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Consolidated Reply

Date: June 14, 2019
Subject: DAA-0567-2015-0013, U.S. Citizenship and Immigration Services, Detainee Records

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I. Background

The National Archives and Records Administration (NARA) is responsible for overseeing agencies' records disposition programs and practices. Each year, Federal agencies create billions of records. Although most are electronic, large volumes are also still created on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing records retention periods and submit these schedules for approval by the Archivist of the United States. These schedules provide for the timely transfer into the National Archives of historically valuable records requiring permanent preservation and authorize the agency to dispose of all other records at the appropriate time.

The Federal Records Act requires all Federal agencies to manage their records under these NARA-approved records schedules, using either the General Records Schedule (GRS) or an agency-specific schedule. Agencies may not destroy Federal records without NARA's approval. During the scheduling process, in accordance with NARA's appraisal policy, NARA determines whether records have only temporary value, and may therefore be disposed of at the appropriate time, or are appropriate for permanent preservation in the National Archives of the United States. Temporary records can be maintained for days, years, or decades. NARA reviews the retention periods proposed for temporary records to ensure the period protects the legal rights of the Government and individuals whose rights and interests are affected by the Government's actions. The Federal Records Act provides the public with an opportunity to comment on all schedules for records proposed as temporary. 44 U.S.C. § 3303a(a). Such public comment is integral to the scheduling and appraisal process, and ensures that records that document citizens' rights and interests are retained for a period of time that is adequate and proper. We publish notice in the Federal Register (and on www.regulations.gov) for these records schedules and invite public comments on them.

Even when an approved records disposition schedule is in place, agencies may not dispose of records that are needed for litigation or in response to Freedom of Information Act (FOIA)

requests. NARA regulations at 36 CFR 1230.3 treat a disposal of records subject to a FOIA request or a litigation hold as an unlawful or unauthorized destruction of records, which must be reported to NARA.

NARA does not control access to records in the legal custody of ICE or any other agency. The FOIA and agency policy govern the right to access information in these executive branch agency records is governed by the FOIA and agency policy.

II. Summary of concerns

NARA received three congressional letters with a total of 36 signatures; a petition from the American Civil Liberties Union (ACLU) with 23,758 comments; a petition from UltraViolet with 1,475 signatures; written comments from 187 individuals and six organizations; and phone calls from seven individuals. We received comments via email at request.schedule@nara.gov, by mail, by telephone, and gathered from other sources, such as the main NARA email address inquire@nara.gov, web forms, the NARA Office of Inspector General, and NARA employees who received comments directly from members of the public.

The vast majority of individuals signing the ACLU petition used the ACLU-provided template. The ACLU petition asked that ICE not be allowed to destroy records related to deaths and abuses of individuals in custody. Commenters were concerned that there will be no historical records and that advocates and attorneys would not have the records needed to investigate and address abuses. The statement was altered by 2,256 individuals by truncating it, modifying adjectives for the administration, or substituting the phrase “I’m concerned” with other adjectives. Unique comments replaced or were added to the ACLU statement by 1,931 signers. These comments are included in the discussion below.

The general comments received from individuals, organizations, and signers of petitions overwhelmingly asked NARA not to approve the disposition request entirely; not to approve the request to destroy records related to death, abuse, and detainee segregation; or to preserve all records on the pending record schedules. Many commenters stated that the records are needed for oversight, accountability, transparency, and program improvement; for identifying trends over time in abuse, death, or use of solitary confinement; for investigations of mismanagement at ICE; for use in designing safe and effective detention facilities; for sociologists and psychologists researching social problems; for crafting future legislation; for historical research into treatment of detainees and conditions of detention; and for understanding immigration and border security issues. Some commenters held that preservation of the records was necessary because of ongoing litigation, or to protect individuals’ rights and ability to seek legal redress or to qualify for certain benefits.

Most but not all items on the schedule received specific comments. Record schedule items receiving specific comments are listed below with the comments received. We refer to the items on the schedule in this summary using the original item numbers on the schedule at the time we published it in the July 15, 2017 Federal Register.

Item 0001 Detainee Sexual Abuse and Assault Files and Item 0002 Death Review Files

These two schedule items received the most comments. Multiple commenters stated the proposed retention period of 20 years was too short in light of inadequate investigations into deaths and assaults, detainees' difficulties in accessing counsel, and the limits on family members' ability to seek relief in courts. Some commenters stated that the proposed retention period is shorter than that for similar records in other agencies. Several commenters indicated that abuse and assault files could be used in support of U-Visa applications. Some commenters indicated that both types of records could be used to identify patterns of abuse, lack of safety enforcement and prevention, and would be useful for legal studies and crafting future legislation. One commenter stated that the documents in the death review files provide a unique window into the operations of the detention system. One commenter submitted that the records support research to reduce deaths and assaults by comparatively studying practices and policies with different rates of deaths and assaults. One commenter stated that destruction of records would retraumatize victims of assaults and abuses, and protect abusers and rapists.

Item 0003 Detainee Telephone Rate Records

This item received three specific comments. Commenters stated that the records should be preserved because they document conditions of detention, that the proposed three-year retention period is too short, and that the records should be preserved permanently because they include legal memoranda that guide agency officials in the interpretations of existing laws and regulations.

Item 0004 Weekly Detention Service Monitor Report

One commenter stated the proposed three-year retention period was too short.

Item 0005 Alternative to Detention (ATD) Participant Tracking Records

One commenter stated that these records are useful in studying detention practices, including the percentage of individuals detained versus monitored, and how such decisions were made.

Item 0008 Detention Information Reporting Line Records

One commenter stated that maintaining the records would promote accountability in detention centers, and that the proposed five-year retention period was too short.

Item 0009 Detainee Segregation Case Files

This item received five specific comments. Commenters stated that the proposed three-year retention period is too short; that the records should be preserved because they document methods and rates of punishment, that the records have been used in litigation regarding forced labor under threat of solitary confinement, and that the records have legal value to victims of solitary confinement who want to seek legal redress for violations of their rights. Commenters stated that the destruction of records of segregation within three years limits complainants' ability to seek criminal or civil redress by ensuring that no official records are available even for complaints duly filed within the applicable statute of limitations.

Item 0010 Daily Detention Log

This item received three specific comments. One commenter stated that the records have research value as a source of statistical data, such as charting detention rates over time and in relation to specific events or policies. Another commenter stated the proposed seven-year

retention period is too short. Finally, a commenter stated that the records warrant permanent retention because they document who was in custody, where, and why, on a particular day.

III. Discussion of proposed records schedule

The Federal Records Act requires all Federal agencies to manage their records under a NARA-approved records schedule, using either the General Records Schedule (GRS) or an agency-specific schedule reviewed and approved by NARA. In order to comply with these requirements, ICE must propose records schedules for all records not covered by a GRS. While many commenters asked that NARA not approve this or any records schedule for ICE, the Federal Records Act at 44 U.S.C. 3102 also requires agencies to establish a program for the economical and efficient management of the records of the agency. Records disposition, when appropriate, is an important part of economical and efficient records management. NARA must provide ICE a legal authority to govern the retention and disposition of its records. Suggestions that no ICE records should ever be destroyed run counter to a foundational principle of the Federal Records Act.

NARA reconsidered the proposed records schedule in light of the comments that addressed legal rights and interests requiring ongoing availability of the records, as well as the appropriateness of preserving the records in the National Archives. Each item on the proposed records schedule is discussed below. Because some items have been removed from this schedule and some have been added, this section refers to both the revised item numbers and the original item numbers when there is a discrepancy. Revisions to item titles are also noted, where applicable.

The revised schedule and the appraisal memo are included in the regulations.gov docket (NARA-19-0007) for this Federal Register notice.

Item 0001 Detainee Sexual Abuse and Assault Files

This item consists of records of the investigation, and the outcome of the investigation. The DHS Office of Inspector General always has the right of first refusal before ICE's Office of Professional Responsibility (OPR) conducts an investigation. Records covered by this item include investigative reports, memoranda, and documentation from Federal and local law enforcement. The investigations normally take 6-18 months to complete. If there is prosecutorial activity, the investigation may take longer. Investigations are handled in the same manner whether the perpetrator of the alleged assault or abuse is another detainee or an ICE employee or contractor.

NARA reaffirms the appropriateness of a temporary disposition for these records. The recommended retention period, however, has been changed from 20 years to 25 years. This item supersedes in part the Joint Integrity Case Management System Master File/Data, approved for disposition under N1-567-11-9, item 1a. The Joint Integrity Case Management System Master File/Data has a 25-year retention period, and we changed this item's retention period to ensure records in the consolidated new item are preserved for the time required for ICE's business needs and to protect legal rights and interests. This 25-year period begins from the date of case closure. This lengthy retention period surpasses all applicable statutes of limitation, ensuring that legal rights of detainees are protected. During this 25-year period, the files may be requested from ICE under the FOIA, and any pending FOIA requests or litigation holds would stay implementation of disposition. NARA expects that any need for records of assault or abuse investigations to

support a visa application would arise in near proximity to the incident of assault or abuse, and certainly within a 25-year period. Regulations implementing the Prison Rape Elimination Act of 2003 for DHS require maintenance of data of allegations of sexual abuse for at least ten years after the date of the initial collection unless Federal, state, or local law requires otherwise. The 25-year retention period from close of case is therefore well in excess of the minimum time established in 6 CFR 115.89.

Data about sexual abuse and assault incidents are also captured in other long-term temporary records with a 75-year retention period [Significant Event Notification System Master File/Data, N1-567-11-4, item 1]. Upon receiving a notice of an alleged sexual abuse or assault, ICE personnel create a Significant Incident Report in the Significant Event Notification system (SEN) within 24 hours. These reports are query-able and include data about incidents, including biographical information and event summaries.

DHS also keeps permanent records involving some sexual abuse and assault incidents and data. The DHS Office of Civil Rights and Civil Liberties (CRCL) includes data about the sexual assault and abuse allegations that it investigates in its annual reports, which are permanent records [Department of Homeland Security, Annual and Other Reports to Congress, DAA-0563-2013-0005-0001]. CRCL is one of many avenues for the public to make complaints involving DHS employees or programs and it investigates only those allegations filed with CRCL. If an incident of sexual abuse or assault is related to significant employee misconduct, the investigative case file would be permanent under proposed schedule item Internal Affairs Significant Misconduct Investigative Case Files, DAA-0567-2015-0012-0001. This item is included in a separate proposed records retention schedule that has not yet been posted for public comment.

Original Item 0002 Death Review Files

When a detainee dies in ICE custody, ICE's Office of Professional Responsibility (OPR) and Enforcement and Removal Operations (ERO) both create and maintain Death Review Files. In 2017, there were 10 detainee deaths. OPR conducts an administrative review of the death and the circumstances surrounding it. This death review is a focused examination of the circumstances surrounding the death, and of the exhibits cited in the investigation. The review includes a determination of whether deficiencies in detention practices contributed to the death. OPR examines medical files of the deceased, speaks to health care providers at the facility, and examines the security of the facility. Its report includes an analysis and any findings relating to deficiencies in following the National Detention Standards. The review also discusses problems encountered that are areas of concern but do not rise to the level of violations of the standards. These OPR death review files were available online from ICE's FOIA library at the time of appraisal. Although the exhibits are not posted online in the FOIA library, exhibits are part of the OPR file. OPR's Death Review Files date back to approximately 2007, when a formal review procedure was established.

OPR sends a copy of its review to ERO. This copy forms a part of ERO's own separate death review file, which compiles source documentation, much of which consists of copies of records scheduled elsewhere. At the beginning of its process, ERO asks the facility where the death occurred to supply all records the facility has on the detainee who died. ERO incorporates into its

death review file everything the facility sends, which sometimes includes a copy of the entire Alien File (A-File). If the facility where the detainee dies sends ERO a copy of the detainee's medical file, then it would be retained in ERO's death review file. ERO's death review file typically includes the death certificate; a memorandum of issue ERO creates for the Executive Associate Director of ERO summarizing findings; background on the detainee and his or her arrest; the removal order statement; consular notification information; the autopsy exam report; the toxicology report; ERO's corrective action plan based on the OPR report; a copy of the Significant Incident Report (SIR) from the Significant Event Notification (SEN) System; and correspondence between ERO and the facility where the detainee died. The file may include an ICE Health Service Corps (IHSC) incident report, and the detainee's telephone call history.

The revised schedule has split original item 0002 into two items. On the revised schedule they are Item 0002 Enforcement and Removal Operations (ERO) Detainee Death Review Files and Item 0003 Office of Professional Responsibility (OPR) Detainee Death Review Files. Revised item 0002 (original item 0002 split) is a temporary item for ERO's Detainee Death Review Files. As noted above, this file compiles source documentation related to the individual and his or her encounters with immigration agencies, whether or not these encounters are determined to be related to the detainee's death. Most if not all of these records accumulated in ERO Death Review files are already scheduled. For example, records such as the death certificate, consular notification and charging documents are included in the U.S. Citizenship and Immigration Services, Alien Files (A-Files) April 1, 1944 to Present, N1-566-08-11, item 1, as permanent records. Significant Incident Reports are scheduled in the Significant Event Notification System (SEN), Master File/Data, N1-567-11-4, item 1 as temporary records maintained for 75 years. The contents of the Detention Case File are scheduled under N1-567-11-014, item 1 and are maintained for 6 years from the date of detainee's transfer or release from facility, or removal from the United States.

NARA has determined that a 20-year retention period is appropriate for the ERO Detainee Death Review Files. The long retention period ensures that individuals and organizations who wish to obtain the ERO death review files have many years to request them from ICE through FOIA. After that, individuals and organizations may request original source files that are retained longer, as described above.

New item 0003 (original item 0002 split) is a separate item for Detainee Death Review Files maintained by OPR. The OPR Detainee Death Review File is the most authoritative source for information about detainee deaths and death reviews. This death review is a focused examination and analysis of the circumstances surrounding the death. The file includes all exhibits cited in the investigation. In light of the public interest in these records, NARA considers a permanent disposition appropriate. The records are proposed for transfer to the National Archives 20 years after closure of case.

New Item 0004, Detainee Death Reports

ICE has added an additional permanent item related to detainee deaths to the proposed schedule. On the revised schedule it is Item 0004, Detainee Death Reports. This item consists of summary data on detainee deaths in ICE custody. Data elements include date of death, nature of death, preliminary cause of death, location of death, location of last detention, IHSC staffing status,

facility type, length of final detention stay, length of hospital stay, autopsy findings, death certificate received date, final cause of death, death category, criminal history based on conviction, most serious criminal conviction, and most recent case number. At the time of the appraisal some of these data points in the form of a data table are available in the ICE FOIA library. This item supersedes an existing permanent authority for summary data on detainee deaths. This existing item is entitled Annual Detainee Deaths Data, Data ICE does not transfer to the Bureau of Justice Statistics (BJS), N1-567-08-001, item 2b2.

The ICE Detainee Death Reports are proposed for transfer to the National Archives 20 years after the fiscal year in which the report is issued. This item was pending on another ICE schedule at the time of appraisal. It is appropriate to include it on this schedule to reflect a change in the office maintaining the data. This record was previously maintained by IHSC and is now maintained by ERO. Additionally, this consolidates the three detainee death-related records series onto one records schedule.

Original Item 0003 Detainee Telephone Rate Records

ICE has removed this item from the schedule because the record copy is part of the procurement file and is therefore already scheduled under GRS 1.1, item 011, Procuring goods and services, DAA-GRS-2013-0003-0001. The previous version of this schedule erroneously stated that the item proposed for disposition included legal memoranda and analysis of public comments. ICE maintains any applicable legal memoranda and analysis of public comments under another records schedule, N1-563-08-33, Department of Homeland Security, Office of the General Counsel Program Records. N1-563-08-33, item 9, Legal Matters, Advice and Analysis, authorizes disposal of files that do not contain significant legal opinions, analysis, conclusion, advice or interpretations, or that do not pertain to significant policy-making decisions or major activities, after three years. Generally, these records would fall into that category. Rulemaking dockets about telephone rates charged to incarcerated persons are maintained by the Federal Communications Commission.

Revised Item 0005 Detention Monitoring Reports (Original Item 0004 Weekly Detention Service Monitor Report)

This item consists of weekly reports filed by Detention Service Monitors (DSMs). DSMs support oversight of ICE's largest facilities, soliciting feedback from local and regional staff. The report is distributed throughout ERO in the form of an itemized narrative that serves as a digest for operational awareness. Reports include significant events at facilities as well as information about media contacts and administrative awareness items such as job vacancy announcements. NARA reaffirms that these records do not warrant retention in the National Archives, and that a three-year retention period is appropriate. Significant events would be registered in the Significant Event Notification System, a long-term temporary record whose master file is already scheduled [Significant Event Notification System Master File/Data, N1-567-11-4, item 1] for a 75-year retention period and the remaining information included in the reports is of short-term value because it is purely administrative.

Original Item 0005 Alternative to Detention (ATD) Participant Tracking Records

Original Item 0006 Alternative to Detention Emergency/Incident Reports

ICE has removed these items from the proposed schedule and proposed them for disposition in a separate request, Alternatives to Detention (ATD) Program, DAA-0567-2018-0001. Public

comment was sought on these items in a separate Federal Register notice published September 4, 2018. Three people requested DAA-0567-2018-0001 and no comments were received.

Revised Item 0006 (Original Item 0007) Detainee Escape Reports

These records are maintained by ERO's Detention Standards Compliance Unit and pertain only to escapes that were successful. The item includes records of investigation into whether proper procedures were observed. Erroneous releases of detainees on ICE's part are considered a category of successful escape and are covered by this item. NARA reaffirms that these records have insufficient historical value to warrant preservation in the National Archives once the business needs of the agency to support any escape-related litigation have been met. A retention period of seven years is appropriate from the standpoint of legal rights and accountability. Escapes are registered in the Significant Event Notification System, a long-term temporary record whose master file is already scheduled [Significant Event Notification System Master File/Data, N1-567-11-4, item 1] for a 75-year retention period.

Revised Item 0007 Detention Reporting Information Line (DRIL) Records (Original Item 0008 Detention Information Reporting Line Records)

The ICE ERO Detention Reporting and Information Line is a toll-free service that provides a direct channel for detainees, the public, non-governmental organizations, academic institutions, and advocates to communicate directly with ERO to answer questions and resolve concerns. Call center representatives answer calls and assist with resolution on subjects such as: incidents of sexual or physical assault or abuse; serious or unresolved problems in detention; reports of victims of human trafficking; and requests for basic case information. ICE telephone operators create records in a web-based platform in response to calls received in call centers. Call reports are collected at ICE headquarters and sent to the appropriate field offices for investigation. For example, if a sexual assault is reported, the agency would create records covered by item 0001, Detainee Sexual Abuse and Assault Files. ICE has developed reporting requirements governing steps that must be taken depending on the allegation made in the call. Some allegations are serious enough to be immediately referred to DHS OIG and OPR.

NARA reaffirms that a temporary disposition for these records is appropriate, as documentation of significant incidents will be captured in records specific to the type of allegation being made. NARA has, however, required ICE to modify the proposed retention period to maintain the records for a minimum of seven years. This retention period will ensure the maintenance of records for a length of time to ensure the protection of detainees' legal rights. Under 42 U.S.C.1983, the statute of limitations applicable to a civil action for deprivation of rights torts is two to six years.

Revised Item 0008 Detainee Segregation Reports (Original Item 0009 Detainee Segregation Case Files)

These are records documenting placement of detainees in segregated housing, either for non-punitive administrative reasons or as a disciplinary action. Non-punitive detention pertains to detainees with mental health problems, or those who are sexual minorities. These records are created for the purpose of managing and monitoring detainee housing. NARA reaffirms that a temporary disposition is appropriate for these records. However, NARA has required ICE to increase the retention period to seven years from the end of the fiscal year in which the detainee

is released from segregation. This retention period will ensure that legal rights and accountability are supported. Under 42 U.S.C. 1983, the statute of limitations applicable to a civil action for deprivation of rights torts is two to six years.

Original Item 0010 Daily Detention Log

Original Item 0011 Residential Detainee Locator Files

ICE has removed these items from the schedule because they are already scheduled under another disposition authority [Department of Homeland Security, Law Enforcement: Identification, investigation, apprehension, and/or removal of aliens unlawfully entering or present [sic] in the United States and facilitate entry of individuals into the United States, DAA-0563-2013-0001-0006]. The 75-year retention period for this approved item ensures that the records can be used as a source for statistical data, and as a record of a particular detainee's custody status and location.