

## **FOIA Bulletin Number: 21-01**

Subject: Collecting Text Messages Responsive to Freedom of Information Act Requests

**1. Purpose.** This FOIA Bulletin outlines the methods records custodians may use to collect text messages that are responsive to Freedom of Information Act (FOIA) requests.

**2. Effective Date.** This policy is effective October 2, 2020.

### **3. Authorities.**

- [Title 5 of the United States Code, Section 552](#)
- [National Archives Bulletin 2015-02, "Guidance on Managing Electronic Messages," issued July 29, 2015](#)
- [Secretary's Order No. 3378, "Improving the Department of the Interior Freedom of Information Act Program," issued January 7, 2020](#)
- [Secretary's Order No. 3371, "The Department of the Interior Freedom of Information Act Program," issued November 20, 2018](#)
- [Office of Information Policy FOIA Update, "'Agency Records' vs. 'Personal Records,'" issued January 1, 1984](#)

**4. Coverage.** This policy applies to all Department employees and supersedes any conflicting Departmental or bureau/office policies or procedures. Bureaus/offices may issue implementing procedures consistent with this policy after receiving written approval from the Departmental FOIA Office (DFO).

**5. Policy.** Text messages (including the contextual information such as the sender, recipient, date, and time) that are sent or received by Department employees with government-issued or personally-owned devices must be collected and processed for potential release under the FOIA if they pertain to agency business and are responsive to a pending FOIA request. The protocol for retention of text messages generally is addressed in the Office of the Chief Information Officer's "Guidance for Managing Text Messages under the Federal Records Act" ([see Attachment](#)). Record custodians (or their designees) may choose from the methods of collection and transmission outlined below, subject to any requirements or limitations prescribed by their bureau/office information technology (IT) office:

#### A. Screenshots

When utilizing the screenshot approach, the record custodian identifies the text messages that are responsive to the FOIA request; takes screenshots of those responsive text messages directly from the mobile device; and transmits the screenshots to the responsible FOIA office for processing, for example through email from the device itself.

#### B. Full Data Back-Up

When utilizing the full data back-up approach, the record custodian coordinates with their bureau/office IT office to physically collect the relevant mobile device. The IT office performs a

full data back-up, isolates all text message files, converts them to a portable document format (PDF), and provides the PDF of the messages to the responsible FOIA office for processing.

### C. Print-to-File

Print-to-File means printing physical copies of only the relevant text messages. Record custodians may coordinate with their bureau/office IT office to transfer copies of the text messages on their mobile device to a computer; identify the text messages that are responsive to the FOIA request; print the messages to paper; and transmit them to the responsible FOIA office for processing, either in hard copy, or after scanning to an electronic format. The print-to-file approach may also be accomplished via an application on the custodians' mobile device, provided any such application has been approved in advance by the Department's Chief Information and Security Officer.

**6. Responsibilities.** Record custodians are responsible for collecting text messages in response to search requests from their FOIA offices by coordinating, as necessary, with the FOIA office and bureau/office IT office to implement the appropriate method of collection.

**7. Distribution.** This policy will be distributed to all FOIA personnel upon issuance. Bureau FOIA Officers are responsible for distributing it to all FOIA personnel new to the Department as part of their orientation materials. This policy will also be made available to all FOIA personnel on the Department's FOIA website accessible at <https://www.doi.gov/foia/news/guidance/>, which provides additional FOIA resources.

**8. Rights and Benefits.** This policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or FOIA personnel, or any other person.

## Guidance for Managing Text Messages under the Federal Records Act

Text message created or received in the course of agency business may be Federal records and if so, agencies must manage them in accordance with Federal records management laws, regulations, and policies. The Frequently Asked Questions (FAQs) below provide general guidance for managing your text messages. Please consult with your [Bureau Records Officer](#) on specific questions and Federal record retention guidelines for your bureau.

### FAQs

Q1. Can I conduct government business using text messages on a mobile device?

A. Yes. However, unlike emails, it is important to note that text messages are not automatically archived. Accordingly, as employees, we are responsible for retaining and archiving text messages and conversations that are evidence of the conducting of government business pursuant to the requirements of the Federal Records Act (44 USC § 3301). Therefore, it is recommended that text messaging be used only for brief notifications or non-substantive communications. When engaging in more comprehensive and substantive communications it is **STRONGLY** recommended that employees rely on email since all email sent and received from DOI.GOV email addresses is automatically archived, ensuring both retention and accessibility to meet the Department's legal and operational requirements.

Q2. Do I have to retain text messages that are Federal records?

A. Yes. Text messages, like anything else that meets the definition of a Federal Record, need to be retained according to an approved records schedule. Most text messages that meet this definition are likely to be classified as transitory records, which have limited retention periods. For additional information regarding Transitory Records, see Q3 below.

Federal Records (44 USC § 3301) are defined as follows:

(A) includes all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them; and

(B) does not include—

(i) library and museum material made or acquired and preserved solely for reference or exhibition purposes; or

(ii) duplicate copies of records preserved only for convenience.

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.

Q3. Can I remove any text messages or conversations from my mobile devices?

- A. Yes, you may remove text messages and conversations that are not federal records or are federal records that are authorized for disposition, unless they are subject to an independent preservation obligation (such as a litigation hold or an active unfulfilled FOIA request). If an independent preservation obligation applies, then the message should be retained, regardless of its status as a federal record, until the preservation obligation no longer applies.

Under the Federal Records Act, personal messages that do not deal with the transaction of government business can be deleted. In addition, text messages that constitute transitory or intermediary records can also be deleted if you are confident the information in the text messages is no longer required. If you are unsure, consult your [Bureau Records Officer](#) before deleting.

Transitory Records: Records required to be preserved only for a short time (generally less than 180 days) and that are not required to meet legal or fiscal obligations, or to initiate, sustain, evaluate, or provide evidence of decision-making, which may be dispositioned when no longer needed for business use. Transitory Records include, but are not limited to:

- messages coordinating schedules, appointments, and events
- transmittal documents such as e-mail, letters, cover memos, and facsimile cover sheets that do not provide evidence of approval, concurrence, or decision-making, or include substantive comments
- received copies of circulated internal information such as agency instructions, notifications, circulars, newsletters, and email blasts to employees
- messages received from agency distribution lists or listservs
- “to-do” or task lists and assignments

Intermediary Records: Records of an intermediary nature, meaning that they are created or used in the process of creating a subsequent record. To qualify as an

intermediary record, the record must also not be required to meet legal or fiscal obligations, or to initiate, sustain, evaluate, or provide evidence of decision-making. Records include:

- non-substantive working files: collected and created materials not coordinated or disseminated outside the unit of origin that do not contain information documenting significant policy development, action, or decision making. These working papers do not result directly in a final product or an approved finished report. Included are such materials as rough notes and calculations and preliminary drafts produced solely for proof reading or internal discussion, reference, or consultation, and associated transmittals, notes, reference, and background materials.
- audio and video recordings of meetings that have been fully transcribed or that were created explicitly for the purpose of creating detailed meeting minutes (once the minutes are created)
- input or source records, which agencies create in the routine process of creating, maintaining, updating, or using electronic information systems and which have no value beyond the input or output transaction: hardcopy input source documents where all information on the document is incorporated in an electronic system
- ad hoc reports, including queries on electronic systems, whether used for one-time reference or to create a subsequent report
- data files output from electronic systems, created for the purpose of information sharing or reference

Q4. Do I only have to produce those items that qualify as Federal Records for FOIA and/other information or document requests?

A. No. Under the FOIA you must produce any "agency records" that are responsive to the request, regardless of whether they are officially considered a Federal record or not and regardless of whether they could have been dispositioned. Courts generally consider recorded information to be an agency record if it is (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.

The legal basis for other valid requests for information or documents, such as in the discovery process in litigation, Congressional oversight, or OIG investigations, similarly do not rely on the Federal Records Act to define the scope of what may be requested or must be produced.

Please consult your FOIA Officer, the Office of the Solicitor, or the Office of Congressional and Legislative Affairs for additional information regarding any specific requests.

Q5. What messaging applications are approved for use on my Government issued mobile device?

Currently only the native IOS or Android messaging applications that come factory installed on your device, and messaging applications like Microsoft Outlook and Teams mobile applications which are deployed in conjunction with the implementation of Office 365, are authorized for use within DOI. No other messaging applications, such as "Snapchat" or "WhatsApp," are authorized for use on a DOI-issued mobile device.

Q6. Can I send government business related messages and other information using my personal mobile device?

- A. It is STRONGLY recommended to avoid doing any government related business on your personal computer or personal mobile devices. This is not only a Federal record keeping best practice but can also help prevent discovery being performed on personal devices in the event an action goes to litigation. Rare exceptions can be made as necessary for continuity of operations or other emergency needs. Any business conducted on a personal device must be forwarded back to government account as indicated in [OCIO Directive 2015-003: Notice of Disclosure Requirements for Official Business Conducted Using Non-Official Electronic Messaging Accounts](#)