

2021

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Recommended Citation

de Perio Wittman, Jessica, "A Trend You Can't Ignore: Social Media as Government Records and Its Impact on the Interpretation of the Law" (2021). *Faculty Articles and Papers*. 584.
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A TREND YOU CAN'T IGNORE: SOCIAL MEDIA AS GOVERNMENT RECORDS AND ITS IMPACT ON THE INTERPRETATION OF THE LAW

*Jessica de Perio Wittman**

ABSTRACT

There has been a sharp increase in official communications from government agencies and elected officials that occur initially, primarily, and even solely, on social media. The Federal Records Act (FRA), Presidential Records Act (PRA) and the Freedom of Information Act (FOIA) govern the retention, access, preservation and disclosure of records produced by the federal government. Recent litigation has highlighted why courts, attorneys, and other legal researchers must consider social media as a primary source of government information, particularly when records may become inaccessible once a social media post is modified or deleted, or when technology becomes obsolete. Additionally, as social media platforms are invoked to preserve the historical record, the absence of clear and consistent retention policies for social media compounds access and preservation issues researchers face when government information is digitally erased days—or even minutes—after it appears. This article establishes that until clear and consistent retention policies exist and there are systemic ways to access and preserve social media as government information, the definition

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The author would like to thank Hannah Bergman from the National Archives and Records Administration for her perspective on the issues presented in this article. The author would also like to thank Douglas Cox and Leslie C. Levin for their insight and critique. The author would also like to thank Haley Hinton, Sarah N. Hollis, Stephanie Javarauckas, Amy Saji, and Chanwon Yoon for their research assistance.

of a “record” becomes irrelevant.

INTRODUCTION

In July 2017, President Donald Trump announced his decision to ban transgender troops in the span of three tweets:

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . . Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.¹

President Barack Obama may have been able to harness the power of social media in his election campaign in 2008,² but President Donald Trump has accelerated the use of social media through his “unprecedented use of Twitter from the Oval Office, and [through] regularly us[ing] it to share thoughts and announcements on politics and diplomacy.”³ The adoption of social media has also expanded to other areas of the executive branch and to members of Congress.⁴ As of July 2020, the U.S.

¹ Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864>; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472>.; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:08 AM), <https://twitter.com/realDonaldTrump/status/890197095151546369>.

² See Jennifer Aaker & Victoria Chang, *Obama and the Power of Social Media and Technology*, STAN. GRADUATE SCH. OF BUS. (Aug. 27, 2009), <https://www.gsb.stanford.edu/faculty-research/case-studies/obama-power-social-media-technology> (discussing Obama’s use of social media in his campaign).

³ Rachel Treisman, *As President Trump Tweets and Deletes, The Historical Record Takes Shape*, NPR (Oct. 25, 2019, 9:17 AM), <https://www.npr.org/2019/10/25/772325133/as-president-trump-tweets-and-deletes-the-historical-record-takes-shape>.

⁴ Social media accounts for executive branch agencies can be located in the U.S. Digital Registry. *U.S. Digital Registry*, DIGITAL.GOV, <https://digital.gov/services/u-s-digital-registry/> (last visited July 8, 2020). For social media accounts held by Congressional members, see JACOB R. STRAUS, CONG. RESEARCH SERV., R45337, SOCIAL MEDIA ADOPTION BY MEMBERS OF CONGRESS: TRENDS AND CONGRESSIONAL CONSIDERATIONS (Oct. 9, 2018), <https://fas.org/sgp/crs/misc/R45337.pdf> (explaining that members of Congress and their constituents utilize social media to communicate).

Digital Registry⁵ had over 6,000 active official social media accounts that represent U.S. government agencies, organizations, and programs.⁶ Those accounts “are managed by federal agencies, heads of agencies, or members of the President’s Cabinet.”⁷ The @unitedstates project reports over 1,000 official social media accounts used by legislators in the 116th Congress.⁸ Twitter, Facebook, YouTube, and Instagram are among the predominant social media platforms that have allowed agencies and elected government officials to interact directly with their constituents and the public at large.⁹

Social media allows users to participate, engage, and network within online communities, in order to share information, ideas, personal messages, and other content.¹⁰ In an effort to meet the public where they are, the federal government turned to social media platforms to convey just-in-time¹¹ government

⁵ *U.S. Digital Registry*, *supra* note 4. The federal government manages the U.S. Digital Registry, which is “an inventory of official government social media accounts, mobile websites and apps, as reported and authenticated by federal managers.” *Id.* It “serves as a resource for agencies, citizens, and developers to confirm the official status of social media and public-facing collaboration accounts, mobile apps, and mobile websites.” *Id.*

⁶ This statistic is current as of July 8, 2020. *Search the Registry*, U.S. DIG. REGISTRY, <https://usdigitalregistry.digitalgov.gov/> (last visited July 8, 2020). The U.S. Digital Registry was created by the General Services Administration to “[h]elp prevent exploitation from unofficial sources, phishing scams, or malicious entities.” *Id.*

⁷ *Id.*

⁸ This statistic is current as of November 2, 2020. *See THE @UNITEDSTATES PROJECT*, <https://theunitedstates.io/> (last visited Nov. 2, 2020). The “@unitedstates project is a shared commons of data and tools for the United States.” *Id.* The *legislators-social-media.yaml* dataset is “designed to include accounts that are paid for with public funds and which represent official communications of their office.” *Unitedstates/congress-legislators*, THE @UNITEDSTATES PROJECT, <https://github.com/unitedstates/congress-legislators> (last visited Nov. 2, 2020). The @unitedstates Project “relies on reasonable verification from the legislative office about the status of their accounts.” *Id.*

⁹ *See Straus, supra* note 4, at 2–3 (explaining the statistics and indicating that “nearly all Members of Congress have accounts on the three oldest platforms—Twitter, Facebook, and YouTube”); *see also THE @UNITEDSTATES PROJECT, supra* note 8.

¹⁰ *See Social Media*, MERRIAM-WEBSTER (2004), <https://merriam-webster.com/dictionary/social%20media>.

¹¹ *See* Chris Snyder, *Government Agencies Make Friends with New Media*, WIRED (Mar. 25, 2009, 4:11 PM), <https://www.wired.com/2009/03/government-agen/> (“We know that about every minute, 15 hours of video is uploaded to YouTube, and there’s about 50 million people that use Facebook, so we know

information.¹² Social media platforms are effective tools to increase citizen participation and engagement, especially for underrepresented groups and segments of the population that feel isolated and unreachable.¹³

Social media posts, however, may differ from press statements that are released at a later date.¹⁴ Additionally, social media has

that's where the public is going to get their information and they don't necessarily always go to government websites."); *Landmark Agreements Clear Path for Government New Media*, U.S. GEN. SERV. ADMIN. (Mar. 25, 2009), <https://www.gsa.gov/about-us/newsroom/news-releases/landmark-agreements-clear-path-for-government-new-media> ("We need to get official information out to sites where people are already visiting and encourage them to interact with their government.") (internal quotation marks omitted).

¹² See *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*; Republication, 67 Fed.Reg. 8452 (Feb. 22, 2002) ("OMB Guidelines") ("Government information' means information created, collected, processed, disseminated, or disposed of by or for the federal government."). The Federal Records Act (Pub. L. No. 81-754, 64 Stat. 578 (1950) (codified at 44 U.S.C. ch. 31.) (FRA) and the Presidential Records Act (Pub. L. No. 95-591, 92 Stat. 2523 (1978) (codified as amended at 44 U.S.C. ch. 22) (PRA) manage the creation, processing, and disposal of government information. See *infra* Part II, IV for further discussion on the FRA and the PRA. The Freedom of Information Act (Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. §552.) (FOIA) manages the dissemination and disclosure of government information. See *infra* Part II.

¹³ See John Carlo Bertot et al., *The Impact of Polices on Government Social Media Usage: Issues, Challenges, and Recommendations*, 29 GOV'T INFO. Q. 31–32 (2012) (explaining how the governments aimed to expand social media communication efforts to reach persons with limited English proficiency, people with disabilities, among other groups); Andrea L. Kavanaugh et al., *Social Media Use by Government: From the Routine to the Critical*, 29 GOV'T INFO. Q. 480, 481 (2012) ("Government officials seek to leverage these resources to improve services and communication with citizens, especially segments of the population that previously were underrepresented.").

¹⁴ For example, Secretary of Treasury Steven Mnuchin tweeted about the postponement of Tax Day. Steven Mnuchin (@stevenmnuchin1), TWITTER (Mar. 20, 2020, 10:04 AM), <https://twitter.com/stevenmnuchin1/status/1241002750483324930>. News outlets cited to the tweet as a primary source before the IRS sent out their official press release. See, e.g., Michael Cohn, *Trump Moves Tax Day to July 15 Because of Coronavirus*, ACCOUNTINGTODAY (Mar. 20, 2020), <https://www.accountingtoday.com/news/trump-moves-tax-day-to-july-15-because-of-coronavirus>. Additionally, on June 26, 2020, President Donald Trump tweeted that he signed an executive order to protect monuments. Donald J. Trump (@realDonaldTrump), TWITTER (June 26, 2020, 5:48 PM), <https://twitter.com/realDonaldTrump/status/1276633518433538049>. News outlets cited to the tweet as a primary source before the White House could release the text of the Executive Order on its website. See, e.g., Stephanie Sandoval, *President Trump Signs Order to Protect Nation's Monuments*, NEWSY

been used to message partisan views and for political activity.¹⁵ Social media posts may also be deleted, modified, or restricted.¹⁶ When social media is used as a primary source of government information, these inconsistencies, inaccuracies, and missing information impact the accuracy of the historical record¹⁷ and prevent courts and researchers from effectively interpreting the law.¹⁸

This article offers a comprehensive analysis of the legal issues presented when the federal government uses social media as a platform for disseminating and disclosing government information. Given the recent media attention, there is some literature that addresses the obvious issues that occur when presidential tweets are deleted, however, this article provides a comprehensive and analytically expansive view of government

(June 26, 2020), <https://www.newsyp.com/stories/president-trump-signs-executive-order-to-protect-monuments/>.

¹⁵ When social media is used for political activity or to convey partisan views, nonprofit organizations such as the Citizens for Responsibility and Ethics in Washington (CREW), have called for government officials to be held accountable for violations of the Hatch Act and the Freedom of Information Act. *See The Hatch Act: Misuses of Official Positions*, CITIZENS FOR RESPONSIBILITY & ETHICS IN WASH., <https://www.citizensforethics.org/hatch-act-mixing-partisan-goals-official-positions-trump-administration/> (last visited Sept. 25, 2020). The Hatch Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (codified as amended at 5 U.S.C. §§7321-7326), limits certain political activities of federal employees, as well as some state, D.C., and local government employees who work in connection with federally funded programs. The law's purposes are to ensure that federal programs are administered in a nonpartisan fashion, to protect federal employees from political coercion in the workplace, and to ensure that federal employees are advanced based on merit and not based on political affiliation. *See* 5 U.S.C. § 7323 (2012). OSC guidance on applying the Hatch Act prohibitions to social media, including Twitter, specifically advises that an employee may not engage in any political activity via Facebook or Twitter while on duty or in the workplace. *See Federal Employee Hatch Act Information*, U.S. OFFICE OF SPECIAL COUNSEL, <https://osc.gov/Services/Pages/HatchAct-Federal.aspx> (last visited Sept. 25, 2020).

¹⁶ *See* Treisman, *supra* note 3 (discussing how President Trump modifies and deletes social media posts).

¹⁷ Critics argue that President Trump's tweets and deletes augment the historical record of his administration. *See id.*

¹⁸ *See id.* ("The difference with President Trump is that he uses Twitter in a way that no one has before, and is using it as a policy platform in a way that other presidents have not . . . [t]he law creates a really clear system, but it's a system that can't be checked once the President makes a decision to create, manage or delete a given record.")

use of social media generally.¹⁹ This article examines why social media content produced by the federal government are classified and preserved as records subject to the Federal Records Act (FRA) and the Presidential Records Act (PRA), and analyzes how the disclosure of, and access to, these records are vital to properly interpreting the law and restoring governmental accountability. Part I explores the growing partnership between the government and social media. The article discusses and evaluates the reasons why and for what purposes the government is using different social media platforms. Part II examines how documents and materials produced by the federal government can be classified as a federal record, presidential record, or non-record, and identifies the rules and regulations that determine the record status of social media. The article also examines how federal records and non-records may also be considered agency records for purposes of the Freedom of Information Act (FOIA).

Part III addresses the records management standards that governmental entities are legally obligated to use in order to preserve and dispose of social media content. The article explores recent directives that aim to implement a twenty-first century solution for records management and initiate the transition to an electronic government. The article also explores the role of social media working groups²⁰ and how they facilitate electronic recordkeeping to ensure transparency, efficiency, and accountability while demonstrating compliance with federal records statutes and regulations. In doing so, the article provides clear examples of how social media is preserved as federal records or presidential records.

In Part IV, the article frames the problems posed by the use of social media for government communication, particularly when social media content may be considered temporary or permanent despite record retention under the FRA and the PRA. The article then examines timing and custody considerations when fulfilling

¹⁹ One is a student note describing presidential tweets. See Gabriel M. A. Elorreaga, Comment, *Don't Delete That Tweet: Federal and Presidential Records in the Age of Social Media*, 50 ST. MARY'S L.J. 483 (2019). The other is an article focusing on presidential tweets and the PRA. See Jessica L. Roberts, #280 *Characters of Legal Trouble: Trump, Twitter, and the Presidential Records Act*, 2019 U. ILL. J.L. TECH. & POL'Y 489 (2019).

²⁰ Social media working groups are employed by several agencies to handle records management. See *infra* Part III.

records requests and how these considerations impact the disclosure requirements under FOIA. The article also addresses issues when locating, identifying, and verifying information within social media platforms, and discusses alternative methods by which researchers can access federal or presidential records, often times at some cost.

In Part V, the article calls for the need for consistent access and preservation of federal and presidential records born as social media content. This recommendation is intended to engage and encourage further research and exploration.

I. THE GROWING PARTNERSHIP BETWEEN THE GOVERNMENT AND SOCIAL MEDIA

It is undeniable that social media has drastically impacted the way the government and government officials communicate with their constituents. For example, on February 29, 2020, in the wake of the COVID-19 outbreak, the Center for Disease Control (CDC) tweeted: “CDCTRAVELNOTICE: #Coronavirus in #Italy and #Iran. CDC recommends avoiding all nonessential travel to Italy and Iran.”²¹ Five hours later, the CDC tweeted: “Today @WADeptHealth and CDC reported the death of a person who had been hospitalized with #COVID-19. This is the first reported death within the US from COVID-19, the infection caused by the novel #coronavirus.”²² That same day, the U.S. Surgeon General sent out a tweet to strongly encourage people to stop buying masks: “[t]hey are NOT effective in preventing general public from catching #Coronavirus, but if healthcare providers can’t get them to care for sick patients, it puts them and our communities at risk!”²³

With the growing amount of social media content disseminated by the U.S. government, it should come as no surprise that the public has come to rely on tweets, Facebook posts, and other announcements on social media as official government

²¹ CDC (@CDCgov), TWITTER (Feb. 29, 2020, 12:11 PM), <https://twitter.com/cdcgov/status/1233801937566433291>.

²² CDC (@CDCgov), TWITTER (Feb. 29, 2020, 6:05 PM), <https://twitter.com/CDCgov/status/1233891108654108672>.

²³ U.S. Surgeon General (@Surgeon_General), TWITTER (Feb. 29, 2020, 7:08 AM), https://twitter.com/Surgeon_General/status/1233725785283932160.

information.²⁴ Communication with constituents or the public is one of the main considerations for a lawmaker or government agency to use social media.²⁵ Social media platforms allow communications with the public to be fast, instantaneous, and direct.²⁶ Due to its popularity, constituents and the general public feel encouraged to use social media platforms to ask questions or voice comments to their representatives or seek information about government-sponsored services.²⁷

²⁴ See, e.g., Phil Willion et al., *In the Coronavirus Crisis, Newsom uses Social Media to Raise Awareness of the Pandemic - and his Profile*, L.A. TIMES (May 10, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-05-10/california-governor-gavin-newsom-twitter-facebook-instagram-trump> (discussing how California Governor Gavin Newsom's government-salaried communications staff has harnessed the power of social media to provide official government information to Californians).

²⁵ Bertot et al., *supra* note 13, at 30; see AI-MEI CHANG & P.K. KANNAN, IBM CTR. FOR THE BUS. OF GOV'T, *LEVERAGING WEB 2.0 IN GOVERNMENT* 28 (2008), <http://www.businessofgovernment.org/sites/default/files/LeveragingWeb.pdf> (indicating that when the government utilizes social media and the web for communication, the public tends to have a more positive view of the government and therefore communication should be a priority); Martha Dorris, *Service Transformation in Government*, PUB. MANAGER 29, 30 (2008) ("Most governments have initiatives that combine and coordinate government-wide services across channels such as the Internet, phone, kiosks, and e-mail."); Melissa W. Graham et al., *The Role of Social Media in Local Government Crisis Communications*, 41 PUB. REL. REV. 386, 387 (2015) ("As the popularity of social media soars, the importance that governments place on social media as a communication tool to engage citizens must rise in turn and reflect active dialog with citizens as a priority."); Alessandro Lovari & Lorenza Parisi, *Listening to Digital Publics. Investigating Citizens' Voices and Engagement Within Italian Municipalities' Facebook Pages*, 41 PUB. REL. REV. 205, 205 (2015) ("Since the beginning of the 20th century public administrations and government institutions stated to use information and communication technologies to relate and communicate with citizens.").

²⁶ See JACOB R. STRAUS & MATTHEW E. GLASSMAN, CONG. RESEARCH. SERV., R44509, *SOCIAL MEDIA IN CONGRESS: THE IMPACT OF ELECTRONIC MEDIA ON MEMBER COMMUNICATIONS* (May 26, 2016), <https://fas.org/sgp/crs/misc/R44509.pdf> ("The cost, speed, and scope of social media present Members with new opportunities to communicate with constituents and wider audiences.").

²⁷ See CHANG & KANNAN, *supra* note 25, at 15 (explaining the benefits of "community" based internet, which allows individuals to voice their comments, feedback, and beliefs). See, e.g., Cory Cromer, *Understanding Web 2.0's Influences on Public E-Services: A Protection Motivation Perspective*, 12 INNOVATION: MGMT., POL. & PRACTICE 192, 202 (2010) (explaining a specific model by which users can participate in government via the internet); Graham et al., *supra* note 25, at 388 (explaining studies in which specific governments were successful in obtaining citizen commentary via social media).

The increased interaction between citizens and their representatives or government agencies has created a continuous dialogue, or a two-way conversation.²⁸ Ines Mergel describes this “collaborative engagement” to explain how citizens interact with elected officials as well as government agencies to influence policy and regulations.²⁹ For example, the early tweets from the CDC regarding COVID-19³⁰ generated real-time reactions from several Twitter users, as they inquired about, and at times demanded, an acceptable response from the agency regarding the outbreak.³¹

²⁸ See CHANG & KANNAN, *supra* note 25, at 21 (explaining that “blogging” and other types of direct conversation between citizens and government organizations could become a reality); Graham et al., *supra* note 25, at 387; see also S. REP. NO. 93-854, at 153–54 (1974) (Conf. Rep.) (“Open government has been recognized as the best insurance that government is being conducted in the best public interest, and the First Amendment reflects the commitment of the Founding Fathers that the public’s right to information is basic to the maintenance of a popular form of government. Since the First Amendment protects not only the right of citizens to speak and publish, but also receive information, freedom of information legislation can be seen as an affirmative congressional effort to give meaningful content to constitutional freedom of expression.”).

²⁹ See Ines Mergel, *A Framework for Interpreting Social Media Interactions in the Public Sector*, 30 GOV’T. INFO. Q. 327, 331 (2013) (“Collaborative engagement is therefore only identifiable in the active interactions of citizens with government provided content.”).

³⁰ See *supra* Part I.

³¹ See Brian Lilley (@Steadfast20), TWITTER (Feb. 29, 2020, 8:44 PM), <https://twitter.com/Steadfast20/status/1233931006064939010> (“The entire reason your organization exists is for events precisely like this. Yet, somehow, you managed to screw it up. Every other developed nation is able to test any citizen who shows symptoms. Hong Kong is even testing dogs. But we can’t get tested unless we’re dying. WHY”); Harshil (@harshilbud), TWITTER (Feb. 29, 2020, 6:09 PM), <https://twitter.com/harshilbud/status/1233892060077400064> (“CDC has continually dropped the ball with their response to #COVID—19. They haven’t been testing, when they did test it was with faulty tests, when states wanted to test they were prohibited by CDC. South Korea runs 1000s of test each day already.”); Imgabby (@Gabbythegirl2), TWITTER (Mar. 1, 2020, 8:57 AM), <https://twitter.com/Gabbythegirl2/status/1234115537334079490> (“How come your website doesn’t show the accurate number of confirmed cases in US and doesn’t show this confirmed fatality? What is going on with your website. Numbers don’t seem to be changing daily and we know that is bull. Don’t let them muzzle you. Get information out anyway”); The Wise Crow (@TheWiseCrow1), TWITTER (Feb. 29, 2020, 9:31 PM), <https://twitter.com/Jonewto/status/1233942872291868673> (“Not to mention the lack of [sic] PPE gear for the paramedics etc. All of whom are now under quarantine. Looks like first responders have not been trained regarding COVID-19 and don’t have the necessary equipment to keep themselves safe.”).

Sometimes, the government is interested in one-way communication,³² whether it is informing the public about staff changes or new vacancies, or disseminating information about new regulations or services. Raising awareness about the ins and outs of the decision-making cycle increases the likelihood that citizens know “what their government is doing.”³³ Informed citizens benefit from a transparent government using social media platforms by ensuring high levels of accountability and governance from their elected representatives as well as public agencies.³⁴ Democracy benefits when there is an informed citizenry.³⁵

The government has used social media platforms primarily for two main purposes: to inform constituents or the public in general of new information pertaining to their policies, regulations, guidelines, and administrative procedures, particularly in emergency or crisis situations; and to communicate with other government officials and entities.³⁶

Health Care Workers need to be kept safe.”)

³² See Lovari & Parisi, *supra* note 25, at 211 (“[T]he prevalent choice of these municipalities is not to fully embrace a two-way symmetrical public relation strategy.”).

³³ See Mergel, *supra* note 29, at 330 (“Transparency ‘provides information for citizens about what their Government is doing.’ For the purpose of this study, transparency is therefore interpreted as broadcasting of government information via social media sites”); see also S. REP. NO. 93-854, at 153 (1974) (Conf. Rep.) (“Recognition of the people’s right to learn what their government is doing through access to government information can be traced back to the early days of our Nation.”).

³⁴ See CHANG & KANNAN, *supra* note 25, at 34 (“[Social media can] make government agencies more transparent and accountable to their citizens.”); Dorris, *supra* note 25, at 32 (indicating that a lack of transparency through social media “can certainly damage trust in government services in general”).

³⁵ See H.R. REP. NO. 93-876, at 123 (1974) (Conf. Rep.) (citing Rep. William L. Dawson, “An informed public makes the difference between mob rule and democratic government. If the pertinent and necessary information on government activities is denied the public, the result is a weakening of the democratic process and the ultimate atrophy of our form of government.”). But, democracy benefits when the information the public obtains is based in fact.

³⁶ Communications between government officials can be cordial, combative, or communicate partisan politics or engage in political activity. See *infra* Part I, B. See also Stephen Barr, *Agencies Share Information by Taking a Page from Wikipedia*, WASH. POST (Jan. 28, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/01/27/AR2008012701655.html> (discussing how the Office of Management and Budget (OMB) hosted an online place where federal officials could swap information and ideas outside traditional boundaries).

A. To Inform Its Citizens

The government relies on social media platforms to impart information regarding changes to its policies and regulations³⁷ and to announce new services.³⁸ These administrative changes, particularly coming from government agencies, have a significant impact on constituents when it comes to the new and updated rules and regulations they need to follow. The government understands that citizens need this important information to make necessary changes and comply with new legislation and policies. Keeping citizens informed of changes, processes, and new information has a positive impact regarding expected transparency and engagement from the government and encourages accountability at all levels.³⁹

Rapid developments require rapid responses.⁴⁰ When natural or man-made emergencies occur, the government should provide vital information about basic services and preventative measures in a rapid and continuous way.⁴¹ Government information used for crisis management or during emergency situations can save lives, prevent related disasters or damage, and educate the

³⁷ See CHANG & KANNAN, *supra* note 25, at 21 (indicating that increased government interaction on the internet encourages individual feedback on “policies, issues, services, and plans of the government”).

³⁸ See generally Graham et al., *supra* note 25 (explaining how different government agencies use social media to announce new services, especially during in crisis communications).

³⁹ Dorris, *supra* note 25, at 32 (“It is incumbent on [the government]-regardless of agency, rank, or responsibility-to nurture the relationships we have with the public and to serve all our citizens to the very best of our abilities.”); see also CHANG & KANNAN, *supra* note 25, at 34 (offering recommendations for how government entities can successfully use social media to engage with citizens); Cromer, *supra* note 27, at 203 (discussing the policy implications of government using social media).

⁴⁰ See Raina M. Merchant et al., *Integrating Social Media into Emergency-Preparedness Efforts*, 365 N. ENG. J. MED. 289, 290 (July 28, 2011) (discussing that public health emergencies need a quick response which can be improved by social media).

⁴¹ See COMMITTEE ON ASSURING THE HEALTH OF THE PUBLIC IN THE 21ST CENTURY, *THE FUTURE OF THE PUBLIC’S HEALTH IN THE 21ST CENTURY* 103 (Nat’l Acad. Press 2003). See generally Yan Jin et al., *Examining the Role of Social Media in Effective Crisis Management: The Effects of Crisis Origin, Information Form, and Source on Publics’ Crisis Responses*, 41 COMM’N RESEARCH 74 (2014); Sonja Utz et al., *Crisis Communication Online: How Medium, Crisis Type and Emotions Affected Public Reactions in the Fukushima Daiichi Nuclear Disaster*, 39 PUB. RELATIONS REV. 40 (2013).

public about similar future emergencies.⁴² Social media allows the government to liaise with a public already familiar with one or multiple social media platforms, and the important messages can reach as many people as possible.⁴³ These immediate and firsthand channels of communication become critical when the government seeks to provide life-or-death information before, during, or after any emergency.⁴⁴ In contrast with traditional media outlets, social media provides government officials with a platform to engage in a participatory and open dialogue with constituents to learn where and which supplemental information is needed.⁴⁵ Additionally, government officials can combat any ambiguous, incorrect, or incongruent data and/or statements with reliable and trusted sources of information.⁴⁶

During the COVID-related quarantine, government agencies and officials used text-based social media posts and video streaming to inform their constituents about resources such as the use of masks,⁴⁷ where they could find testing locations,⁴⁸ and to share updated health and safety information.⁴⁹ Facebook Live

⁴² See generally Sora Kim & Brooke Fisher Liu, *Are All Crises Opportunities? A Comparison of How Corporate and Government Organizations Responded to the 2009 Flu Pandemic*, 24 J. PUB. RELATIONS RESEARCH 69 (2012).

⁴³ See generally Missy Graham & Elizabeth Johnson Avery, *Government Public Relations and Social Media: An Analysis of the Perceptions and Trends of Social Media Use at the Local Government Level*, 7 PUB. RELATIONS J. 1 (2013) (explaining the reach of government social media).

⁴⁴ See *id.*

⁴⁵ See Claire H. Procopio & Steven T. Procopio, *Do You Know What It Means to Miss New Orleans? Internet Communication, Geographic Community, and Social Capital in Crisis*, 35 J. APPLIED COMMUN RESEARCH 67, 72 (2007) (acknowledging that those who feel uncertain or scared during times of crisis will likely look to social media and thus proposing guidelines and suggestions for how a government can prepare to respond).

⁴⁶ See Graham et al., *supra* note 25, at 392 (explaining how to handle “rumor[s] and misinformation” utilizing social media during crisis, natural disasters, and major accidents).

⁴⁷ U.S. Surgeon General (@Surgeon_General), *supra* note 23.

⁴⁸ Governor Mike DeWine (@GovMikeDeWine), TWITTER (Jun. 12, 2020, 1:17 PM), <https://twitter.com/GovMikeDeWine/status/1271491704839827456> (“POP-UP TESTING: Anyone can get a no-cost test at any of these locations today. Testing is open until 4:30 p.m. or 5:00 p.m. depending on the site location.”); Governor Ned Lamont (@GovNedLamont), TWITTER (Jun. 24, 2020, 3:33 PM) <https://twitter.com/GovNedLamont/status/1275874654964584449> (“COVID-19 tests are available at @CHCConnecticut locations across Connecticut every weekday from 9AM-1PM.”).

⁴⁹ CDC (@CDCgov), TWITTER (May 12, 2020, 6:20PM),

was used to conduct press releases.⁵⁰ Government officials relied on Twitter to quickly inform citizens on updated quarantine information,⁵¹ government reopening strategies,⁵² and day-to-day infection data.⁵³ The public also had an opportunity to use social

<https://twitter.com/cdcgov/status/1260333933276758017> (“Protect yourself and others from #COVID19 when out shopping. This video shows you how.”); Office of the Governor of California (@CAgovernor), TWITTER (June 24, 2020, 8:00 PM), <https://twitter.com/CAgovernor/status/1275941778957320192> (“Face coverings need to go over your nose and mouth. Not under your chin. Not hanging from one ear. Over your nose and mouth. Together we have the power to #SlowtheSpread of #COVID19.”).

⁵⁰ Jim #MaskUpPHL Kenney (@PhillyMayor), TWITTER (June 23, 2020, 10:35 AM), <https://twitter.com/PhillyMayor/status/1275437216047587332> (“Tune in today at 6 p.m. for a Facebook Live town hall about the criminal justice response to COVID-19.”).

⁵¹ Andrew Cuomo (@NYGovCuomo), TWITTER (July 2, 2020, 8:27 PM), <https://twitter.com/NYGovCuomo/status/1278847785241128960> (“Washing your hands often with soap is still one of the best ways of avoiding COVID. Be safe and be smart.”); Gov. Bill Lee (@GovBillLee), TWITTER (Mar. 30, 2020), <https://twitter.com/GovBillLee/status/1244732132527923203> (“For the health and safety of our communities, I have issued safer at home guidelines in every Tennessee county to further mitigate the spread of COVID-19.”).

⁵² Andrew Cuomo (@NYGovCuomo), TWITTER (July 1, 2020, 12:04 PM), <https://twitter.com/NYGovCuomo/status/1278358903223353350> (“Indoor dining in NYC will be postponed until the facts change and it is safe and prudent.”); Governor Tom Wolf (@GovernorTomWolf), TWITTER (Apr. 22, 2020, 7:18 PM), <https://twitter.com/GovernorTomWolf/status/1253100989227438081> (“Tonight, I’m announcing our plan to slowly reopen Pennsylvania. We will use a measured, scientific approach. We will not just be flipping a switch to go from closed to open. And, ultimately, #COVID19 will set the timeline. There will be three phases: red, yellow, and green.”); Jim #MaskUpPHL Kenney (@PhillyMayor), TWITTER (June 23, 2020, 2:23 PM), <https://twitter.com/PhillyMayor/status/1275494593115688967> (“While most of PA will be in the green phase this Friday, Philadelphia will remain in the yellow phase. However, we will loosen restrictions on some activities. If our case counts continue to decline and we meet our targets, we will CAREFULLY enter the green phase on July 3.”).

⁵³ Andrew Cuomo (@NYGovCuomo), TWITTER (July 4, 2020, 11:09 AM), <https://twitter.com/NYGovCuomo/status/127943222722965505> (“Today’s update on the numbers: 62,403 tests were performed yesterday. 726 tests came back positive (1.16% of total). Total hospitalizations fell to 844. Sadly, there were 11 COVID fatalities yesterday.”); Gavin Newsom (@GavinNewsom), TWITTER (June 24, 2020, 2:19 PM), <https://twitter.com/GavinNewsom/status/1275856083488251911> (“In the last 14 days, CA has conducted 1,052,101 tests with a #COVID19 positivity rate of 5.1%.”); Jim #MaskUpPHL Kenney (@PhillyMayor), TWITTER (June 24, 2020, 1:30 PM), <https://twitter.com/PhillyMayor/status/1275843749696995330> (“Today @PHLPublicHealth reported: -108 new cases of COVID-19 in Philadelphia, for a total of 25,443. -7 people died, for a total of 1,570 deaths.”).

media as a way to ask and receive answers regarding government announcements.⁵⁴

Additionally, in light of the summer 2020 protests regarding police brutality, government officials extensively used social media outlets, often as a source to make immediate announcements and keep their citizens safe. For example, Philadelphia Mayor Jim Kenney asked demonstrators to follow @PhilaOEM for important updates.⁵⁵ Similarly, the Minnesota Department of Public Safety warned demonstrators about troop dispersal and potential arrests.⁵⁶ The FBI urged the public to report violence at demonstrations.⁵⁷ Government officials used their social media accounts to announce curfews,⁵⁸ share State of

⁵⁴ Governor Mike DeWine (@GovMikeDeWine), TWITTER (Apr. 2, 2020, 7:10 PM), <https://twitter.com/GovMikeDeWine/status/1245851220821995525> (responding to a tweet to the “#AskGovDeWine” tag posted by Bud Irvin (@thatjuststinks), the Governor noted that “[a]nyone coming back to #Ohio after traveling out of state should self-quarantine for 14 days as soon as they return.”).

⁵⁵ Jim #MaskUpPHL Kenney (@PhillyMayor), TWITTER (June 13, 2020, 1:14 PM), <https://twitter.com/PhillyMayor/status/1271853517356109825> (“If you are out participating in demonstrations, follow @PhilaOEM for important updates and information.”).

⁵⁶ Minnesota Department of Public Safety (@MnDPS_DPS), TWITTER (May 30, 2020, 12:57 AM), https://twitter.com/MnDPS_DPS/status/1266594519124004864 (“Troopers are giving dispersal orders near the Fifth Precinct. Leave the area now or you will be arrested. #MACCMN.”).

⁵⁷ FBI St. Louis (@FBIStLouis), TWITTER (June 2, 2020, 8:50 PM), <https://twitter.com/FBIStLouis/status/1267982000675344384> (“If you witness or have witnessed unlawful violent actions, the #FBI urges you to submit any info, or upload photos or videos here: fbi.gov/violence.”).

⁵⁸ Eric Garcetti (@MayorOfLA), TWITTER (May 31, 2020, 3:27 PM), <https://twitter.com/MayorOfLA/status/1267175980218507265> (“A curfew will be in place tonight citywide, starting at 8 p.m. and lasting through 5:30 a.m. Monday morning. All Angelenos should remain inside tonight, with the exception of first responders, people going to and from work, and anyone seeking or giving emergency care.”); Jim Kenney (@PhillyMayor), TWITTER (May 30, 2020, 10:19 PM), <https://twitter.com/PhillyMayor/status/1266917163757174785> (“I signed an executive order implementing a curfew in Philadelphia for 8 p.m.-6 a.m. tonight and tomorrow night. During this time, people may leave their homes only to go to work at essential businesses or to seek medical attention or police assistance.”); London Breed (@LondonBreed), TWITTER (May 31, 2020, 2:02 AM), <https://twitter.com/LondonBreed/status/126697338884471808> (“We are implementing a curfew that will start tomorrow at 8pm. People are hurting right now. They’re angry. I’m angry. The City and the police will support peaceful protests, as we did all day today.”); Mayor Lyda Krewson

Emergency declarations,⁵⁹ and provide information regarding police⁶⁰ and National Guard presence.⁶¹ Such information was

(@LydaKrewson), TWITTER (June 2, 2020, 12:20 PM), <https://twitter.com/LydaKrewson/status/1267853525490503681> (“In order to protect the health, safety & welfare of our residents, businesses, and institutions, today I signed an executive order establishing a citywide curfew that goes into effect at 9pm tonight and will continue until 6 am the next day. It repeats daily until further notice.”); Michael B. Hancock (@MayorHancock), TWITTER (May 30, 2020, 4:19 PM), <https://twitter.com/MayorHancock/status/1266826483441340417> (“Hey Denver, we want everyone to be safe. That’s why, starting tonight, a citywide curfew will be in effect for the @CityofDenver beginning at 8p – and nightly from 8p to 5a through Monday, June 1st. Please spread the word and take care of yourselves.”).

⁵⁹ Governor Brian P. Kemp (@GovKemp), TWITTER (May 30, 2020, 12:09 AM), <https://twitter.com/GovKemp/status/1266582530234482688> (“At the request of Mayor @KeishaBottoms & in consultation with public safety & emergency preparedness officials, I have issued a State of Emergency for Fulton County to activate as many as 500 @GeorgiaGuard troops to protect people & property in Atlanta.”); Governor Mike Parson (@GovParsonMO), TWITTER (May 30, 2020, 10:28 PM), <https://twitter.com/GovParsonMO/status/1266919362193166336> (“Today I signed Executive Order 20-11 to declare that a State of Emergency exists in Missouri due to civil unrest. The Missouri National Guard and the Missouri Highway Patrol stand ready to support local authorities.”); Office of the Governor of California (@CAGovernor), TWITTER (Mar. 4, 2020, 8:01 PM), <https://twitter.com/CAGovernor/status/1235369869081628673> (“Governor @GavinNewsom today declared a State of Emergency to make additional resources available, formalize emergency actions already underway across multiple state agencies and departments, help the state prepare for broader spread of #COVID19, and more.”).

⁶⁰ Jim #MaskUpPHL Kenney (@PhillyMayor), TWITTER (June 1, 2020, 3:05 PM), <https://twitter.com/PhillyMayor/status/1267532765051969536> (retweeting @GovernorTomWolf’s tweet and stating “[o]ur team met with @GovernorTomWolf to review our response so far and to look ahead. I thanked the governor for the state’s assistance, including the State Police and National Guard who are providing crucial support to the @PhillyPolice”); Mayor Andrew Ginther (@MayorGinther), TWITTER (June 22, 2020, 12:50 PM), <https://twitter.com/MayorGinther/status/1275108793995542528> (“If you were at the protest and believe police acted inappropriately, I encourage you to send photos, videos and complaints to reportCPD@columbus.gov”); Muriel Bowser (@MurielBowser), TWITTER (June 1, 2020, 8:40 PM), <https://twitter.com/MurielBowser/status/1267617085913522177> (“I imposed a curfew at 7pm. A full 25 minutes before the curfew & w/o provocation, federal police used munitions on peaceful protestors in front of the White House, an act that will make the job of @DCPoliceDept officers more difficult. Shameful!”).

⁶¹ Gov. Bill Lee (@GovBillLee), TWITTER (May 31, 2020, 5:43 PM), <https://twitter.com/GovBillLee/status/1267210064064065536> (“Following last night’s unlawful incidents in Nashville, the National Guard will remain mobilized in each of our Grand Divisions until further notice.”); Gov. Gary Herbert (@GovHerbert), TWITTER (May 30, 2020, 7:11 PM),

made publicly available via social media prior to announcement on their official government website.⁶² Additionally, many mayors and governors held regular “Media Availability” events in which they dedicated time to their office communicating and responding to social media questions and comments.⁶³

B. To Communicate Between Government Entities

More recently, government officials and agencies have utilized their social media platforms to communicate with,⁶⁴ support,⁶⁵

<https://twitter.com/GovHerbert/status/1266869972749303809> (“We condemn violence and looting. I have activated the National Guard to help control the escalating situation in downtown Salt Lake City. I once again call on all who are protesting to do so peacefully.”); Governor Jay Inslee (@GovInslee), TWITTER (June 1, 2020, 1:33 AM),

<https://twitter.com/GovInslee/status/1267328455298838531> (“Following an additional request from Spokane County, I have decided to order a statewide activation of the National Guard. This allows us to deploy additional aid in protecting individuals and property in the event of further destructive or violent acts.”); Governor Mike DeWine (@GovMikeDeWine), TWITTER (May 30, 2020, 5:09 PM), <https://twitter.com/GovMikeDeWine/status/1266838549816582146> (“I am activating our @OHNationalGuard to drive out hate and violence and instill order. This is about the safety of our communities – our neighbors, our families, and our friends.”); SC National Guard (@SCNationalGuard), TWITTER (June 1, 2020, 5:56 PM),

<https://twitter.com/SCNationalGuard/status/1267575658290577408> (“The South Carolina National Guard was activated beginning May 31, 2020, to assist law enforcement in maintaining citizen safety and peace at protests taking place throughout the state.”); Governor Tim Walz (@GovTimWalz), TWITTER (May 30, 2020, 12:40 AM), <https://twitter.com/GovTimWalz/status/1266590321779118085> (“The Minnesota National Guard, State Patrol, and local police are on the ground responding to incidents in Mpls-St. Paul. I urge residents to comply with 8pm curfew and go home immediately. Law enforcement needs to respond to emergencies, restore order, and keep Minnesotans safe.”); Governor Tom Wolf (@GovernorTomWolf), TWITTER (May 31, 2020, 6:19 PM), <https://twitter.com/GovernorTomWolf/status/1267219281177194507> (“Working with @PEMAHQ and @PADMVA, at the request of municipalities, we activated @PANationalGuard members yesterday to keep our communities safe. Over 600 Guardsmen have been placed on state active duty to provide support to local law enforcement.”).

⁶² See, e.g., Eric Garcetti (@MayorOfLA), TWITTER (May 30, 2020, 11:29 PM), <https://twitter.com/MayorOfLA/status/1266934742936514561> (“The California National Guard is being deployed to Los Angeles overnight to support our local response to maintain peace and safety on the streets of our city.”).

⁶³ See, e.g., *Transcript: Mayor de Blasio Holds Media Availability*, NYC.GOV.T (June 2, 2020), <https://www1.nyc.gov/office-of-the-mayor/news/397-20/transcript-mayor-de-blasio-holds-media-availability>.

⁶⁴ See, e.g., Mayor Jacob Frey (@MayorFrey), TWITTER (May 30, 2020, 12:20

and criticize⁶⁶ other officials and organizations. For example, government officials have utilized their social media platforms to communicate collaboratively with fellow officials, increasing the transparency, efficiency, and cooperation in the democratic process.⁶⁷ As protests continued in the days following the killing of George Floyd, government officials and agencies communicated amongst one another via Twitter to keep citizens informed and portray a united front.⁶⁸ For example, Minneapolis Mayor, Jacob Frey, tweeted “Governor Walz at our request and in partnership with our city @MayorCarter, has just fully mobilized the Minnesota National Guard. MPD and our fire Department will be assisting tonight as part of this operation.”⁶⁹ Mayor Frey also used his social media presence to share and comment on

AM), <https://twitter.com/MayorFrey/status/1266585209337786369> (responding and retweeting another tweet by @RepHassan and stating “[f]or our @minneapolisfire fighters to respond, the area of the fire must be secure so they can focus on fighting the fire without risking their own safety. We are working with the State National Guard & MN DPS – who control Incident Command tonight – to provide support in South”).

⁶⁵ See, e.g., Senator Bernie Sanders (@BernieSanders), TWITTER (Aug. 11, 2020, 4:58 PM), <https://twitter.com/BernieSander/status/1293290750982139905> (congratulating Senator Kamala Harris on her nomination as Vice President); Senator Amy Klobuchar (@amyklobuchar), TWITTER (Aug. 11, 2020, 4:31 PM), <https://twitter.com/amyklobuchar/status/1293283826794246144> (endorsing Senator Kamala Harris on her nomination as Vice President).

⁶⁶ See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (June 2, 2020, 9:33 AM), <https://twitter.com/realDonaldTrump/status/1267811637811187712> (“Yesterday was a bad day for the Cuomo Brothers. New York was lost to the looters, thugs, Radical Left, and all other forms of Lowlife & Scum. The Governor refuses to accept my offer of a dominating National Guard. NYC was ripped to pieces. Likewise, Fredo’s ratings are down 50%!”).

⁶⁷ See, e.g., Congresswoman Ayanna Pressley (@Rep.Pressley), TWITTER (May 29, 2020, 12:58 PM),

<https://twitter.com/reppressley/status/1266413647733145600> (discussing a collaborative effort between Congresswomen Pressley and Ilhan to combat police brutality).

⁶⁸ See, e.g., Senator Cory Booker, (@SenBooker), TWITTER (June 4, 2020, 1:22 PM), <https://twitter.com/SenBooker/status/1268593918419046401>; Senator Joe Manchin (@Sen_JoeManchin), TWITTER (June 4, 2020, 12:42 PM), https://twitter.com/Sen_JoeManchin/status/1268583941092638720.

⁶⁹ Mayor Jacob Frey (@MayorFrey), TWITTER (May 30, 2020, 1:08 PM), <https://twitter.com/MayorFrey/status/1266778560234225669> (“Governor Walz at our request and in partnership with our city and @MayorCarter Carter, has just fully mobilized the Minnesota National Guard. MPD and our fire department will be assisting tonight as part of this operation.”).

information provided by other city agencies.⁷⁰

Social media has also become an arena for political debate, where the public is offered a front-row seat to the discord between government entities and officials. For example, District of Columbia Mayor Muriel Bowser and President Donald Trump have exchanged communication, criticism, and response regarding President Trump's militarization of the city in light of demonstrations in support of the Black Lives Matter movement.⁷¹ In 2017, White House Director of Social Media Dan Scavino, Jr. tweeted that Rep. Justin Amash (R-MI) was "a big liability" and called for voters to "defeat him in [the next] primary."⁷² As part of his response, Amash tweeted "Bring it on. I'll always stand up for liberty, the Constitution & Americans of every background. You can help here" and accompanied his tweet with a URL directing the public to his campaign fundraising site.⁷³ While some may see such communication as simple political feuding,⁷⁴ this exchange may show the power of a public dispute of this type.⁷⁵

⁷⁰ See, e.g., *id.*; MnDPS_DPS (@MnDPS_DPS), TWITTER (May 30, 2020, 12:37 AM), https://twitter.com/MnDPS_DPS/status/1266589645581824000 ("350 troops and officers are on the ground near the Fifth Precinct in Minneapolis to clear the area and enforce the curfew. #MACCMN").

⁷¹ See Muriel Bowser (@MurielBowser), *supra* note 60 ("I imposed a curfew at 7pm. A full 25 minutes before the curfew & w/o provocation, federal police used munitions on peaceful protestors in front of the White House, an act that will make the job of @DCPoliceDept officers more difficult. Shameful! DC residents – Go home. Be safe.").

⁷² See Dan Scavino (@DanScavino), TWITTER (Apr. 1, 2017, 12:33 PM) <https://twitter.com/danscavino/status/848211792916557824>; The Office of the Special Counsel concluded that this activity violated the Hatch Act. See letter from Ana Galindo-Marrone, Chief, Hatch Act Unit, to Adam J. Rapport, Chief Counsel/Assistant Dir., Citizens for Responsibility and Ethics in Washington (June 5, 2017), <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/06/09153036/DOC060817-06082017170020.pdf>.

⁷³ Justin Amash (@justinamash), Twitter (Apr. 1, 2017, 2:35 PM), <https://twitter.com/justinamash/status/848242383007367168>. Because this tweet was released from an account that is used for Congressional purposes, CREW requested an investigation of Rep. Justin Amash (R-MI) by the Office of Congressional Ethics. See letter from Noah Bookbinder, Exec. Dir., Citizens for Responsibility and Ethics in Washington (April 4, 2017), <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/04/04163507/OCE-Amash-4-4-17.pdf>.

⁷⁴ See, e.g., Claire Zillman, *Hillary Clinton's 'Delete Your Account' Tweet Sparks an Epic Twitter War with Trump*, FORTUNE (June 10, 2016, 6:34 AM), <https://fortune.com/2016/06/10/donald-trump-twitter-hillary-clinton/>.

⁷⁵ Muriel Bowser (@MurielBowser), TWITTER (June 5, 2020, 10:42 AM),

II. THE GOVERNMENT CREATES RECORDS WHEN CONTENT IS POSTED ON SOCIAL MEDIA

All executive branch documents are divided into three distinct categories: federal records, presidential records, and non-records.⁷⁶ Federal records are governed by the Federal Records Acts or FRA.⁷⁷ Presidential records are managed by the Presidential Records Act or PRA.⁷⁸ Non-records are all records exempted from the PRA and the FRA.⁷⁹ Federal records and non-records may be considered agency records under the Freedom of Information Act (FOIA).⁸⁰ No record is subject to both the FRA

<https://twitter.com/MurielBowser/status/1268916115809488896>. CREW also alleged that the communication between Scavino and Amash violated the Hatch Act and called for investigations by the Office of Special Counsel and the Office of Congressional Ethics. See Jordan Libowitz, *Scavino Reprimanded for Hatch Act Violation*, CREW (June 9, 2017), <https://www.citizensforethics.org/press-release/scavino-reprimanded-hatch-act-violation/> (discussing that the Office of Special Counsel issued Scavino a warning letter for Hatch Act Violation).

⁷⁶ Catherine F. Sheehan, *Opening the Government's Electronic Mail: Public Access to National Security Records*, 35 B.C. L. REV. 1145, 1147 (1994).

⁷⁷ The Federal Records Acts consist of the following statutes: Archival Administration, 44 U.S.C. §§ 2101–20 (1988); Records Management by the Archivist of the United States and by the Administrator of General Services, 44 U.S.C. §§ 2901–09 (1988); Records Management by Federal Agencies, 44 U.S.C. §§ 3101–07 (1988); Disposal of Records, 44 U.S.C. §§ 3301–14 (1988). Legislative branch documents and judicial branch documents may also be subject to the FRA. See *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 556 (D.C. Cir. 1996) (“The FRA describes a class of materials that are federal records subject to its provisions, and the PRA describes another, mutually exclusive set of materials that are subject to a different and less rigorous regime”) (quoting *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1293 (D.C. Cir. 1993)).

⁷⁸ See Presidential Records Act, 44 U.S.C. §§ 2201–2209 (2014).

⁷⁹ See 44 U.S.C. § 2201(2)(B) (2012) (listing items exempt from the PRA); 44 U.S.C. § 3301 (2012) (defining federal record and listing items not included). For example, non-records are documents created by members of Congress. These documents are not managed by the PRA or the FRA but are managed by the Senate Archivist and the House Office of Art and Archives. See STRAUS, *supra* note 4, at 12 (“In general, the Senate Archivist and the House Office of Art and Archives provide guidance to [Congressional] Members and committees in their respective chambers on archiving matters, including social media postings.”). “All records generated by a member of Congress in the course of his or her service in the House or Senate are the personal property of the member. This includes records such as email, websites, draft legislation, correspondence, databases, and, potentially, social media postings.” *Id.*

⁸⁰ See 5 U.S.C. § 552(f)(2) (2018). The term “agency” is defined by FOIA. Agency records may be subject to the disclosure requirements under the Freedom of Information Act. See *infra* Part IV. Federal records and non-records may be

and the PRA.⁸¹

A. Records under the Federal Records Act

The FRA dictates whether other executive branch materials are still considered a record.⁸² Records include “all recorded information,⁸³ regardless of form or characteristics, made or received by a federal agency⁸⁴ under federal law or in connection

subject to disclosure requirements under FOIA if they are considered agency records. *See infra* Part IV.

⁸¹ *See Armstrong*, 90 F.3d at 556 (“The FRA describes a class of materials that are federal records subject to its provisions, and the PRA describes another, mutually exclusive set of materials that are subject to a different and less rigorous regime”) (quoting *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1293 (D.C. Cir. 1993)).

⁸² *See* 44 U.S.C. § 3301(a)(1) (2012) (explaining what executive branch materials are considered a record).

⁸³ *See* 44 U.S.C. § 3301(a)(2) (2012) (“[T]he term ‘recorded information’ includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form.”); *see also* 36 C.F.R. § 1222.12(a) (2020) (noting that “recorded information” comes in all formats and media).

⁸⁴ A federal agency is defined as “any executive agency or any establishment in the legislative or judicial branch of the Government (except the Supreme Court, the Senate, the House of Representatives, and the Architect of the Capitol, and any activities under the direction of the Architect of the Capitol).” *See* 44 U.S.C. § 2901(14) (2012). *See also* 36 C.F.R. § 1220.18 (2020). Under this definition, the following entities within the legislative branch may be subject to records management: the Congressional Budget Office, the Government Accountability Office, the Government Publishing Office, the Library of Congress, the Office of Congressional Workplace Rights, the Capitol Police Board, the John C. Stennis Center for Public Service Training and Development, the Open World Leadership Center, the Office of Congressional Accessibility Services, and the Office of the Attending Physician. *See The Government of the United States, U.S. GOV’T MANUAL*, <https://www.usgovernmentmanual.gov/> (last visited Oct. 6, 2020). Similarly, in the judicial branch, entities such as the Administrative Office of the United States Courts, the Federal Judicial Center, the Territorial Courts, the United States Courts of Appeals, the United States Court of Appeals for the Armed Forces, the United States Court of Appeals for Veterans Claims, the United States District Courts, the United States Court of Federal Claims, the United States Court of International Trade, the United States Sentencing Commission, and the United States Tax Court may be subject to records management. *Id.* Independent establishments and government corporations may also be subject to records management. *See* 44 U.S.C. § 2901(14) (2012); *see also* 36 C.F.R. § 1220.18 (2020). Although the Supreme Court is not considered a federal agency, the official judicial records of the Supreme Court are viewed as governmental records and are maintained and disposed of by the government according to the recordkeeping requirements of

with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization.”⁸⁵

The National Archives and Records Administration (NARA) is the repository for the permanent records⁸⁶ originated with all agencies of the U.S. government and is responsible for overseeing agencies’ adequacy of documentation and records disposition programs and practices.⁸⁷ Content generated by federal agencies on social media is likely a federal record and must be managed according to the applicable laws and regulations.⁸⁸

The FRA contains detailed standards regarding records retention. Agencies must identify all records, including social media records,⁸⁹ and determine how they will be managed.⁹⁰ The

the Federal Records Act. See Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1666, 1674-75 (2013). Official records include materials in a judicial matter or a case, such as briefs, transcripts, motions, judgments, and orders. *Id.*

⁸⁵ 44 U.S.C. § 3301(a)(1) (2012).

⁸⁶ “Permanent record means any Federal record that has been determined by NARA to have sufficient value to warrant its preservation in the National Archives of the United States, even while it remains in agency custody.” 36 C.F.R. § 1220.18 (2020). “The Archivist shall establish standards for the selective retention of records of continuing value, and assist Federal agencies in applying the standards to records in their custody.” 44 U.S.C. § 2905 (2012). “Less than 5% of all the records that federal agencies create or receive in the course of conducting the business of the U.S. government are considered to have permanent value and are transferred to the [NARA] for permanent preservation and access.” NAT’L ARCHIVES & REC. ADMIN., FOIA REFERENCE GUIDE (2018), <https://www.archives.gov/foia/foia-guide>. This transfer usually occurs after 20 to 30 years. *Id.*

⁸⁷ NARA requires Senior Agency Officials for Records Management to submit annual reports [hereinafter, SAORM reports] to determine the overall progress of the federal government in managing its records and the transition away from paper to digital formats, and to identify best practices and model solutions within federal agencies. *Senior Agency Official for Records Management 2019 Annual Report*, NAT’L ARCHIVES & REC. ADMIN., <https://www.archives.gov/files/records-mgmt/agency/dod-nsa-saorm-2019.pdf>. These annual reports are made available on the NARA website. See *id.* NARA also notes when agencies are non-compliant and have not submitted in their SAORM reports. *Id.*

⁸⁸ See generally 44 U.S.C. chs. 21, 29, 31, 33; 36 C.F.R. § 1220. See NARA *Bulletin 2014-02: Guidance on Managing Social Media Records*, THE NAT’L ARCHIVES & RECORDS ADMIN. (Oct. 25, 2013), <https://www.archives.gov/records-mgmt/bulletins/2014/2014-02.html>.

⁸⁹ There are a number of agencies at the federal level that explicitly state that business information stored on social media sites are considered federal records under 44 U.S.C. § 3301. See GUIDELINES FOR HPA REVIEW, SOCIAL MEDIA, AND

following list of questions help agencies determine record status of social media content.⁹¹ “If the answers to any of the below questions are yes, then the content is likely to be a federal record”:

- “Does it contain evidence of an agency’s policies, business, or mission?”
- “Is the information only available on the social media site?”
- “Is the tool authorized by the agency?”
- “Does the agency use the tool to convey official agency information?”
- “Is there a business need for the information?”⁹²

Social media content may also be considered “a Federal record when the use of social media provides added functionality, such as enhanced search capabilities,⁹³ opportunities for public comment, or other collaboration.”⁹⁴ “A complete Federal record must have content, context, and structure along with associated

MEDIA RELATIONS, TURNER-FAIRBANK HIGHWAY RESEARCH CENTER R&D COMMUNICATION REFERENCE GUIDE, FED. HIGHWAY ADMIN. RESEARCH & TECH. (Feb. 2017); *See Your Records Management Responsibilities*, U.S. DEP’T OF ENERGY (July 2010) (“Informational items from the Department posted to social media sites are records.”).

⁹⁰ *See NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88 (citing a general clause for use in the standard GSA Terms of Service agreement: “[t]he Agency acknowledges that use of contractor’s site and services may require management of Federal records. Agency and user-generated content may meet the definition of Federal records as determined by the agency. If the contractor holds Federal records, the agency and the contractor must manage Federal records in accordance with all applicable records management laws and regulations, including but not limited to the Federal Records Act (44 U.S.C. chs. 21, 29, 31, 33), and regulations of the National Archives and Records Administration (NARA) at 36 CFR Chapter XII Subchapter B.”).

⁹¹ *See NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88.

⁹² NARA Bulletin 2014-02 seems to be the most thorough and useful when determining whether social media is a federal record. *See id.* However, the technical legal standard remains the same – the statutory definition (44 U.S.C. § 3301) and NARA regulations further defining phrases in the statute. *See, e.g.*, 36 C.F.R. § 1220.12 (2020).

⁹³ For example, the use of social media enables users to provide closed captioning and an audio description. *See Improving the Accessibility of Social Media in Government*, DIGITAL.GOV, <https://digital.gov/resources/improving-the-accessibility-of-social-media-in-government/> (last visited July 23, 2020) (discussing that closed captioning ensures accessibility).

⁹⁴ *NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88.

metadata (e.g., author, date of creation).⁹⁵ “The complete record must be maintained to ensure reliability and authenticity.”⁹⁶ If an agency cannot clearly determine whether an item is a record, NARA’s regulations require the agency to treat the item as a record.⁹⁷

1. *Determining the Record Status*

Agencies have drafted and implemented social media policies to set clear guidelines on what constitutes as an official use of social media versus an unofficial use.⁹⁸ In their social media policies, there is usually some language specifying who is an authorized user of their social media platform and who may post content there.⁹⁹ Additionally, there may be language that discusses which devices are authorized to access certain social media sites.¹⁰⁰ These social media policies are also put in place to address the record status of their social media content.¹⁰¹ In doing so, agencies encourage, if not require, employees to carefully consider their posting content and behavior on social media platforms.¹⁰² For example, employees are required to

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 36 C.F.R. § 1222.16 (2020).

⁹⁸ For example, the Coast Guard has an external media policy that addresses social media concerns. *See* U.S. DEP’T OF HOMELAND SEC., U.S. COAST GUARD, COAST GUARD EXTERNAL AFFAIRS MANUAL (2014), <http://auxpa.cgaux.org/PADocs/USCGExternalAffairsManual.pdf> [hereinafter, COAST GUARD EXTERNAL AFFAIRS MANUAL].

⁹⁹ *See, e.g., id.* at 3–32 (“Headquarters staffs, areas, districts, sectors, and units are authorized to provide information and respond to Internet discussions on official and unofficial sites on matters that are under their purview, as outlined in this Manual.”).

¹⁰⁰ *See, e.g., id.* at 3–22 (“All photographs and video taken aboard Coast Guard units by employees are subject to screening and approval of the commanding officer or officer-in-charge prior to release for commercial or public use at the commanding officer’s or officer-in-charge’s discretion. This may include imagery captured using personal imaging devices.”).

¹⁰¹ *See, e.g., id.* at 3–30 (“Because a social media site is conducting communication and transactions on behalf of the Coast Guard, it shall be properly managed as a federal record. All content and comments posted on official social media sites shall be preserved in accordance with current records management policies.”).

¹⁰² *See* U.S. ENVTL. PROTECTION AGENCY, OFF. OF ENVTL INFO., SOCIAL MEDIA POLICY (July 7, 2005), https://www.epa.gov/sites/production/files/2013-11/documents/social_media_policy.pdf [hereinafter, EPA SOCIAL MEDIA POLICY].

consider whether posts may be held by the social media site indefinitely.¹⁰³ Additionally, agency employees are expected to consider whether their posts may be misconstrued as official communication from the agency or whether the post inadvertently reveals sensitive information.¹⁰⁴

Even if the communication is considered unofficial, NARA can require the retention of those social media posts.¹⁰⁵ For example, in 2017, the Badlands National Park Service Twitter account tweeted out data about climate change, then quickly deleted the tweets.¹⁰⁶ The National Park Service said that the tweets had been posted by a former employee who should not have been able to access the account.¹⁰⁷ NARA opened up an inquiry about whether the deletion of those tweets constituted an unauthorized disposal of federal records and determined that NPS should have preserved those tweets as records.¹⁰⁸

In addition to providing detailed procedures on how to preserve social media, EPA also offers a “non-exhaustive list” that enables employees to quickly determine whether social media content is a federal record. *See* U.S. ENVTL. PROTECTION AGENCY, MANAGING SOCIAL MEDIA RECORDS PROCEDURE at 3 (June 25, 2020), https://www.epa.gov/sites/production/files/2020-06/documents/managing_social_media_records_procedure.pdf [hereinafter, EPA MANAGING SOCIAL MEDIA RECORDS PROCEDURE].

¹⁰³ *See* COAST GUARD EXTERNAL AFFAIRS MANUAL, *supra* note 98, at 3–31 (stating that when personnel express any Coast Guard related information or opinion, they shall consider that it may be posted publicly indefinitely).

¹⁰⁴ *See, e.g.*, EPA SOCIAL MEDIA POLICY, *supra* note 102, at 3 (“When using social media tools and third-party sites, whether on behalf of EPA or on their own time, EPA employees are bound by the Standards of Ethical Conduct for Employees of the Executive Branch.”); COAST GUARD EXTERNAL AFFAIRS MANUAL, *supra* note 98, at 3–28 (“Even when off-duty, and on a personal site or blog, Coast Guard members are subject to the Uniform Code of Military Justice and employees are subject to administrative or legal action if they violate policy or security regulations.”).

¹⁰⁵ *See* NARA Bulletin 2015-02: Guidance on Managing Electronic Messages, NAT’L ARCHIVES & RECORDS ADMIN. (July 29, 2015), <https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html> (stating that while *all* federal employees should attempt to refrain from using personal accounts for official purposes, if personal accounts are used and the communication is considered “agency business,” then the communication may be deemed as a “Federal record,” and therefore require the retention of said record).

¹⁰⁶ Aidan Quigley, *Badlands National Park Climate Change Tweets Deleted*, POLITICO (Jan. 24, 2017, 6:16 PM), <https://www.politico.com/story/2017/01/badlands-tweets-deleted-trump-234136>.

¹⁰⁷ *Id.*

¹⁰⁸ Kevin Bogardus & Emily Yehle, *I Take Responsibility’ – Rogue Badlands*

Officials who are authorized to use government accounts also need to consider the value in liking or following an entity or individual and what it may convey to others.¹⁰⁹ In many cases, “following an organization may convey endorsement of the entire entity.”¹¹⁰ Meanwhile, “retweeting or reposting content [originating] from another entity may only imply endorsement of the content that is being reposted.”¹¹¹ To share, retweet, friend, follow, or publicly respond in some way may also constitute a government record under the FRA.¹¹² If this is the case, the interaction must be retained as required by applicable records retention schedules.¹¹³ For example, the Department of Health and Human Services (HHS)¹¹⁴ and the Department of the Interior (DOI)¹¹⁵ have made clear in their respective social media guidelines that the act of sharing, reposting, liking, or following among other engagement or interaction features might be construed as endorsements by that particular agency.¹¹⁶ Both agencies recommend clear disclaimers and extreme vigilance

Tweeter, E & E NEWS (Apr. 17, 2017),
<https://www.eenews.net/stories/1060053173>.

¹⁰⁹ Cf. COAST GUARD EXTERNAL AFFAIRS MANUAL, *supra* note 98, at 1–5, 3–30 (stressing the importance of how communication will be interpreted by the receiver).

¹¹⁰ *Social Media Policies*, U.S. DEP’T. OF HEALTH & HUM. SERV., <https://www.hhs.gov/web/social-media/policies/index.html> (last viewed Mar. 26, 2019) [hereinafter, HHS SOCIAL MEDIA POLICIES].

¹¹¹ *Id.*

¹¹² See U.S. DEP’T OF INTERIOR, DIGITAL MEDIA POLICY 6 (2018), https://www.doi.gov/sites/doi.gov/files/elips/documents/470_dm_2_digital_media_policy_1.pdf (“Content created in an official capacity may constitute a federal record”).

¹¹³ See *id.* (stating that bureaus and offices need to work with their “Records Officers” to ensure compliance with retention schedules).

¹¹⁴ HHS SOCIAL MEDIA POLICIES, *supra* note 110.

¹¹⁵ U.S. DEP’T OF INTERIOR, WEBSITE AND SOCIAL MEDIA BASICS, <https://www.doi.gov/employees/dmguide/website-and-social-media-basics#main-content> (last visited July 23, 2020) [hereinafter, DOI WEBSITE & SOCIAL MEDIA BASICS].

¹¹⁶ See *id.* (“Never share, retweet, or repost content that would imply (or appear to imply) that the federal government is promoting a company or encouraging the public to buy something.”); see also HHS SOCIAL MEDIA POLICIES, *supra* note 110 (“Consider the value in liking/following a specific entity and what it may convey to your audience. In many cases, following an organization may convey endorsement of the entire entity, while retweeting or reposting content from another entity may only imply endorsement of the content that is being reposted.”).

when deciding to utilize any of these features on an official government account.¹¹⁷ Whenever possible, the Department of Justice (DOJ) recommends disabling certain features such as direct messaging or public message threads.¹¹⁸ Other agencies such as the Department of Energy (DOE), have opted to allow users to comment on their posts, while explicitly outlining some guidelines on when comments may be removed.¹¹⁹ Overall, many agencies now treat all social media posts as matters of public information subject to the same retention policies as official communications.¹²⁰

a. Does it contain evidence of an agency’s policies, business, or mission?

For some agencies, the social media policy encourages the proactive contribution of online content in order to further public information, discussion, and understanding of the agency’s role, mission, or business practices.¹²¹ For example, the Environmental

¹¹⁷ See DOI WEBSITE & SOCIAL MEDIA BASICS, *supra* note 115 (“Only post information that is publicly available on the primary bureau, Departmental or government website (Off. of Mgmt. and Budget M-10-23, Section 3, ‘Agencies should also provide individuals with alternatives to third-party websites and applications. People should be able to obtain comparable information and services through an agency’s official website or other official means.’”); HHS SOCIAL MEDIA POLICIES, *supra* note 110 (“All content posted to third-party sites should also be verifiable through an agency’s official website. People should also be able to obtain comparable information and services through an agency’s official website or other official means.”).

¹¹⁸ U.S. DEP’T OF JUSTICE, SOCIAL MEDIA CONTENT MANAGEMENT REQUIREMENTS AND PROCEDURES (Feb. 9, 2018), <https://www.justice.gov/oip/page/file/1070336/download>. (“Direct messaging is not permitted. When possible, the function should be disabled.”).

¹¹⁹ DEP’T OF ENERGY, SOCIAL MEDIA, ENERGY.GOV, <https://www.energy.gov/about-us/web-policies/social-media> (last visited July 23, 2020) (noting that comments may be removed from DOE blogs or social media accounts if, for example, they “[c]ontain obscene, indecent or profane language,” “[c]ontain threats or defamatory statements,” or “[c]ontain hate speech directed at race, color, sex, sexual orientation, national origin, ethnicity, age, religion or disability”).

¹²⁰ See, e.g., *id.* (“Non-public, sensitive, Personally Identifiable Information (PII) and classified information should not be disclosed on public social media platforms”).

¹²¹ See, e.g., *id.* (“Department of Energy personnel are encouraged to access and contribute content on social media sites in their official capacity We are continually exploring how to best use social media platforms to engage the public in open discussion about energy issues and how they benefit from the

Protection Agency (EPA) uses social media networks and tools to increase the potential for everyone to gain a better understanding of environmental conditions and solutions.¹²² On July 7, 2020, the EPA released new guidance on how the public should disinfect public spaces effectively and efficiently to control SARS-CoV-2, the novel coronavirus that causes COVID-19.¹²³

Similarly, the Coast Guard recognizes that social media tools offer direct two-way engagement in an effort to “listen” to their constituencies and consider both feedback and criticisms of how the agency does business.¹²⁴ On July 9, 2020, the Coast Guard congratulated the all-woman aircrew from the U.S. Coast Guard Air Station Kodiak who participated in the first all-woman HC-130J Super Hercules aircraft flight in U.S. history.¹²⁵ The social media post also encouraged those who were interested “in making history as a member of the #USCG” to leave a comment or chat to one of their online recruiters.¹²⁶ These examples demonstrate that government agencies use social media to disseminate their policies, business, and mission.¹²⁷

b. Is the information only available on the social media site?

Social media content may be considered a federal record if it is unique and not anywhere else.¹²⁸ Agencies may need to determine if identical content exists on another platform or

Department’s work.”).

¹²² See EPA SOCIAL MEDIA POLICY, *supra* note 102.

¹²³ See Press Release, Env’tl. Prot. Agency, EPA Takes Action to Help Americans Disinfect Indoor Spaces Efficiently and Effectively (July 7, 2020) (referencing a press release in which the EPA released guidelines regarding appropriate disinfectants to use in battle against COVID-19).

¹²⁴ See COAST GUARD EXTERNAL AFFAIRS MANUAL, *supra* note 98, at 3–26.

¹²⁵ See Go Coast Guard, FACEBOOK (July 9, 2020, 11:00 AM), <https://www.facebook.com/GoCoastGuard/posts/3186082561435251>.

¹²⁶ *Id.*

¹²⁷ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-605, SOCIAL MEDIA: FEDERAL AGENCIES NEED POLICIES AND PROCEDURES FOR MANAGING AND PROTECTING INFORMATION THEY ACCESS AND DISSEMINATE (2011),

<https://www.gao.gov/assets/330/320244.pdf> (explaining how social media has aided federal agencies to support their missions).

¹²⁸ See NARA Bulletin 2014-02: Guidance on Managing Social Media Records, *supra* note 88 (describing how social media is classified as a federal record).

medium.¹²⁹ When making this consideration, agencies may look at unique textual details, graphics, hyperlinks, or other functionality differences between the social media post and the other medium.¹³⁰ If the content and format of a webpage representing it are unique or different, the alternative version of the webpage may be independently preserved as a federal record.¹³¹

On March 20, 2020, Treasury Secretary Steven Mnuchin tweeted that the Internal Revenue Service was postponing the national income tax filing day from April 15, 2020 to July 15, 2020.¹³² “At @realDonaldTrump’s direction, we are moving Tax Day from April 15 to July 15. All taxpayers will have this additional time to file and make payments without interest or penalties.”¹³³

Other considerations to determine whether a social media product is a unique record requiring preservation include adding a new question to a post, adding a new hyperlink, responding to questions or comments from the public, posting questions or comments intended to engage the public, adding a photo or other graphical element, editing text (other than fixing a typo), adding text to a post, adding multimedia elements to a post, and adding or updating a sound recording.¹³⁴ Lastly, the agency may consider whether the use, presence, or expression of the content on the social media platform is presented in such a unique way that it would not otherwise exist in the absence of the social media post.¹³⁵

c. Is the tool authorized by the agency?

Agencies may explicitly state which tools and platforms are authorized by the agency either in their social media policies¹³⁶ or

¹²⁹ See EPA MANAGING SOCIAL MEDIA RECORDS PROCEDURE, *supra* note 102, at 3.

¹³⁰ *See id.*

¹³¹ *Id.* at 2–3, 5.

¹³² Mnuchin, *supra* note 14.

¹³³ *Id.*

¹³⁴ See EPA MANAGING SOCIAL MEDIA RECORDS PROCEDURE, *supra* note 102.

¹³⁵ *See id.* (“Content created with social media tools qualifies as a federal record and must be captured and maintained in a recordkeeping system.”).

¹³⁶ *See e.g.*, DOI WEBSITE & SOCIAL MEDIA BASICS, *supra* note 115. The agencies are not required by law to create social media policies, but several agencies

on their websites.¹³⁷ “Official social media accounts” on those platforms “include all accounts created and maintained using federal government resources to communicate about the work of the Administration.”¹³⁸ For example, the CDC states in their social media policy that “Facebook accounts are viewed as an official voice of [the] CDC.”¹³⁹ Since 2009, “The agency has expanded its Facebook presence beyond the main CDC profile, and now supports multiple Facebook profiles connecting users with information on a range of CDC health and safety topics.”¹⁴⁰ The list of CDC official Facebook profiles includes CDC Clinician Outreach and Communication Activity – COCA, CDC Diabetes, CDC Emergency, CDC en Español, CDC Global, CDC Heads Up, CDC HIV, among others.¹⁴¹

NASA encourages the public to follow their flagship accounts on several social media platforms, including Twitter, Facebook, Instagram, Snapchat, YouTube, Tumblr, Pinterest, LinkedIn, Giphy, Flickr, Twitch, Soundcloud, and Periscope.¹⁴² NASA’s social media presence includes NASA Centers and Facilities (Goddard Space Flight Center and the Kennedy Space Center); Organizations and Programs (Education at NASA, NASA History, Science @ NASA); Missions and Topics (Climate, Soil Moisture Active Passive Mission, Hubble Space Telescope, International Space Station); and NASA People and Astronauts

create these policies to ensure compliance with the FRA. For compliance standards, see *NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88.

¹³⁷ See U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/> (last visited Sep. 27, 2020) (providing links to their various social media accounts).

¹³⁸ Memorandum from Neil Eggleston, Counsel to the President, The White House, on Disposition of Official Media Accounts (Oct. 31, 2016), https://www.army.mil/e2/downloads/rv7/socialmedia/memo_to_agencies_re_social_media_accounts_103116.pdf.

¹³⁹ CTRS. FOR DISEASE CONTROL & PREVENTION, SOCIAL MEDIA AT CDC: FACEBOOK GUIDELINES AND BEST PRACTICES (Dec. 27, 2019), <https://www.cdc.gov/socialmedia/tools/guidelines/facebook-guidelines.html#:~:text=Careful%20consideration%20should%20always%20be,a n%20official%20voice%20of%20CDC>.

¹⁴⁰ *Id.*

¹⁴¹ See CTRS. FOR DISEASE CONTROL & PREVENTION, SOCIAL MEDIA AT CDC: FACEBOOK (Aug. 24, 2020), <https://www.cdc.gov/socialmedia/tools/Facebook.html> (listing the many CDC Facebook profiles).

¹⁴² See NASA, SOCIAL MEDIA AT NASA, <https://www.nasa.gov/socialmedia> (last visited July 23, 2020).

(Randolph J. Bresnik, Karen L. Nyberg, Peggy A. Whitson).¹⁴³

The approved social networking tool authorized for Coast Guard sectors and units is a Facebook government page.¹⁴⁴

d. Does the agency use the tool to convey official agency information?

In their social media policy, agencies have an opportunity to clarify and confirm who can provide information or respond to social media discussions under their purview.¹⁴⁵ For example, the General Services Administration (GSA) states that when an employee communicates in an official capacity, he or she is communicating on behalf of the agency and can only do what is authorized by GSA.¹⁴⁶ When an employee is using social media tools personally, it should not appear to others as though the employee is speaking for GSA.¹⁴⁷ Some agencies even encourage their employees to use a disclaimer that clarifies that their social media communications on their personal accounts “reflect only [their] personal views and do not necessarily represent the views of [the] agency or the United States.”¹⁴⁸ However, “a disclaimer

¹⁴³ *Id.*

¹⁴⁴ See U.S. COAST GUARD, U.S. COAST GUARD SOCIAL MEDIA HANDBOOK 1 (2015), https://static.dvidshub.net/media/pubs/pdf_25224.pdf (referencing Facebook as an approved tool for the Coast Guard); see also U.S. Coast Guard (@UScoastguard), FACEBOOK, <https://www.facebook.com/UScoastguard/>.

¹⁴⁵ See *infra* Part II.A.1; *supra* notes 98, 102, 110, 112, 115 (providing several agencies’ policies that address who may use their social media accounts).

¹⁴⁶ U.S. GSA, GSA SOCIAL MEDIA POLICY (Apr. 24, 2018), <https://www.gsa.gov/about-us/newsroom/social-media/gsa-social-media-policy> (listing several requirements for social media users acting in an official capacity including coordination with the GSA Office of Strategic Communication and the Office of General Counsel “when creating, sharing, or discussing content regarding GSA or GSA-related matters”, “refrain[ing] from communicating with members of the press,” and “avoid[ing] [the] endorse[ment] of any commercial products, services, entities, political parties, candidates or groups , private interests or non-Federal groups.”).

¹⁴⁷ *Id.* (prohibiting the use of one’s title or position “unless several biographical details are included . . . and the employee’s title/position is given no more prominence than the other significant biographical details.”).

¹⁴⁸ See U.S. DEP’T OF COMMERCE, SOCIAL MEDIA AND WEB 2.0 POLICY, <https://www.commerce.gov/about/policies/social-media#unofficial> (last visited July 23, 2020) (stating that an employee is not required but is encouraged to use a “disclaimer clarifying that [their] social media communications reflect only [their] personal views and do not necessarily represent the views of [the] agency or the United States”). This disclaimer may be present in the post itself

may not necessarily eliminate the potential that a reasonable person could construe that the employee's personal social media account is sanctioned or endorsed by [the agency]."¹⁴⁹

For example, on April 6, 2015, the new GSA's Chief Information Officer, David Shive posted on Twitter @GSA_CIO at 8:22am: "First day on the new gig. Good luck to @sonny_h on the new job at Box.com."¹⁵⁰ On the same day at 8:59am, David Shive posted a tweet in his personal account @dasrightnow: "My GSA CIO tweets R now @GSA_CIO. Follow me there unless U R really interested in what I made for dinner or how much snow fell at my house."¹⁵¹

e. Is there a business need for the information?

For many agencies, social media is an integral portion of their communication strategy. The CDC, for example, indicated that "Facebook, as with other social media tools, [are] intended to be a part of a larger integrated health communications strategy or campaign developed under the leadership of the Associate Director of Communication Science (ADCS) in the Health Communication Science Office (HCSO) of CDC's National Centers, Institutes, and Offices (CIOs)."¹⁵² Since 2014, the CDC on its main Facebook profile has maintained a communications strategy called Public Health Nerd or #PHNerd to raise awareness on health issues and public health policies.¹⁵³ The information spread through this public health campaign sustains the agency's mission to protect and inform everyone about health,

or in someone's social media profile. *Id.*

¹⁴⁹ See, e.g., GSA SOCIAL MEDIA POLICY, *supra* note 146.

¹⁵⁰ David Shive (@GSA_CIO), TWITTER (Apr. 6, 2015, 8:22 AM), https://twitter.com/GSA_CIO/status/585054934724251648.

¹⁵¹ David Shive (@dasrightnow), TWITTER (Apr. 6, 2015, 8:59 AM), <https://twitter.com/dasrightnow/status/585064343617671170>.

¹⁵² CTRS. FOR DISEASE CONTROL & PREVENTION, SOCIAL MEDIA GUIDELINES AND BEST PRACTICES, <https://www.cdc.gov/socialmedia/tools/guidelines/pdf/facebookguidelines.pdf> (last updated May 16, 2012).

¹⁵³ See CTRS. FOR DISEASE CONTROL & PREVENTION, ARE YOU A PUBLIC HEALTH NERD? (Apr. 13, 2015), <https://blogs.cdc.gov/yourhealthyenvironment/2015/04/13/are-you-a-public-health-nerd/>.

safety and security threats.¹⁵⁴ Communicating with the public via social media enables government agencies to keep constituents informed and educated.¹⁵⁵

f. Does the use of social media provide added functionality?

The use of social media provides to all users “added functionality, such as enhanced search capabilities, opportunities for public comment, or other collaboration.”¹⁵⁶ The use of social media also enables for an opportunity to provide closed captioning and an audio description.¹⁵⁷ By their nature, social media platforms offer enhanced search capabilities through the use of tagging, algorithms, other metrics, and the author’s ability to disseminate information through text, image, or video.¹⁵⁸ Government officials and agencies can share content posted on non-official accounts with the public, and vice versa.¹⁵⁹ Social media also relies on public participation and engagement for its

¹⁵⁴ See *id.* (promoting “awareness about CDC’s work to protect the nation’s health and safety”).

¹⁵⁵ See *id.* (promoting to those interested about public health and allowing them to gain knowledge through information shared through the campaign).

¹⁵⁶ See NARA Bulletin 2014-02: *Guidance on Managing Social Media Records*, *supra* note 88.

¹⁵⁷ See *Improving the Accessibility of Social Media in Government*, *supra* note 93 (offering best practices in ensuring that social media content by governmental entities are accessible to all citizens, including those with disabilities). The use of video on an official agency website also enables for an opportunity to provide closed captioning and an audio description. See *id.* However, government agencies primarily use YouTube and Facebook Live to stream videos. See STRAUS, *supra* note 4, at 1.

¹⁵⁸ See Jan H. Kietzmann et al., *Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media*, 54 BUS. HORIZONS 241 (2011) (“Social media employ mobile and web-based technologies to create highly interactive platforms via which individuals and communities share, cocreate, discuss, and modify user-generated content.”).

¹⁵⁹ See, e.g., Dr. Simone Gold (@drsimonegold), TWITTER (Sept. 16, 2020, 6:21 PM), <https://twitter.com/drsimonegold/status/1306372660587184128> (showing a tweet from a private citizen Dr. Simone Gold, who publicly shared official documents from the Nevada State Board of Pharmacy in a nonofficial capacity); Me (@j_officerandrew), TWITTER (Sept. 16, 2020, 5:02 PM), https://twitter.com/j_officerandrew/status/1306352724129308672 (showing that President Donald Trump retweeted nonofficial information from a private citizen).

platform to thrive.¹⁶⁰ Lastly, other collaboration tools and methods are constantly developed and implemented by social media platforms on a regular basis.¹⁶¹

B. Agency Records under the Freedom of Information Act

Executive branch materials may also qualify as an agency record.¹⁶² Under FOIA, agency records are materials that are created or obtained by an agency and under agency control at the time of the request.¹⁶³ The Supreme Court stated that “[b]y control [it meant] that the materials have come into the agency’s possession in the legitimate conduct of its official duties”.¹⁶⁴ The Court of Appeals for the D.C. Circuit has found that control over records maintained by a government contractor not currently located on agency property are still agency records due to “the extensive supervision and control exercised by the agency” over the documents.¹⁶⁵ Additionally, to determine whether material produced by an agency constitutes as an agency record, one must consider:

[1] the intent of the document’s creator to retain or relinquish

¹⁶⁰ See Kietzmann et al., *supra* note 158. A tweet or post is generally made available to an individual’s followers or the public. See *About Different Types of Tweets*, TWITTER, HELP CENTER, <https://help.twitter.com/en/using-twitter/types-of-tweets> (last visited Oct. 10, 2020) (explaining how a tweet works and who the audience is). Once such a post is shared, retweeted, or commented on, that post may be accessible to a greater audience, increasing viewership. See *id.*

(explaining how functions such as retweeting, make a tweet appear on that particular individual’s page making it available for their followers to see).

¹⁶¹ See, e.g., Andrew Hutchinson, *Facebook Expands Test of New Hashtag Use Metrics Within Post Composer*, SOCIALMEDIATODAY (Sept. 21, 2020), <https://www.socialmediatoday.com/news/facebook-expands-test-of-new-hashtag-use-metrics-within-post-composer/585629/>; Andrew Hutchinson, *Instagram Adds Automatic Closed Captions for IGTV Videos*, SOCIALMEDIATODAY (Sept. 15, 2020) <https://www.socialmediatoday.com/news/instagram-adds-automatic-closed-captions-for-igtv-videos/585289/> (stating that the Social Network updates regularly to implement new tools for ease of access, content creation, etc.).

¹⁶² 5 U.S.C. § 552(f)(1)-552(g) (2016).

¹⁶³ U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 144–45 (1989).

¹⁶⁴ *Id.* at 145.

¹⁶⁵ See *Burka v. U.S. Dep’t of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (finding that data tapes not “currently located on agency property” are “agency records” due to “the extensive supervision and control exercised by the agency over collection and analysis of the data.”).

control over the records; [2] the ability of the agency to use and dispose of the records as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency's record system or files.¹⁶⁶

FOIA applies only to the records of the executive branch of the federal government and certain Presidential records.¹⁶⁷ FOIA does not apply to records of the federal courts or records of Congress.¹⁶⁸ FOIA also does not create a right of access to records held by local or state government agencies.¹⁶⁹

C. Presidential Records under the Presidential Records Act

The Presidential Records Act (PRA) of 1978 “governs the official records of Presidents and Vice Presidents that were created or received after January 20, 1981.”¹⁷⁰ The PRA changed the legal ownership of the official records of the President from private to public, and established a new statutory structure under which Presidents, and subsequently NARA, must manage the records of their Administrations.¹⁷¹ The PRA was amended in

¹⁶⁶ *Id.* (quoting *Tax Analysts v. U.S. Dep’t of Justice*, 845 F.2d 1060, 1069 (D.C.Cir. 1988) (citation omitted), *aff’d on other grounds*, 492 U.S. 136 (1989)); *Cause of Action v. Nat’l Archives & Records Admin.*, 753 F.3d 210, 212–13 (D.C. Cir. 2014).

¹⁶⁷ 36 C.F.R. § 1250.6 (2020).

¹⁶⁸ *Id.*

¹⁶⁹ U.S. DEP’T OF STATE, ABOUT FOIA AND OTHER INFORMATION ACCESS PROGRAMS,

<https://foia.state.gov/learn/foia.aspx#:~:text=The%20FOIA%20applies%20only%20to,state%20or%20local%20government%20agencies> (last visited Oct. 9, 2020) (“The FOIA applies only to federal agencies and does not create a right of access to records held by Congress, the courts, or by state or local governments.”).

¹⁷⁰ *Presidential Records Act*, *supra* note 79.

¹⁷¹ *See, e.g.*, Treisman, *supra* note 3. The early history of presidential papers is similar to that of records created and maintained within a Congressional member’s office as these records are the property of the Congressional member. *See* Watts, *supra* note 84, at 1665, 1686, 1732 (“The early history of presidential papers is [also] very similar to that of judicial papers in that presidential papers also were viewed originally as a species of private property.”). Under the private ownership system for presidential papers, many presidential collections did not fare very well, but this slowly began to change in the early twentieth century, when President Franklin D. Roosevelt established the first Presidential Library after recognizing that “Presidential papers are an important part of the national heritage and should be accessible to the public.” *See* NAT’L ARCHIVES &

2014 to include electronic records.¹⁷² The term “presidential record” includes any

[D]ocumentary materials, . . . created or received by the President, the President’s immediate staff,¹⁷³ or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.¹⁷⁴

RECORDS ADMIN., PRESIDENTIAL LIBRARY HISTORY, <http://www.archives.gov/presidential-libraries/about/history.html> (last visited Aug. 15, 2016). In contrast, most senators opt to “donate their collections to a research repository in their home state when they leave office.” U.S. SENATE, INFORMATION ABOUT SENATORS’ PAPERS AND ARCHIVES, https://www.senate.gov/artandhistory/history/common/generic/About_Senators_Papers.htm (last visited July 23, 2020). The repository then makes such information “available to researchers after an appropriate amount of time has passed.” *Id.* For example, former Senator David Vitter donated his professional papers to Tulane University. *David B. Vitter Congressional Papers*, TULANE U. SPECIAL COLLECTIONS, TULANE U. LIBR., <https://archives.tulane.edu/repositories/3/resources/3111> (last visited July 23, 2020). “While print and broadcast sources contain a great deal of congressional information, it is the senator’s personal papers that contain the most comprehensive and authentic record.” *See* U.S. SENATE, INFORMATION ABOUT SENATORS’ PAPERS AND ARCHIVES, *supra* note 171.

¹⁷² Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2003 (2014) (amending 44 U.S.C. § 2203 (2012) to include electronic records).

¹⁷³ 44 U.S.C. § 2201(2) (2012); *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993). The court in *Meyer v. Bush* addressed what it meant to be “immediate staff” to the president when considering whether the particular task force, created by an Executive Order, was “substantially independent” or whether its function was “solely to advise and assist” the President. *Id.* In particular, the court focused on Congress’ vision of immediate personal staff, such as those with “continuing interaction.” *Id.* In accepting and applying the *Soucie* doctrine, the court focused on three “interrelated factors” to determine the relationship: (1) “how close operationally the group is to the President;” (2) “what the nature of its delegation from the President is;” and (3) “whether it has a self-contained structure.” *Id.* at 1293. In *Meyer*, because the task force was not found to be a “substantial independent authority,” it was not considered an agency under FOIA and thus under the immediate discretion of the President. *Id.* at 1297–98 (“The various cabinet members of the Task Force were unquestionably officers who wielded great authority as heads of their departments. But there is no indication that when acting as the Task Force they were to exercise substantial independent authority, nor in fact, did they do so.”).

¹⁷⁴ 44 U.S.C. § 2201(2) (2012). The U.S. government has also taken the position that the National Security Council (NSC) is exempt from both the documentation requirements of the FRA and the disclosure requirements of the

The record includes any documentary materials relating to the political activities of the President or members of the President's staff, but only if such activities "relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President."¹⁷⁵ Additionally, "Presidential records include almost any material related to the president's activities whether they are documents, texts, tweets, recorded conversations, or emails."¹⁷⁶ In *Knight First Amendment Inst. at Columbia Univ. v. Trump*, the Second Circuit panel cited NARA's determination that the President's tweets were

Freedom of Information Act (FOIA). Douglas Cox & Ramzi Kassem, *Off the Record: The National Security Council, Drone Killings, and Historical Accountability*, 31 YALE J. ON REG. 363, 365 (2014). This exemption raises doubts about whether the NSC can be held accountable for its actions. *Id.* at 364 (criticizing how the Obama administration's use of the drone killing program engenders a lack of accountability and transparency to Congress, the public, and to history). See also *Armstrong*, 90 F.3d at 555–57 (quoting *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1293 (D.C. Cir. 1993) (holding that National Security Council is not an agency and is therefore not subject to the Federal Records Act—"no record is subject to both the FRA and the PRA [Presidential Records Act]," "[t]he FRA describes a class of materials that are federal records subject to its provisions, and the PRA describes another, mutually exclusive set of materials that are subject to a different and less rigorous regime."). There is also debate in the Trump administration as to what constitutes a presidential record. See Nicholas Wu, *Trump Says it's 'Illegal' for Pelosi to Tear Up his State of the Union Address. Experts Say That's Not True*, USA TODAY (Feb. 7, 2020, 1:44 PM), <https://www.usatoday.com/story/news/politics/2020/02/07/trump-illegal-pelosi-tear-up-speech-but-experts-disagree/4691243002/> (quoting Heidi Kitrosser, professor at University of Minnesota Law School, who asserts the claim that Pelosi violated the Presidential Records Act when she ripped up the State of the Union speech is invalid because "federal records were designed to prevent the president and his advisers from shielding documentary information from public view").

¹⁷⁵ 44 U.S.C. § 2201(2) (2012). The Act also notes that a presidential record does not include "any documentary materials that are (i) official records of an agency (as defined in section 552(e) of title 5, United States Code); (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified." 44 U.S.C. § 2201(2)(B) (2012).

¹⁷⁶ See Douglas Cox, *Does Trump's Team Have a Clinton Email Problem?*, CNN, <https://www.cnn.com/2017/09/27/opinions/trump-clinton-email-problem-opinion-cox/index.html> (last updated Sept. 27, 2017) (discussing the prohibition of using a "non-official" email account to send a presidential record, unless the message is copied to an official email account or forwarded to the official email account within 20 days).

presidential records that must be preserved.¹⁷⁷

The responsibility for the custody and management of the incumbent Presidential records lies with the President.¹⁷⁸ The President and his staff are also required to take all practical steps to file personal records separately from Presidential records.¹⁷⁹ The incumbent President is allowed to dispose of records that do not have “administrative, historical, informational, or evidentiary value,” once the views of the Archivist of the U.S. on the proposed disposal has been obtained in writing.¹⁸⁰ Both the Press Secretary and the Department of Justice treat President Trump’s posts as official statements.¹⁸¹

¹⁷⁷ Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 232 (2d Cir. 2019) (“Finally, we note that the National Archives, the agency of government responsible for maintaining the government’s records, has concluded that the President’s tweets are official records. The Presidential Records Act of 1978 established public ownership of the President’s official records. Under that Act, ‘Presidential records’ include documentary materials created by the President ‘in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory or other official or ceremonial duties of the President.’ The statute authorizes the Archivist of the United States to ‘maintain and preserve Presidential records on behalf of the President, including records in digital or electronic form.’ Accordingly, the National Archives and Records Administration has advised the White House that the President’s tweets are ‘official records that must be preserved under the Presidential Records Act.’”) (internal quotation marks omitted).

¹⁷⁸ 44 U.S.C. § 2203(f) (2012).

¹⁷⁹ 44 U.S.C. § 2203(b) (2012).

¹⁸⁰ 44 U.S.C. §§ 2203(b), 2203(g)(4) (2012).

¹⁸¹ It should be noted that the term “official statements” is different than the term “official record.” See Andrew Blake, *DOJ: Donald Trump’s Tweets Are ‘Official Statements of the President,’* WASH. TIMES (Nov. 14, 2017), <https://www.washingtontimes.com/news/2017/nov/14/doj-donald-trump-tweets-are-official-statements-of/>; Elizabeth Landers, *White House: Trump’s Tweets Are ‘Official Statements,’* CNN (June 6, 2017, 4:37 PM), <https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html>; Lorelei Laird, *DOJ Says Trump’s Tweets Are Official Presidential Statements,* ABA J. (Nov. 14, 2017, 2:49 PM), http://www.abajournal.com/news/article/government_says_trumps_tweets_are_official_presidential_statements. In *James Madison Project v. Dep’t of Justice*, a FOIA lawsuit, the judge asked DOJ attorneys to explain if the tweets were official statements of the White House and the President. 302 F.Supp.3d 12, 24 (D.D.C. 2018). In response, Department of Justice (DOJ) attorneys said, “the government is treating the statements upon which plaintiffs rely as official statements of the President of the United States.” *Id.* Furthermore, in *Knight*, the DOJ argued that President Trump’s tweets are official policy statements, although his actions with his Twitter account are “personal conduct that is not

Any incumbent Presidential records (whether textual or electronic) that are held on courtesy storage by the Archivist remain in the exclusive legal custody of the President and any request or order for access to such records must be made to the President, not NARA.¹⁸² Presidential records automatically transfer into the legal custody of the Archivist as soon as the President leaves office.¹⁸³ In addition to establishing the public ownership of all Presidential records, the PRA requires the Vice-Presidential records to be treated in the same way as Presidential records.¹⁸⁴ Records from the First Lady of the United States may also be treated in the same way as Presidential records.¹⁸⁵

III. PRESERVATION OF GOVERNMENT INFORMATION THAT APPEARS ON SOCIAL MEDIA

Similar to its print counterparts, documents and records produced by government agencies in social media offer insight into the inner workings of our government and provide a historical context to the rules and regulations that shape our society.¹⁸⁶ If not preserved properly, legal researchers and

an exercise of state power.” 928 F.3d at 232. “To be sure, the President’s account identifies his office, and his tweets make official statements about the policies of his administration.” Memorandum of Law in Support of Motion for Summary Judgment, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-cv-5205) at 21, 2017 WL 9533183. “But the fact that the President may announce the ‘actions of the state’ through his Twitter account does not mean that all actions related to that account are attributable to the state.” *Id.* In *Knight*, the court cited that, “[i]n June 2017, the White House responded to a request for official White House records from the House Permanent Select Committee on Intelligence by referring the Committee to a statement made by the President on Twitter.” 928 F.3d at 232.

¹⁸² 44 U.S.C. § 2203(f) (2012) (stating that “the Archivist may not disclose any such records, except under direction of the President”).

¹⁸³ 44 U.S.C. § 2203(g)(1) (2012).

¹⁸⁴ 44 U.S.C. § 2207 (2012).

¹⁸⁵ See, e.g., REAGAN LIBRARY COLLECTIONS, FIRST LADY, OFFICE OF THE ADVANCE: RECORDS, 1981-1989 (Jan. 11, 2018),

<https://www.reaganlibrary.gov/public/archives/textual/smf/fladvanc.pdf> (providing the availability of Nancy Reagan’s records related to field trips, memos, event planning checklists, verbal regrets, and schedules).

¹⁸⁶ See Brent Barnhart, *Social Media and Government: How to Keep Citizens Engaged*, SOCIAL STRATEGY (Apr. 9, 2020), <https://sproutsocial.com/insights/social-media-and-government/> (stating social

scholars would not be able to access this source of government information.¹⁸⁷ Preservation is key to restore useful access to this government information.¹⁸⁸

On November 28, 2011, President Barack Obama signed the Presidential Memorandum – Managing Government Records.¹⁸⁹ As an executive branch-wide effort to reform management policies and records, federal agencies were now expected to commit to implementing a twenty-first century solution for records management that would initiate the transition to an electronic government.¹⁹⁰ The Archivist and the Director of Office of Management and Budget (OMB), in coordination with the Associate Attorney General, were expected to “issue a Records Management Directive that directs agency heads to take specific steps to reform and improve records management policies and practices within their agency.”¹⁹¹ The directive would focus on several areas.¹⁹² First, the directive must prioritize “creating a Government-wide records management framework that is more efficient and cost-effective.”¹⁹³ Second, the directive should aim to “promote records management policies and practices that enhance the capability of agencies to fulfill their statutory missions.”¹⁹⁴ Next, the directive should place an expectation upon agencies to maintain accountability through documentation and to increase appropriate public access to government records.¹⁹⁵ Lastly, the directive should focus on “supporting agency compliance with applicable legal requirements related to the preservation of information relevant to litigation and

media keeps citizens up to date and gives valuable information or clarifies potential misinformation).

¹⁸⁷ See WENDY GINSBERG, CONG. RESEARCH SERV., R43165, RETAINING AND RESERVING FEDERAL RECORDS IN A DIGITAL ENVIRONMENT: BACKGROUND AND ISSUES FOR CONGRESS 6 (2013) (stating that poor record management could lead to vital historical records being lost forever).

¹⁸⁸ See *id.* at 16 (stating that records need to be “appropriately protected from corruption or destruction” so that they can be accessed and usable).

¹⁸⁹ Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011) [hereinafter, 2011 Presidential Memo].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

transitioning from paper-based records management to electronic records management where feasible.”¹⁹⁶

In June 2018, the Executive Office of the U.S. released a publication entitled “Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations.”¹⁹⁷ The 2018 Reform Plan included a proposal that would “transition Federal agencies’ business processes and recordkeeping to a fully electronic environment and end NARA’s acceptance of paper records by December 31, 2022.”¹⁹⁸ The 2018 Reform Plan aimed to “improve agencies’ efficiency, effectiveness, and responsiveness to citizens by converting paper-based processes to electronic workflows, expanding online services, and enhancing management of Government records, data, and information.”¹⁹⁹ “To ensure this necessary transformation away from paper-based processes would occur across all of the Executive Branch, NARA [was expected to] coordinate with Federal agencies to develop and provide the guidance, technical assistance, and services needed to implement this proposal.”²⁰⁰ Additionally, the GSA “would play a supporting role by connecting agencies with commercial digitization services available in the private sector,” enabling “agencies to more efficiently procure needed services and expedite the electronic records process.”²⁰¹

On June 28, 2019, the Archivist and the Acting Director of OMB affirmed the goals set forth in the Records Management Directive and directed federal agencies to transition recordkeeping to a fully electronic environment.²⁰² This directive

¹⁹⁶ *Id.*

¹⁹⁷ *See generally* EXEC. OFFICE OF THE PRESIDENT, DELIVERING GOVERNMENT SOLUTIONS IN THE 21ST CENTURY, REFORM PLAN AND REORGANIZATION RECOMMENDATIONS, (2018), <https://www.performance.gov/GovReform/Reform-and-Reorg-Plan-Final.pdf> [hereinafter, 2018 REFORM PLAN].

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1.

²⁰¹ *Id.*

²⁰² Memorandum from Russell T. Vought, Acting Director of the Office of Management and Budget, and David S. Ferriero, Archivist of the United States to the Nat’l Archives and Records Admin., to Heads of Executive Departments and Agencies, Transition to Electronic Records, EXEC. OFFICE OF THE PRESIDENT (June 28, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-21.pdf>.

complies with all records management laws and policies and is consistent with the President's Management Agenda²⁰³ and the 2018 Reform Plan.²⁰⁴ Together, these two initiatives set the guidelines for records management and preservation for the federal government.²⁰⁵

A. Records Management and Preservation Standards – Federal Agencies

Federal agencies are held to high preservation standards.²⁰⁶ Per NARA's Managing Government Records Directive (M-12-18), agencies are expected to "require electronic recordkeeping to ensure transparency, efficiency, and accountability" while "demonstrat[ing] compliance with federal records statutes and regulations."²⁰⁷ Agencies are also expected to "articulate clear processes, policies, and recordkeeping roles and responsibilities to ensure social media records are identified, managed, and captured."²⁰⁸ "At a minimum, these responsibilities include the ability to identify and retrieve federal records that are being created and maintained on social media."²⁰⁹

As a result of the 2011 Presidential Memo, senior agency management deemed records management a priority.²¹⁰ Agency heads were expected to allocate proper resources to ensure the

²⁰³ *Id.* (explaining that the Record Management Directive for an electronic-based environment is consistent with management policies and the President's Management Agenda).

²⁰⁴ *Id.* (explaining that the Record Management Directive for an electronic-based environment is consistent with the Administration's "Reform Plan and Reorganization Recommendations").

²⁰⁵ *See id.* (discussing the President's Management Agenda and the Reform Plan, which set guidelines for a paperless government).

²⁰⁶ *See NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88 (discussing the thorough recordkeeping standards with which Federal agencies must comply).

²⁰⁷ Memorandum from Jeffrey D. Zients, Acting Dir. of the Office of Mgmt. and Budget, and David S. Ferriero, Archivist of the U.S., Nat'l Archives and Records Admin., to the Heads of Exec. Dep'ts and Agencies and Indep. Agencies, EXEC. OFFICE OF THE PRESIDENT (Aug. 24, 2012),

<https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

²⁰⁸ *NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88.

²⁰⁹ *Id.*

²¹⁰ 2011 Presidential Memo, *supra* note 189.

effective implementation of the record requirements.²¹¹ Additionally, agency heads were directed to identify a senior official to supervise the review and submit a report that described the agency's plans for improving or maintaining its records management program.²¹² In this report, agency heads must address the "manage[ment] of electronic records, including email and social media, deploying cloud based services or storage solutions, and meeting other records challenges."²¹³ Agency heads also needed to "identif[y] any provisions, or omissions, in relevant statutes, regulations, or official NARA guidance that currently pose an obstacle to the agency's adoption of sound, cost effective records management policies and practices."²¹⁴ Lastly, agency heads were expected to "identif[y] policies or programs that, if included in the Records Management Directive required by section 3 of" the 2011 Presidential Memo "or adopted or implemented by NARA, would assist the agency's efforts to improve records management."²¹⁵

Agencies are also expected to establish "social media working group[s] comprised of records management staff, web managers, social media managers, information technology staff, privacy and information security staff, agency counsel, public affairs staff, and other relevant stakeholders."²¹⁶ "The social media working group . . . appl[ies] the definition of a Federal record to social media content and identif[ies] what constitutes a complete record, including the content, context, structure, and necessary metadata."²¹⁷ "This group . . . also reviews existing records schedules²¹⁸ to determine if social media records are covered."²¹⁹

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88.

²¹⁷ *Id.*

²¹⁸ There are different types of records schedules. For example, the General Records Schedules (GRS) cover record management while the Records Control Schedules (RCS) discuss disposition. Existing records schedules are available on the NARA website. *See* NAT'L ARCHIVES & RECORDS ADMIN., GENERAL RECORDS SCHEDULES (GRS), FEDERAL RECORDS MANAGEMENT, <https://www.archives.gov/records-mgmt/grs>; NAT'L ARCHIVES & RECORDS ADMIN., RECORDS CONTROL SCHEDULES, FEDERAL RECORDS MANAGEMENT,

The records schedule provides mandatory disposition instructions to all agency staff “regarding how to maintain the agency’s operational records and what to do with them when they are no longer needed for current business.”²²⁰ “The disposition instructions state whether individual series of records are ‘permanent’ or ‘temporary,’ as well as how long to retain the records.”²²¹ “Records with historical value, identified as ‘permanent,’ are transferred to [NARA] at the end of their retention period.”²²² “All other records are identified as ‘temporary’ and are eventually destroyed in accordance with the NARA records schedule or the General Records Schedule.”²²³ “In the absence of an applicable records schedule, records must be treated as permanent until they are scheduled.”²²⁴

“After an agency has identified social media content as a Federal record, it must [also] determine whether an existing disposition authority applies, including the General Records Schedules (GRS).”²²⁵ “If the content is not covered by an existing authority, a new schedule should be developed.”²²⁶ “An agency should develop a new records schedule if social media users enhance the content by adding comments, metadata, or other information that becomes part of the complete record.”²²⁷ “If agencies change the way they use a social media tool, then that may affect the record-value of the information.”²²⁸ Agencies are expected to also “consider regularly reviewing their social media tools and associated records schedules.”²²⁹

For example, the “EPA’s records schedules are media-

<https://www.archives.gov/records-mgmt/rcs/schedules/index.html>.

²¹⁹ *NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88.

²²⁰ NAT’L ARCHIVES & RECORDS ADMIN., NARA RECORDS SCHEDULE, <https://www.archives.gov/about/records-schedule> (last updated July 1, 2020).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

neutral”²³⁰ and are inclusive of social media.²³¹ In its social media policy, the EPA offers a procedure for all agency employees to follow when managing social media records.²³² New content “created with social media tools qualifying as a federal record must be captured and maintained in a recordkeeping system that complies with the EPA’s Record Management Policy.”²³³ The social media policy also describes the protocol for identical content on multiple mediums and provides guidance on whether supplemental information to social media content may constitute a new record and require preservation in the recordkeeping system.²³⁴ The EPA social media policy also provides options for retention, such as saving in a shared drive, saving in the Enterprise Content Management System (ECMS), and taking screenshots and saving in a word processing package.²³⁵ The policy also prohibits the deletion of social media activity, posts, or comments made by the agency on third-party or EPA-hosted social media sites.²³⁶

Similarly, the Department of Defense (DoD) released a memo outlining the transition and archiving of all official social media accounts across the agency, “including accounts run by or for Presidential appointees confirmed by the Senate and other political appointees.”²³⁷ “[O]fficial accounts must either be: (1) transferred to the next Administration or (2) closed.”²³⁸ “Within 30 days after the departure of the official associated with the

²³⁰ “The EPA’s records schedules are media-neutral, [which] means that they apply to any form of record (e.g., in hardcopy paper, computer disc, audio recording, social media, etc.). See EPA MANAGING SOCIAL MEDIA RECORDS PROCEDURE, *supra* note 102.

²³¹ *Id.*

²³² *Id.* at 1.

²³³ *Id.* at 2. See U.S. ENVTL. PROTECTION AGENCY, INFORMATION DIRECTIVE INTERIM POLICY (2018), <https://www.epa.gov/sites/production/files/2018-09/documents/interim-records-mgmt-policy-20180822.pdf>.

²³⁴ *Id.* at 2.

²³⁵ *Id.* at 2–3.

²³⁶ *Id.* at 3.

²³⁷ WASH. HEADQUARTERS SERVS. RECORDS, PRIVACY AND DECLASSIFICATION DIVISION, OSD RECORDS & INFO. MGMT. PROGRAM, PROCEDURES FOR ARCHIVING SOCIAL MEDIA ACCOUNTS OF OSD COMPONENTS, WASHINGTON, <https://www.esd.whs.mil/Portals/54/OSD%20RIM%20Procedures%20for%20Archiving%20Social%20Media%20Sites%2018%20Jan%2017.pdf> (last updated Jan. 18, 2017).

²³⁸ *Id.*

institutional account, content posted to the account must be managed and preserved in accordance with the proper records schedule.”²³⁹ “For example, content posted on the Secretary of Defense’s Twitter account, @SecDef, will be managed in accordance with the records schedule in File Series 200 of DoD Administrative Instruction 15, Volume II.”²⁴⁰ Under File Series 200, social media content is considered temporary and is categorized as insider threat information.²⁴¹ The disposition directive is to cut off the data annually and destroy the data three years after the cutoff.²⁴² The DoD memo also offers detailed instruction sheets on how to download archives located on Twitter, LinkedIn archive, LinkedIn, SlideShare, Google (including Google+ and YouTube videos), Instagram, Flickr, and Facebook.²⁴³

“Senior agency officials for records management (SAORM) in Executive Branch departments and agencies are required to submit to NARA their annual SAORM report.”²⁴⁴ NARA uses SAORM reports to “determine the overall progress of the Federal Government in managing its records and the transition away from paper to digital formats, and to identify best practices and model solutions within Federal agencies.”²⁴⁵ In the SAORM report, agencies, at a minimum, are required to report whether

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ DEP’T OF DEF., OSD RECORDS DISPOSITION SCHEDULES, SERIES 200 – MANAGEMENT AND OPERATIONS, https://www.esd.whs.mil/Portals/54/Documents/RPDD/RDS/200_Series_Management_and_Operations.pdf?ver=2019-07-08-130514-510 (describing insider threat information files as data collected and maintained by insider threat programs undertaking analytic and risk-based data collection activities to implement insider threat directives and standards).

²⁴² *Id.* NARA recognizes that obsolescence of technology is a major challenge when retaining data. Kenneth Thibodeau, *NARA’s Electronic Records Archives Program*, 96 LAW LIBR. J. 633, 635 (2004).

²⁴³ PROCEDURES FOR ARCHIVING SOCIAL MEDIA ACCOUNTS OF OSD COMPONENTS, *supra* note 237.

²⁴⁴ In contrast, Legislative Branch agencies are not required to submit a report, although some voluntarily comply. See NAT’L ARCHIVES & RECORDS ADMIN., SENIOR AGENCY OFFICIALS FOR RECORDS MANAGEMENT ANNUAL REPORTS, <https://www.archives.gov/records-mgmt/resources/saorm-reports> (last visited July 23, 2020).

²⁴⁵ See NAT’L ARCHIVES & RECORDS ADMIN., SENIOR AGENCY OFFICIAL FOR RECORDS MANAGEMENT 2019, <https://www.archives.gov/files/records-mgmt/agency/usdt-saorm-2019.pdf>.

they are managing all permanent electronic records in electronic format on an annual basis.²⁴⁶ Additionally, agencies are asked to report whether any progress was made toward managing all permanent and temporary records in electronic format.²⁴⁷ SAORMs must also demonstrate that the agency has “taken steps to ensure that their records management program complies with the Federal Records Act and its regulations through strategic plans including performance goals, objectives, and measures.”²⁴⁸ Agencies must also detail what procedures and documentation are in place “to ensure records of outgoing senior officials[] are properly captured and/or processed and not improperly removed, altered, or deleted including electronic records and email.”²⁴⁹

“[A]ny alteration, deletion, destruction, or removal of records . . . without following the applicable records schedule must be promptly reported to NARA.”²⁵⁰ For example:

If an agency head learns of any ‘actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or destruction of records in the custody of the agency,’ he or she—with the assistance of the Archivist—is to notify the Attorney General to initiate an investigation and any necessary recovery efforts. If any agency head does not notify the Archivist of an allegation or instance of unlawful removal, the FRA authorizes the Archivist to initiate action with the Attorney General for the possible recovery of such records. The FRA, as amended, requires the Archivist to notify Congress of instances in which he or she must initiate such action with the Attorney General. Anyone found guilty of ‘willfully and unlawfully’ concealing, removing, mutilating, obliterating, destroying, or attempting to do any such action against a federal record, can be fined and imprisoned for up to three years. In addition to fines and possible imprisonment, anyone holding federal office who is convicted of this crime can lose his or her position and be

²⁴⁶ *See id.*

²⁴⁷ *See id.*

²⁴⁸ *See id.*

²⁴⁹ *See id.*

²⁵⁰ Arian Ravanbakhsh, *Records Management of Social Media and Electronic Records*, BLOG: CHIEF RECORDS OFFICER FOR U.S. GOV. (Jan. 27, 2017), <https://records-express.blogs.archives.gov/2017/01/27/records-management-of-social-media-and-electronic-records/>.

disqualified from holding federal office in the future.²⁵¹

B. Records Management and Preservation Standards – Presidential Records

The PRA establishes three basic requirements for handling presidential records during a president's tenure.²⁵² The Act requires records "shall, [and] to the extent practicable, be categorized as Presidential records or personal records upon their creation of receipt and be filed separately."²⁵³ The PRA defines "presidential records" broadly to include all "documentary materials . . . created or received by the President, [and] the President's immediate staff . . . in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."²⁵⁴ For example, "the White House automatically archives 'tweets' from official White House accounts."²⁵⁵ "On Facebook, the White House also automatically archives all content created by White House pages."²⁵⁶ Additionally, the White House also captures some public engagement on social media.²⁵⁷ These archives would remain in the exclusive legal custody of the President until the end of their term.²⁵⁸ Prior to leaving office, the President may restrict public access to certain records.²⁵⁹ "Specifically, the PRA allows public access to Presidential records through the Freedom of Information Act (FOIA) beginning five years after the end of the Administration,²⁶⁰ but allows the President to invoke as many as

²⁵¹ GINSBERG, *supra* note 187, at 11.

²⁵² 44 U.S.C. § 2203(b) (2016).

²⁵³ *Id.*

²⁵⁴ 44 U.S.C. § 2201(2) (2016).

²⁵⁵ WHITE HOUSE, PRIVACY POLICY <https://www.whitehouse.gov/privacy-policy/> (last visited July 23, 2020).

²⁵⁶ *Id.*

²⁵⁷ *See id.*

²⁵⁸ 44 U.S.C. § 2203(f) (2016).

²⁵⁹ 44 U.S.C. § 2204(a) (2016).

²⁶⁰ 44 U.S.C. § 2204(a). Such records must fall within one of the categories described by FOIA Exemptions 1, 3, 4, and 6, or must relate to appointments to federal office or consist of confidential communications requesting or submitting advice between the President and his or her advisers or between such advisers.

six specific restrictions to public access for up to twelve years.”²⁶¹

The PRA also “[c]odifies the process by which former and incumbent Presidents conduct reviews for executive privilege prior to public release of records by NARA.”²⁶² This process had been “formerly . . . governed by Executive Order 13489.”²⁶³ The PRA “[e]stablishes procedures for Congress, courts, and subsequent Administrations to obtain ‘special access’ to records from NARA that remain closed to the public, following a privilege review period by the former and incumbent Presidents.”²⁶⁴ “[T]he procedures governing such special access requests continue to be governed by the relevant provisions of [Executive Order] 13489.”²⁶⁵ The PRA also “[e]stablishes preservation requirements for official business conducted using non-official electronic messaging accounts.”²⁶⁶ One who creates Presidential records can use non-official electronic messaging accounts only when “that individual copies an official account as the message is created or forwards a complete copy of the record to an official messaging account.”²⁶⁷ The PRA “[p]revents an individual who has been

²⁶¹ 44 U.S.C. §§ 2204(a), (b)(1)(A)(ii). There are six specific restrictions: when the information is “(1) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order; (2) relating to appointments to Federal office; (3) specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code), provided that such statute (A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of material to be withheld; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) confidential communications requesting or submitting advice, between the President and the President’s advisers, or between such advisers; or (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

²⁶² 44 U.S.C. § 2204(a); *see generally* Exec. Order No. 13,489, 74 Fed. Reg. 4,669 (Jan. 26, 2009).

²⁶³ 44 U.S.C. § 2204(a).

²⁶⁴ 44 U.S.C. § 2204(a); *see* Exec. Order No. 12,667, 54 Fed. Reg. 3,403 (Jan. 16, 1989).

²⁶⁵ 44 U.S.C. § 2204(a); *see generally* Exec. Order No. 13489, 74 Fed. Reg. at 46670.

²⁶⁶ 44 U.S.C. § 2204(a); *see generally* 44 U.S.C. § 2209 (2014).

²⁶⁷ 44 U.S.C. § 2204(a); *see also* Citizens for Responsibility & Ethics in Washington v. Trump, 924 F.3d 602, 607-08 (D.C. Cir. 2019) (discussing how notice and instruction from White House counsel to its staff to comply with PRA was sufficient to hold that presidential staffers, and by extension, the President,

convicted of a crime related to the review, retention, removal, or destruction of records from being given access to any original records.”²⁶⁸ The Executive Office of the President (EOP) also has its own disposition plan.²⁶⁹

IV. PROBLEMS WITH GOVERNMENTAL USE OF SOCIAL MEDIA AND ITS IMPACT ON DISCLOSURE AND ACCESS UNDER THE FREEDOM OF INFORMATION ACT

The law is researched by those seeking to interpret it.²⁷⁰ When the law is published in print, researchers can be assured that the law—and the history behind it—is immutable or at least difficult to change.²⁷¹ The rapid transition to a digital government designates social media as a new source of legal information that courts and researchers cannot ignore.²⁷² However, the

were not violating the PRA through their use of automatically-disappearing text messages through private text messaging platforms). White House counsel issued a memorandum describing staff’s PRA preservation and categorization obligations, prohibiting use of message-deleting applications, restricting electronic communications to official accounts that automatically preserved records, and instructing personnel on which devices to conduct their work. *See* Citizens for Responsibility & Ethics in Washington, 924 F.3d at 607–08.

²⁶⁸ *See* 44 U.S.C. § 2204(f).

²⁶⁹ 44 U.S.C. § 2204(a). *See, e.g.*, Memorandum from Eggleston, *supra* note 138 (“To the extent possible, the EOP will keep institutional accounts—those associated with an agency/component (e.g., @WhiteHouse) or with an institutional position (e.g., @POTUS)—at EOP for use by the next Administration.”) (“[Similarly,] to the extent possible, EOP will transfer individual accounts—those associated with a particular Administration employee (e.g., @Goldman44)—to NARA to be preserved within each platform”).

²⁷⁰ *See Legal Research*, CORNELL L. SCH.,

https://www.law.cornell.edu/wex/legal_research (last visited Oct. 12, 2020) (providing the definition for legal research).

²⁷¹ *See* Anna Russell & Jane Larrington, *Authenticating the John Hancock of Online Primary Legal Materials*, AALL SPECTRUM 17 (June 2013), <https://www.aallnet.org/wp-content/uploads/2017/12/vol-17-No-8-digital-authentication.pdf> (discussing generally that researchers “take for granted the authenticity and official status of legal primary source documents” that are produced in print because “well-known publishers and long-established printing practices provide a reliable chain of custody”).

²⁷² *See generally* Tony Tran & Yael Bar-Tur, *Social Media in Government: Benefits, Challenges and How it’s Used*, HOOTSUITE.COM (Mar. 26, 2020), <https://blog.hootsuite.com/social-media-government/#:~:text=There%20are%20many%20key%20benefits,and%20durin,g%20times%20of%20crisis.&tex=On%20social%2C%20people%20can%20engage,a%20chance%20to%20engage%20back> (discussing the use of social media by

dissemination of government information via social media has outpaced the government's ability to organize and archive the information in the same ways that it could do with traditional records.²⁷³ When the content of government information can be easily changed and the question of what or what is not a "record" is at issue, a researcher is unable to get a complete—or even accurate—picture of the law.²⁷⁴

Even if an agency is preserving deleted social media content within an agency records management system, the records may never see the light of day.²⁷⁵ First, the government has relied on third-party vendors for the dissemination and preservation of government information born on social media.²⁷⁶ Second, it is often uncertain and opaque what retention periods are being assigned to social media records and they could be very short retention periods.²⁷⁷ Additionally, even if a deleted social media post is preserved somewhere within an agency records management system, it is usually not accessible except via FOIA request absent an alternative requirement to post it online.²⁷⁸ Third-party databases capturing social media in real time and

the public sector).

²⁷³ See, e.g., Page Freezer, *Social Media Recordkeeping Considerations for Government Agencies*, NACO.COM (Apr. 25, 2019), <https://www.naco.org/blog/social-media-recordkeeping-considerations-government-agencies> (providing that the demand on recordkeeping is overwhelming).

²⁷⁴ See *id.* (articulating the issues surrounding digital authentication, including but not limited to, verifying the data originates from a governmental entity, ensuring that the data has not been altered, and the preservation of an official version of the law).

²⁷⁵ See SOCIAL MEDIA: FEDERAL AGENCIES NEED POLICIES AND PROCEDURES FOR MANAGING AND PROTECTING INFORMATION THEY ACCESS AND DISSEMINATE, *supra* note 127 (discussing procedures and issues surrounded by managing and protecting government information and social media services).

²⁷⁶ *Id.* at 1 ("The use of these services by federal agencies was endorsed . . . [for] promoting transparency and open government . . . and to harness new technologies to put information about their operations and decisions online so that it would be readily available to the public.").

²⁷⁷ See NARA *Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88 (discussing recommendations for federal agencies managing records when agencies use social media platforms).

²⁷⁸ See GREGORY C. WILSHUSEN, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-872T, CHALLENGES IN FEDERAL AGENCIES' USE OF WEB 2.0 TECHNOLOGIES 10-11 (2010), <http://www.gao.gov/new.items/d10872t.pdf> (discussing the challenges federal agencies are presented with in protecting government records with the increase use of internet technologies).

preserving them could perhaps be far more reliable for access, however, many—if not all—of these databases are fee-based and the once-public information is behind a paywall.²⁷⁹

A. *Social Media Is Outside of the Government's Control*

Archiving and preserving posts is not a predominant feature in most social media platforms.²⁸⁰ Therefore, the use of third-party providers without the assurance of complying with archiving and preservation guidelines and regulations for public information becomes problematic.²⁸¹ “[A] social media provider could discontinue their service²⁸² or delete information from an agency’s account.”²⁸³ “[A]gencies may stop using a social media platform at any time.”²⁸⁴ In any situation, “the agency is not relieved of its records management and possible capture obligations.”²⁸⁵ In an effort to mitigate this risk, NARA developed the following general clause for use in the standard GSA Terms of Service agreement:

The Agency acknowledges that use of contractor’s site and services may require management of Federal records. Agency and user-generated content may meet the definition of Federal records as determined by the agency. If the contractor holds Federal records, the agency and the contractor must manage Federal records in accordance with all applicable records management laws and regulations, including but not limited to

²⁷⁹ See Sharon Ringel & Angela Woodall, *A Public Record at Risk: The Dire State of News Archiving in the Digital Age*, COLUM. JOURNALISM REV. (Mar. 28, 2019), https://www.cjr.org/tow_center_reports/the-dire-state-of-news-archiving-in-the-digital-age.php (discussing practices of archiving and preserving material in the digital age).

²⁸⁰ See Rachel Woody, *Responses & Retrospectives: Rachel Woody on Myspace and the Precarity of User Content on Social Media Platforms*, ARCHIVES AWARE (July 11, 2019), <https://archivesaware.archivists.org/2019/07/11> (discussing current and historical issues surrounding social media platforms and implications for the archives profession).

²⁸¹ SARAH DAY THOMSON, DIGITAL PRESERVATION COALITION, PRESERVING SOCIAL MEDIA 12 (2016) (discussing the costs of using third-party providers).

²⁸² NARA acknowledges obsolescence as a common problem when preserving electronic records. See Thibodeau, *supra* note 242 (explaining that there is a risk to lose digital records because there is a likelihood that a researcher will lose the ability to access the record through the obsolescence of technology).

²⁸³ See NARA *Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

the Federal Records Act (44 U.S.C. chs. 21, 29, 31, 33), and regulations of the National Archives and Records Administration (NARA) at 36 CFR Chapter XII Subchapter B). Managing the records includes, but is not limited to, secure storage, retrievability, and proper disposition of all Federal records including transfer of permanently valuable records to NARA in a format and manner acceptable to NARA at the time of transfer. The agency is responsible for ensuring that the contractor is compliant with applicable records management laws and regulations through the life and termination of the contract.²⁸⁶

“This clause does not include stipulations about capture.”²⁸⁷
“Therefore, agencies must determine capture-related issues and include them in agreements with providers when possible.”²⁸⁸
“Agencies that have contracts for cloud computing services are expected to follow this records management guidance,” but ultimately have discretion to negotiate these contracts while balancing other additional legal and security requirements to meet their business needs.²⁸⁹

Since 2009, the federal government has engaged in creating new policies as well as standardizing the usage of social media platforms among all the federal agencies, the White House, and the U.S. Congress.²⁹⁰ The GSA developed a series of guidelines

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88. For example, agencies must consider how personally identifiable information (PII) is handled and how they will mitigate potential privacy risks. Memorandum from Clay Johnson III, Deputy Dir. for Mgmt., on Safeguarding Against and Responding to the Breach of Personally Identifiable Information, to the Heads of Exec. Dep'ts and Agencies (May 22, 2007). Agencies may not need, or may not want, to collect PII and must factor it into their records management program. *Id.* As a result, agencies, such as NARA, may produce a Privacy Impact Statement to address these privacy concerns. See Scott & Scott LP, *Negotiating Contracts: 12 Key Terms to Negotiate in a Software as a Service or Cloud Service Agreement*, LEXOLOGY (Apr. 25, 2017), <https://www.lexology.com/library/detail.aspx?g=8ed191ca-f24e-4919-9196-db5d7980b261>. See generally NAT'L ARCHIVES & RECORDS ADMIN., TWITTER PRIVACY ASSESSMENT, <https://www.archives.gov/files/privacy/privacy-impact-assessments/twitter.pdf> (identifying system subject to personally identifiable information and conduction of a privacy assessment.)

²⁹⁰ See Jill R. Aitoro, *GSA Signs Deals for Agencies to Use Social Networking Sites*, NEXTGOV (Mar. 25, 2009), <https://www.nextgov.com/technology-news/2009/03/gsa-signs-deals-for-agencies-to-use-social-networking-sites/43426/> (providing that the GSA has entered into agreements with social media sites).

which aim to help federal agencies navigate and utilize social media platforms amid current government regulation.²⁹¹ Other federal institutions, such as NARA and the Library of Congress, have joined such efforts. These institutions guide and mentor the agencies or government officials trying to make sense of the ever-changing landscape of social media.²⁹²

In 2010, the Library of Congress took the unprecedented action to archive all tweets, and to provide access to all of them.²⁹³ Twitter donated “its digital archive of public tweets to the Library of Congress.”²⁹⁴ The Library of Congress’ former Director of Communications, Matt Raymond, posted on the Library of Congress blog:

In addition to looking at preservation issues, the Library [of Congress] will be working with academic research communities to explore issues related to researcher access. The Twitter collection will serve as a helpful case study as we develop policies for research use of our digital archives. Tools and processes for researcher access will be developed from interaction with researchers as well as from the Library’s ongoing experience with serving collections and protecting privacy rights.²⁹⁵

A few years later, the Library of Congress recognized the need to consider its own limited resources, concentrate on archiving tweets, and build a sustainable platform.²⁹⁶ Gayle Osterberg, in

²⁹¹ *Id.* (discussing that several government agencies have utilized a template provided by the GSA when working with providers).

²⁹² See Patricia C. Franks, *How Federal Agencies Can Effectively Manage Records Created Using New Social Media Tools*, BUS. GOV’T MAG. 86, 89 (Spring/Summer 2011), <http://www.businessofgovernment.org/sites/default/files/Spring%20Summer%202011.pdf> (discussing the challenges associated with effective records management when an agency uses a social media tool and providing some recommendations on how to best address issues internally); RECORD MANAGEMENT BASIC AWARENESS 2020, <http://www.loc.gov/extranet/cld/RMAwarenessQuiz/#nara-role> (last visited Nov. 14, 2020).

²⁹³ Matt Raymond & Greg Pass, *Twitter Donates Entire Tweet Archive to Library of Congress*, LIB. OF CONG. (Apr. 15, 2010), <https://www.loc.gov/item/prn-10-081/twitter-archive-to-library-of-congress/2010-04-15/>.

²⁹⁴ *Id.*

²⁹⁵ Matt Raymond, *The Library and Twitter: An FAQ*, LIB. OF CONG. (Apr. 28, 2010), <https://blogs.loc.gov/loc/2010/04/the-library-and-twitter-an-faq/>.

²⁹⁶ See Gayle Osterberg, *Update on the Twitter Archive at the Library of Congress*, LIB. OF CONG. (Dec. 26, 2017), <https://blogs.loc.gov/loc/2017/12/update-on-the-twitter-archive-at-the-library-of-congress-2/?loclr=blogloc>.

her former role as the Library of Congress' Director of Communications, stated, "The Library will work with Twitter to acquire tweets on a selective basis."²⁹⁷

Preservation of the government's communication on social media platforms goes to the very heart of an overarching problem: the government is using a privately-owned platform to spread public information.²⁹⁸ Much like any other user, if the government wants to use the platform, they need to register and make use of the features solely available on the platform.²⁹⁹ Even if the initial intention of archiving tweets was to provide access for research, the quality of the research will be diminished if selective archiving results in incomplete records.³⁰⁰

Recordkeeping is further complicated when social media companies may elect to restrict or provide commentary to social media content posted by the government.³⁰¹ As COVID-19 limited in-person voting, there was a trend towards states permitting or encouraging more people to vote from home via absentee/mailed ballots, or shifting to all-mail elections.³⁰² In response, on May 26, 2020, President Donald Trump tweeted, "There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed. The Governor of California is sending Ballots to millions of people,

²⁹⁷ *Id.*

²⁹⁸ *Cf.* Knight First Amendment Inst., 928 F.3d at 231 n.2 (2d Cir. 2019) (stating that no user can pick and choose which features to have on their account as any and all features are available equally to everyone and even a governmental account cannot choose to have features not available to other users).

²⁹⁹ *Id.*

³⁰⁰ *See* Osterberg, *supra* note 296 ("The Library took this step for the same reason it collects other materials – to acquire and preserve a record of knowledge and creativity for Congress and the American people.").

³⁰¹ *See, e.g.,* Nandita Bose & Jeff Mason, *Trump Move Could Scrap or Weaken Law That Protects Social Media Companies*, REUTERS (May 28, 2020, 1:51 AM), <https://www.reuters.com/article/us-twitter-trump-executive-order-social/trump-move-could-scrap-or-weaken-law-that-protects-social-media-companies-idUSKBN2340MW> (stating that Twitter flagged the President's tweets regarding "unsubstantiated claims of fraud about mail-in voting").

³⁰² *See* NAT'L CONF. OF STATE LEGISLATURES, ABSENTEE AND MAIL VOTING POLICIES IN EFFECT FOR THE 2020 ELECTION (Oct. 16, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx>.

anyone.”³⁰³ As a result, Twitter appended this tweet with an alert that “the company has introduced [in an effort to] combat misinformation and disputed or unverified claims.”³⁰⁴ In contrast, Facebook CEO Mark Zuckerberg indicated that he believed that social media companies should not be “arbiters of truth,” leaving the public to make up their own minds.³⁰⁵ To date, it is still unclear how long Twitter will continue fact-checking social media content, particularly those that come from governmental agencies and officials, and whether others will follow suit.³⁰⁶ As social media continues to outpace print newspapers in the United States as a news source,³⁰⁷ there is societal pressure on social media platforms³⁰⁸ to responsibly address and validate the veracity and authenticity of social media content and its impact on public trust.³⁰⁹ Instead, the government must be able to

³⁰³ Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2020, 8:17 AM), <https://twitter.com/realDonaldTrump/status/1265255835124539392>.

³⁰⁴ Brian Fung, *Twitter Labeled Trump Tweets With a Fact Check for the First Time*, CNN BUS. (May 27, 2020), <https://www.cnn.com/2020/05/26/tech/twitter-trump-fact-check/index.html>.

³⁰⁵ David Priest, *Mark Zuckerberg: Social Media Platforms Shouldn't Fact-Check Trump*, CNET (May 28, 2020, 7:07 AM), <https://www.cnet.com/news/mark-zuckerberg-says-social-media-platforms-should-not-fact-check-trump/>.

³⁰⁶ See Exec. Order No. 13,925, 85 Fed. Reg. 34,079, 34,081 (Jun. 2, 2020) (asserting that fact-checking by social media companies is censorship that hurts the “national discourse,” and directing federal and state entities to review speech restrictions by social media companies and assess whether there are “unfair or deceptive acts or practices.”).

³⁰⁷ Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RESEARCH CTR. (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/>.

³⁰⁸ See Renee Diresta, *Social Media Fact-Checking Is Not Censorship*, SLATE (June 4, 2020, 11:03 AM), <https://slate.com/technology/2020/06/twitter-fact-checking-trump-misinformation-censorship.html> (asserting that fact checking is not censorship and discussing how technology platforms curate and rank the information according to an algorithm that considers what topics are getting the highest engagement across social media user communities, the sources users read, and what social media users are most likely to be personally interested in, or click on); see also Priest, *supra* note 305.

³⁰⁹ The American Press Institute discusses how journalists often describe the essence of their work as finding and presenting “the facts” and “the truth about the facts.” See Walter Dean, *Journalism as a Discipline of Verification*, AM. PRESS INST., <https://www.americanpressinstitute.org/journalism-essentials/verification-accuracy/journalism-discipline-verification/> (last visited July 23, 2020).

guarantee that the information it posts on social media is accurate at all times.³¹⁰

B. Not All Records Are Eligible for Permanent Retention

Web publishing has offered the government a powerful way of giving the public access to information.³¹¹ “[W]hen information is born digital and available exclusively from a webpage, it seriously complicates the issues of preservation, consequently threatens the public’s ability to access information over time.”³¹² There are “[p]ublic expectations that all electronic messages are permanently valuable and immediately accessible.”³¹³ However, less than five percent of the records that are created by an agency are considered permanent and later transferred to NARA for legal custody.³¹⁴

C. Executive Branch Documents Have Inconsistent Retention Standards

Record preservation is also complicated by some of the functionalities of social media platforms. Although some of these platforms can act as electronic messaging systems, they may not be designed with “the ability to identify, capture, and preserve records.”³¹⁵ The use of multiple social media platforms and the

³¹⁰ See 36 C.F.R. § 1236.10(a) (“[R]eliability is defined as [c]ontrols to ensure a full and accurate representation of the transactions, activities or facts to which they attest and can be depended upon in the course of subsequent transactions or activities.”) (providing that reliability is one of the records management controls that are required to “ensure that Federal records in electronic information systems can provide adequate and proper documentation of agency business for as long as the information is needed.”); see also 5 C.F.R. § 2635.101 (citing that “[p]ublic service is a public trust”).

³¹¹ See Rebecca Kunkel, *Law Libraries and the Future of Public Access to Born-Digital Government Information*, 109 LAW LIBR. J. 67 (2017) (“Many observers assume that the shift toward electronic publishing has improved access to government information.”).

³¹² *Id.* at 69, 71 (detailing the issues surrounding web archiving, particularly around fugitive documents).

³¹³ NARA Bulletin 2015-02: *Guidance on Managing Electronic Messages*, *supra* note 105.

³¹⁴ FOIA REFERENCE GUIDE, *supra* note 86.

³¹⁵ NARA Bulletin 2015-02: *Guidance on Managing Electronic Messages*, *supra* note 105.

variety of devices used to communicate also adds multiple intricate layers to recordkeeping and maintaining data integrity³¹⁶ and authenticity.³¹⁷ Social media may include content that may require removal from the site for being inconsistent with an agency's comment and posting policies.³¹⁸ The deletion or modification of social media posts makes it difficult to capture complete records, including metadata and any attachments, in a manner that ensures authenticity and availability.³¹⁹ The Archivist may be able to determine what constitutes as a permanent record, but agencies are otherwise left to determine their own records disposition guidelines.³²⁰ In 2016, Neil Eggleston, the Counsel to the President, sent a memo to heads of executive departments detailing "the disposition plan of the Executive Office of the President for its official [social media] accounts."³²¹ Eggleston further asked agencies to "develop their own disposition plans consistent with this guidance."³²² In the memo, Eggleston indicated that it was not necessary for agencies to "follow [the Executive Office of the President]'s disposition

³¹⁶ See 36 C.F.R. § 1236.10(c) ("[Integrity is defined as] [c]ontrols, such as audit trails, to ensure records are complete and unaltered.") (providing that integrity is one of the records management controls required to "ensure that Federal records in electronic information systems can provide adequate and proper documentation of agency business for as long as the information is needed.").

³¹⁷ See 36 C.F.R. § 1236.10(b) ("[Authenticity is defined as] [c]ontrols to protect against unauthorized addition, deletion, alteration, use, and concealment.") (providing that authenticity is one of the records management controls required to "ensure that Federal records in electronic information systems can provide adequate and proper documentation of agency business for as long as the information is needed.").

³¹⁸ *NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88 ("Some removed content, such as spam, may be non-record while other types of content are records that must have an approved disposition authority."). Since non-records can be subject to FOIA, agencies are expected to "consult with agency counsel" about preservation policies that are consistent with the disclosure requirements for FOIA. *Id.*

³¹⁹ See 36 C.F.R. § 1236.10(b) ("Retention of record functionality and integrity requires: . . . maintaining a link between records and their metadata through conversion or migration, including capture of all relevant associated metadata at the point of migration (for both the records and the migration process.)"). 36 C.F.R. § 1236.14(b).

³²⁰ See RICHARD A. WIRE, *DISPOSITION OF FEDERAL RECORDS: A RECORDS MANAGEMENT HANDBOOK* (2000) (explaining the Archivist's role of assisting agencies with determining permanent records).

³²¹ Memorandum from Eggleston, *supra* note 138.

³²² *Id.*

plan.”³²³ Instead, agencies are expected to “develop their own plans consistent with the guidance in [the] memorandum and with applicable records requirements.”³²⁴

In deciding how to manage records, the social media working group within each agency is expected to apply the definition of a federal record to social media content and identify a complete record, including the content, context, structure, and necessary metadata.³²⁵ This is difficult when temporary records “may not need to be captured and can be maintained in the social media platform.”³²⁶ Capture³²⁷ is only deemed “important for temporary records with long-term retentions or for permanent records.”³²⁸ Permanent records “should be exported from the social media platform into an agency recordkeeping system.”³²⁹ Agency needs will dictate whether capture is done in-house or using a third-party provider, and what social media capture method is used.³³⁰ If an agency decides to use a third-party provider, and the “provider can export a complete record, the agency should include a clause in the Terms of Service agreement that specifies how

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88.

³²⁶ *Id.* When determining whether temporary records will be left in the social media platform, the agency is expected “to assess their business needs and evaluate risks associated with leaving [temporary] records in social media.” *See id.*

³²⁷ *See id.* When determining how to capture data, agencies must consider any existing procedures for data collection, whether tools and resources are in place for collection, and how the data will be used later to fulfill institutional needs. *See id.* NARA has published a white paper discussing best practices for the capture of social media records. *See* NAT’L ARCHIVES & RECORDS ADMIN., WHITE PAPER ON BEST PRACTICES FOR THE CAPTURE OF SOCIAL MEDIA RECORDS (May 2013), <https://www.archives.gov/files/records-mgmt/resources/socialmediacapture.pdf>.

³²⁸ *NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88.

³²⁹ *Id.* *But see* Thibodeau, *supra* note 242 (acknowledging that proper preservation of digital information requires systems that will be able to evolve over time, otherwise the system itself will compound the problems of preservation, rather than solve them). Kenneth Thibodeau, *The Electronic Records Archives Program at the National Archives and Records Administration* (July 2007), <https://journals.uic.edu/ojs/index.php/fm/article/view/1922/1804>.

³³⁰ *NARA Bulletin 2014-02: Guidance on Managing Social Media Records*, *supra* note 88.

and when this will occur.”³³¹ “This clause should state that export shall occur before the provider deletes or destroys the Federal records that reside on their systems. It should include instructions for notification and export requirements if the provider goes out of business or is bought by another company.”³³²

D. Record Preservation Does Not Always Equal Record Disclosure

Even if a social media post is preserved somewhere within an agency records management system, this content is not accessible except via FOIA request, absent an alternative requirement to post it online.³³³ There is nothing that says that all federal records have to be disclosed, only agency records that meet the disclosure requirements for FOIA.³³⁴ NARA is subject to FOIA in two ways: as an agency required to disclose its own agency records³³⁵ and as a data custodian of permanent agency records.³³⁶ NARA is able to disclose records pertaining to other agencies *only* after it receives legal custody of those records.³³⁷ Legal custody transfers when agencies pass permanent records to NARA for archiving.³³⁸ Until agencies transfer these permanent

³³¹ *Id.*

³³² *Id.*

³³³ FOIA REFERENCE GUIDE, *supra* note 86.

³³⁴ See 5 U.S.C. § 552(f)(2) (2016) (providing what constitutes an agency and a record for purposes of FOIA).

³³⁵ See 44 U.S.C. § 2102 (1988) (establishing the National Archives and Records Administration as an “independent establishment in the executive branch”). NARA has legal custody of the records in the National Archives of the United States, and NARA can make release decisions when there is a FOIA request. NAT’L ARCHIVES & RECORDS ADMIN., NARA ELECTRONIC READING ROOM/FOIA LIBRARY, <https://www.archives.gov/foia/electronic-reading-room> (last visited Oct. 24, 2020). NARA can provide access to these records, but the requester will need to visit NARA to see the records, as they are “located at NARA’s archival facilities in the Washington, DC area and around the country, as well as at [the] Presidential Libraries.” *Id.*

³³⁶ See 36 C.F.R. § 1235.10 (“Agencies must transfer permanent records to the National Archives of the United States records that have been scheduled as permanent.”).

³³⁷ See 36 C.F.R. § 1250.8(a) (2017).

³³⁸ See 36 C.F.R. § 1235.22 (2009) (“Legal custody of records passes from the agency to NARA when the appropriate NARA official signs the SF 258 acknowledging receipt of the records.”); see also NAT’L ARCHIVES & RECORDS

records, federal agencies are expected to disclose any information requested under FOIA directly from the particular agency.³³⁹ Similarly, the PRA may dictate that the U.S. “reserve[s] and retain[s] complete ownership, possession, and control of Presidential records,”³⁴⁰ however, every administration has interpreted the PRA differently.³⁴¹ Additionally, the deletion and modification of social media posts prior to its transfer to NARA impacts the integrity of the presidential record.³⁴² NARA only takes “legal and physical custody of the outgoing administration’s records . . . immediately after the President leaves office.”³⁴³

ADMIN., ACCESSIONING GUIDANCE AND POLICY, <https://www.archives.gov/records-mgmt/accessioning#:~:text=What%20is%20accessioning%3F,nation%20and%20the%20public%20interest> (last visited Oct. 24, 2020) (“Transfer[ring] refers to moving records into the physical custody of NARA,” while accessioning refers to moving records into the legal, and in most cases physical, custody of NARA).

³³⁹ See 36 C.F.R. § 1250.8(c) (stating that NARA’s federal record centers store records that remain in the legal custody of the agencies that created them, and therefore, disclosure and FOIA requests must go through that agency). Unless it falls under one of nine exemptions which protect interests such as personal privacy, national security, and law enforcement, agencies are expected to fulfill FOIA requests. FOIA REFERENCE GUIDE, *supra* note 86. Before permanent records are transferred to NARA, agencies may opt to participate in the Federal Records Program, where they can pay NARA to have physical custody of the records. During this time, the agency still has legal custody over the records and can make release decisions. *Id.* If these records are requested, NARA sends records to the agency. *Id.*

³⁴⁰ 44 U.S.C. § 2202 (1978).

³⁴¹ See NAT’L ARCHIVES & RECORDS ADMIN., PRESIDENTIAL RECORDS ACT (PRA) OF 1978, <https://www.archives.gov/presidential-libraries/laws/1978-act.html> (last visited Sept. 28, 2020) (explaining that each President interprets the PRA differently, as long as the Archivist’s views “on the proposed disposal ha[s] been obtained in writing”).

³⁴² See NAT’L ARCHIVES & RECORDS ADMIN., CTR. FOR ADVANCED SYS. & TECH., ISSUES AND OPTIONS REGARDING MANAGING SOCIAL MEDIA RECORDS OF THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (Dec. 27, 2010), <https://www.archives.gov/files/applied-research/presentations/managing-social-media-records.pdf> (indicating that altering the social media posts affects their integrity); see also 36 C.F.R. § 1236.10 (2009) (“[Integrity is defined as] [c]ontrols, such as audit trails, to ensure records are complete and unaltered.”) (stating that integrity is one of records management controls “needed to ensure that Federal records in electronic information systems can provide adequate and proper documentation of agency business for as long as the information is needed.”).

³⁴³ David S. Ferriero, *NARA’s Role Under The Presidential Records Act And The Federal Records Act*, 49:2 PROLOGUE MAG., NAT’L ARCHIVES, <https://www.archives.gov/publications/prologue/2017/summer/archivist-pra-fra> (last visited Dec. 29, 2020). For example, when President Barack Obama left office, NARA archived the activity on the @POTUS Twitter account on a newly-

E. Third-Parties Offer Access . . . For a Price

The abundance and rapid increase of both the number of government accounts as well as government information posted exclusively on social media means that a significant amount of effort to capture and preserve this information may be required. Legal information companies may be positioned to tackle this issue at an efficient speed.³⁴⁴ Reliable access to complete records requires capturing and preserving social media in real time.³⁴⁵ The short-lived status of social media content is similar to when an agency puts out a memo or policy on their website and it is later superseded or subject to link rot.³⁴⁶ While a copy surely lives somewhere within the agency (and can also be subject to FOIA), it is no longer publicly accessible on an agency website and we rely on third-parties, such as Westlaw, for a copy of the memo that is accessible in a meaningful way.³⁴⁷

On July 28, 2015, ProQuest Congressional launched a new interface which included a “News and Social Media” tab.³⁴⁸ This enhancement would provide researchers with the ability to “retrieve social media content from Senators, Representatives, and Federal agencies.”³⁴⁹ The search could be “filtered by a

created handle @POTUS44. President Obama (@POTUS44), TWITTER, <https://twitter.com/potus44>.

³⁴⁴ See NARA Bulletin 2014-02: *Guidance on Managing Social Media Records*, *supra* note 88.

³⁴⁵ *Id.*

³⁴⁶ See Raizel Liebler & June Liebert, *Something Rotten In The State Of Legal Citation: The Life Span Of A United States Supreme Court Citation Containing An Internet Link (1996–2010)*, 15 YALE J.L. & TECH. 274, 277–78, 300 (2013) (discussing the rising number of links that are provided within Supreme Court cases yet no longer work and how these are still available at NARA, in Washington, D.C.). Link rot refers to the condition of “[i]nternet links no longer working.” *Id.* at 278. Link rot also impacts other legal primary materials, such as cases. *Id.* at 277–278 (discussing how an alarmingly high number of websites cited by the Supreme Court are no longer working).

³⁴⁷ *Id.* at 300–302.

³⁴⁸ See Felicity Murphy, *New ProQuest Congressional Interface Launched*, HUNTER’S QUERY (July 29, 2015), <http://huntersquery.byu.edu/new-proquest-congressional-interface-launched/>.

³⁴⁹ Janet Clarke, *Congressional Tweets? #EnhancedResearch @SBULibraries*, STONY BROOK UNIV. LIB. (Aug. 5, 2015), <https://library.stonybrook.edu/2015/08/05/congressional-tweets-enhancedresearch-sbulibraries/>.

specific date or date range and limited by platform.”³⁵⁰ Researchers could also limit the search by content type, such as “blogs, press releases, and videos.”³⁵¹ “Search results [also] identi[fied] . . . details of the originating source, along with full text links.”³⁵² While the tab still exists on ProQuest Congressional today, the database only contains an archive of social media content and “it is not currently updated.”³⁵³ VoxGov is one vendor who has maintained a collection of government information born-digital as social media.³⁵⁴ The company offers their subscribers unedited documents scraped from federal government websites and social media sources.³⁵⁵ The document types include “Press Releases, News, Notices, Columns, Articles, Op-Eds, Decisions, Opinions, Orders, Events, Media Advisories, Fact Sheets, Newsletters, Bulletins, Recalls, Alerts, Reports, Publications, Speeches, Statements, Remarks, Testimony, and Transcripts, along with Social Media from official government sources, [such as] Twitter, Facebook, [and] You Tube.”³⁵⁶ As of 2017, VoxGov contains over twenty-four million government documents, which are supplemented with extensive metadata to support hashtag filtering and trending.³⁵⁷ While the addition of supplemental metadata may increase the likelihood of a researcher locating the information,³⁵⁸ one must still take into

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Congressional Help: News and Social Media*, PROQUEST LIBGUIDES, <https://proquest.libguides.com/congressionalhelp/news> (last updated Sept. 13, 2019, 12:11 PM).

³⁵⁴ See Jean O’Grady, *VoxGov: A Veritable Goldmine of “Hidden” U.S. Government Insights and Trends*, DEWEY B STRATEGIC (Jan. 19, 2017), <https://www.deweybstrategic.com/2017/01/voxcgov-veritable-goldmine-of-hidden.html> (stating that the website offers “hidden government data . . . for anyone trying to understand [and] track the statements and positions of government agencies and officials related to any issue”).

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*; see also *Actionable Government Intelligence*, VOXGOV, <https://www.voxgov.com/> (last visited Oct. 26, 2020) (stating that the service provides tools for professionals to better “[d]etect trends,” track issues, etc.).

³⁵⁸ See U.S. Patent No. 10,325,221 (filed June 18, 2019) (“Users may desire to obtain descriptions of metadata tags . . . and those descriptions provide more information than the initial hashtag might have included.”). The hashtag system may be fraught with typos or words holding multiple meaning (for example, #goodtrouble may refer to a documentary on the late Representative

consideration that information databases can contain biases.³⁵⁹ Most importantly, none of this government information is accessible to researchers unless they purchase a subscription to these databases.³⁶⁰ Law firms, courts, and academic law libraries make budgetary determinations when considering whether any database subscription is valuable for their business needs.³⁶¹ As an alternative, a researcher could rely on databases containing deleted social media posts that are created by individuals, however, they may have incomplete information or difficulty verifying or authenticating the record.³⁶² Therefore, researchers still may not have access to complete governmental records.³⁶³

V. THE WAY FORWARD: THE NEED FOR CONSISTENT ACCESS AND PRESERVATION OF GOVERNMENT INFORMATION BORN AS SOCIAL MEDIA CONTENT

Traditionally, government information has been deemed reliable and consistent in the way that it is found.³⁶⁴ Legal research has considered authoritative sources, such as case law, legislation, and academic literature, as the main, if not the sole,

John Lewis or it could refer to a television show). *Id.* The use of supplemental tags, or search terms, may open up the possibility of locating relevant information. *Id.* (“Users may desire to obtain descriptions of metadata tags . . . and those descriptions provide more information than the initial hashtag might have included.”).

³⁵⁹ See Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 L. LIBR. J. 387, 388 (2017) (conducting a study demonstrating that system biases and assumptions affected the results provided by some of the major legal database providers).

³⁶⁰ See Kunkel, *supra* note 311, at 75 (“Public libraries that offer free online sources improve their ability to serve patrons who may not have full access to the libraries’ paid subscriptions.”).

³⁶¹ See FREDERICK W. DINGLEY ET AL., COLLECTION DEVELOPMENT, ACQUISITIONS, AND LICENSING 140 (2014).

³⁶² See Heather Small et al., *What Your Tweets Tell Us About You: Identity, Ownership and Privacy of Twitter Data*, 7 INT’L. J. DIG. CURATION 174, 185 (2012) (explaining that deleted social media posts can be compiled into researchers’ collections and databases, but these records can be difficult to authenticate).

³⁶³ See *id.* at 182 (“[E]ven when qualitative data are made available, it typically has low rates of reuse . . . due to the fact that the ‘recovery of context can only ever be partial.’”).

³⁶⁴ See Russell & Larrington, *supra* note 271, at 17.

sources of legal information.³⁶⁵ This notion was confirmed as legal publishers, such as LexisNexis and Westlaw, established methods of access and retrieval that are beneficial to the legal researcher.³⁶⁶

Social media defies the traditional methods of confirming sources of legal authority.³⁶⁷ Companies, such as ProQuest and VoxGov, have tried to provide resources to expedite the tracking, finding, and analyzing of government information in different social media platforms.³⁶⁸ Their attempts to capture this information confirm that social media upends the traditional notions of accountability and transparency in government information.³⁶⁹ Additionally, their willingness to explore solutions when it comes to issues of authenticity and preservation of social media posts confirms that researchers are interested in using government information found on social media platforms.³⁷⁰ The availability and complexity of these vendors' products continue to challenge traditional legal research methods to understand the full extent of public-government interaction.³⁷¹

Unfortunately, a systemic way to retrieve and verify information (similar to how digests and online citators, such as Shepard's and KeyCite, allow researchers to quickly update cases to determine if they still represent 'good law') is still needed.³⁷²

³⁶⁵ See *Authoritative Sources*, U.S. LEGAL, <https://legalresearch.uslegal.com/authoritative-sources> (last visited Oct. 1, 2020).

³⁶⁶ See William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 L. LIBR. J. 543, 552–55 (1984–1985) (discussing the introduction of LexisNexis and later Westlaw into law firms in the 1970s and their benefit to the legal profession).

³⁶⁷ See GINSBERG, *supra* note 187, at 10 (discussing the complexity of e-records and the challenges of managing the records).

³⁶⁸ See *Urban Affairs & Planning: Government & Nonprofit*, VA. TECH. U. LIBR., <https://guides.lib.vt.edu/c.php?g=10471&p=2476200> (last updated Sept. 26, 2020) (discussing ProQuest's and VoxGov's ability to record government documents, including social media).

³⁶⁹ See *id.* (stating that VoxGov updates their content "every 15 minutes").

³⁷⁰ See *New Engagement 365 Days a Year: A Dozen News Databases That Every SU Student Should Know!*, SYRACUSE UNIV. LIBR., <https://researchguides.library.syr.edu/newsengagement> (last updated Apr. 8 2020) (discussing the multiple social media platforms used by VoxGov to obtain government documents).

³⁷¹ See *id.* (providing all the different government information that can be obtained through VoxGov or ProQuest).

³⁷² See *Locating Legal Information in Primary and Secondary Resources: #3:*

Yet government agencies continue to allow and encourage a direct and fast dialogue with both constituents and the general public, while attempting to uphold regulations and government standards when communicating on behalf of the government.³⁷³ As social media platforms are invoked to preserve the historical record, the absence of clear, consistent retention policies for social media compounds the access and preservation issues researchers face when government information can be digitally erased days—or even minutes—after it appears.³⁷⁴ Until clear, consistent retention policies exist and there are systemic ways to access and preserve social media as government information, the definition of a “record” becomes irrelevant.

Introduction to Shepard's Citations, HOWARD W. HUNTER L. LIBR., <https://lawlibguides.byu.edu/c.php?g=315332&p=2106927> (last updated Sept. 4, 2019) (discussing that currently, legal information companies, such as Westlaw and LexisNexis, have started implementing legal analytic tools to enable a researcher to visualize aggregated data). However, these taxonomies, algorithms, and visualizations do not fully resolve the basic access and preservation issues posed by social media. Considering their expertise in evaluating sources of information and their role in educating researchers on how to locate primary sources of legal information, law librarians are potential allies in solving these issues alongside archivists and record management professionals. See Anne Klinefelter, *The Value of an Academic Law Library in the 21st Century*, in *ACADEMIC LAW LIBRARIES WITHIN THE CHANGING LANDSCAPE OF LEGAL EDUCATION: A PRIMER FOR DEANS AND PROVOSTS* 4, 5–7 (2020) (discussing the role that law librarians play in research processes as well as the academic world with their expertise).

³⁷³ See Mergel, *supra* note 29 (discussing the increasing use of social media by the government while trying to comply with regulations).

³⁷⁴ See Muira McCammon, *Can They Really Delete That?*, SLATE (Apr. 17, 2018), <https://slate.com/technology/2018/04/can-federal-agencies-really-just-delete-tweets.html> (discussing government agencies that had previously deleted their tweets).