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<sup>3</sup> *Id.* at p. 3.

<sup>4</sup> See U.S. General Accounting Office, *Information Management: Challenges in Managing and Preserving Electronic Records*, June 2002, available at <http://www.gao.gov/new.items/d02586.pdf>.

<sup>5</sup> U.S. General Accounting Office, *Electronic Records: Management and Preservation Pose Challenges*, July 8, 2003, available at <http://www.gao.gov/new.items/d03936t.pdf>.

<sup>6</sup> U.S. General Accounting Office, *Federal Records: National Archives and Selected Agencies Need to Strengthen E-Mail Management*, June 2008.

role that avoids any direct conflict with the agencies it oversees. Even today NARA's response is to continue studying the problem; its latest approach to its inspection responsibilities is the development of an agency self-reporting scheme that is many months away from providing useful information, much less leading to any needed reforms. We urge the new archivist to re-invigorate NARA's invaluable role in this area. Years studying the problem is no substitute for the active oversight responsibility Congress imposed on NARA through the FRA.

NARA has justified its failure to take a more active role as the result of the limited enforcement authority the FRA confers on it, suggesting the problem and solution lie with Congress, not the agency. We most strenuously disagree. NARA has ample statutory authority, including quite specifically the obligation to inspect and survey the records management programs and practices of and between federal agencies. *See* 44 U.S.C. § 2904. NARA alone bears the blame for failing to exercise the statutory authority and responsibilities it already has. We urge Mr. Ferriero to re-evaluate the need for additional authority only after exercising the full authority NARA currently has.

Second, we urge NARA to conduct an independent audit of the Electronic Records Archives (ERA) project, including an analysis of its status, functionality, and feasibility. Launched in 2001, the ERA has been touted as the answer to the long-term preservation of electronic records of all formats, notwithstanding the varying operating systems, software, and hardware agencies use to create and access records. In the intervening years we have seen huge cost overruns, multiple instances of contractor mismanagement, if not fraud, and growing doubt about whether the ERA is capable of delivering on its promise to be the answer to the government's long-term preservation needs. Moreover, even if the ERA performs as advertised – of which there is considerable doubt – NARA has yet to tackle the issue of public access to the records preserved in the ERA. For the ERA to be successful, it must afford the public access to its records that is straight-forward, effective, and efficient. Development of this critical public access function, however, remains in the early planning phase.

NARA's steadfast refusal to acknowledge the full extent of the problems with the ERA, the ERA's known limitations, and the extent to which what is ultimately delivered differs fundamentally from what NARA initially promised all point to one conclusion: there must be an outside, independent and thorough audit of the ERA and all steps taken to date. Such an audit must include the actions of Lockheed Martin, the primary contractor for the ERA. Why, for example, has Lockheed Martin applied for numerous patents related to the ERA, despite the fact the project is entirely federally funded? What accounts for the multiple cost overruns, and has NARA effectively and appropriately managed its relationship with the contractor? Although NARA's Inspector General has tried to answer these questions and his public reports document problems he uncovered, we understand NARA has resisted his efforts to obtain more in-depth information. The public and Congress deserve answers to these and myriad other questions that ultimately will answer the critical question: should NARA continue with or abandon the ERA? We ask the Archivist to take a clear-eyed look at this question and, if necessary, have the courage to abandon the ERA project if it cannot deliver on its promises.

Third, NARA suffers from a culture of passivity and indifference that must change if NARA is to emerge as an effective leader in the management and preservation of our nation's history. NARA's failure to assume a leadership role in this arena reflects a failure to appreciate the urgency of the situation. With each day, month, and year that goes by without effective records management in place we lose another slice of our nation's history. President Obama has promised an unprecedented level of transparency and accountability in our government, but this promise cannot be fulfilled if agencies fail to preserve agency records. NARA is the only federal entity with preservation as its central mission, yet NARA has been sitting on the sidelines while the White House and other agencies begin the process of transforming out government into one of transparency. Use of new technology that the administration has embraced presents new and perplexing questions and concerns. For example, how should we manage blog posts tweets, and preserve posts on facebook and all the other evolving methods of? NARA must lead the way in answering these questions and guiding agencies toward full and effective electronic record keeping.

In short, the status quo at NARA is unacceptable. The advent of a new paradigm of transparency and a new archivist provide NARA with an opportunity to re-invigorate and re-define itself as part of the solution, not the problem, to the management and preservation of our federal records. Toward that end, NARA must shift its emphasis from being a history museum to a records access agency. This shift will also require a change in funding emphasis from presidential libraries to efforts that will make all of our governmental records publicly accessible. From Fiscal Year (FY) 1998 to FY 2009, NARA's budget went from \$219 million to \$486 million. At the same time, the presidential libraries' share of that budget increased from 15% to 32% (a figure that does not take into account contributions the libraries receive from trust funds and foundations), meaning that presidential libraries now consume one-third of NARA's budget. Even with this disproportionate share, presidential libraries continue to maintain unacceptable backlogs with little or no increase in their levels of services or efficiency.

Congress, too, has an important role to play to bring our government into the 21<sup>st</sup> century. As a starting point, Congress should amend both the FRA and the Presidential Records Act (PRA) to better address these government-wide problems. The Electronic Communications Preservation Act, Congress's most recent attempt to improve the FRA, fails to provide any effective enforcement mechanisms for noncompliance, adding no new penalties for an agency's failure to implement electronic record keeping requirements. The proposal gives agencies an overlong period of four years in which to implement effective electronic record management, failing to take into account currently available software. Also missing from the proposed legislation are comprehensive benchmarks for agencies to meet, especially with respect to training, education, and compliance, even though these are three major deficiencies in agencies' current records practices. And with this proposal Congress missed an opportunity to mandate a more active role for NARA in ensuring government-wide compliance with electronic record keeping.

That same bill would amend the PRA to require the archivist to establish standards for records management of presidential records. In light of recent experience with the Bush White

House's gross mismanagement of its electronic records, which resulted in the disappearance of millions of emails from White House servers, amendments to the PRA are long overdue. Still missing, however, are any effective enforcement mechanisms, including a private right of action, and the proposal contains no penalties for a president's non-compliance or a government official's deliberate destruction of records. Nor does the bill enhance the archivist's very limited role in ensuring a president's compliance with the PRA, a critical change if we want to ensure adequate protection for presidential records. On both the FRA and PRA fronts, we urge Congress to enact more effective and muscular legislation that will better protect the treasure trove of historical documents held by both the president and federal agencies.

CREW welcomes the opportunity to work with this Committee and the new leadership at NARA to address these very important issues. I am happy to answer your questions.

### **Biographical Information for Anne L. Weismann**

**Anne L. Weismann** serves as Chief Counsel for Citizens for Responsibility and Ethics in Washington (CREW), a non-profit, non-partisan organization dedicated to promoting ethics and accountability in government. Ms. Weismann is responsible for all of CREW's litigation and litigation-related matters, advocates for transparency and accountability in government, frequently lectures on access to government information, and writes reports on issues of transparency and record keeping in the federal government. She currently serves on the Board of Directors of the American Society of Access Professionals (ASAP). Her publications include "The Elusive Vice-Presidential Records of Richard B. Cheney," *Passport*, Vol. 40, No. 2, September 2009, and "Record Chaos: The Deplorable State of Electronic Record Keeping in the Federal Government," April 2008. Prior to joining CREW, Ms. Weismann served as Deputy Chief of the Enforcement Bureau at the Federal Communications Commission, with responsibility for all telecommunications matters. Before that, she worked in the Civil Division of the U.S. Department of Justice, where she served as an Assistant Branch Director with supervisory responsibility over banking litigation, housing litigation, and from 1995 until 2002, all government information litigation. She received her J.D. from George Washington University's National Law Center.