

# Common Questions About Federal Records and Related Agency Requirements

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## Summary

Federal departments and agencies create federal records in the course of their daily operations. Congress first enacted the Federal Records Act (FRA; 44 U.S.C. Chapters 21, 29, 31, and 33) in 1950. Congress deemed federal records worthy of preservation for their “informational value,” and also because they document “the transaction of public business” and the “organization, functions, policies, decisions, procedures, operations, or other activities of the Government.” The FRA requires executive branch departments and agencies to collect, retain, and preserve—or dispose of—these records.

This report provides an introduction to federal records. It describes the scope and requirements of the FRA and its associated regulations. Among the questions this report addresses are the following:

- What is a federal record?
- What is not a federal record?
- Which agencies are required to comply with the Federal Records Act?
- How do agencies transfer or dispose of federal records?

This report includes amendments to the Federal Records Act made by the Presidential and Federal Records Act Amendments of 2014 (P.L. 113-187). The law, enacted on November 26, 2014, amends the FRA by, among other things, modifying the definition of federal record and clarifying the Archivist’s role as the final determinant of whether certain materials qualify as a federal record.

This report focuses on federal recordkeeping laws, regulations, and policies. This report does not address the recordkeeping requirements of Congress, the Supreme Court, the President, or the Architect of the Capitol. Additional information on presidential records is available in CRS Report R40238, *The Presidential Records Act: Background and Recent Issues for Congress*, by Wendy Ginsberg.

This report will be updated at the beginning of each new Congress or in the event of significant legislative activity.

## **Contents**

|   |    |
|---|----|
| Introduction.....   | 1  |
| What Is a Federal Record?.....  | 1  |
| What Is Not a Federal Record?.....  | 3  |
| Does the Federal Records Act Cover Presidential Records? .....  | 3  |
| Which Agencies Are Required to Comply with the Federal Records Act? .....   | 4  |
| For What Purposes Are Agencies Required to Collect and Maintain Records? .....  | 5  |
| What Authorities Govern Records Management? .....   | 6  |
| How Do Agencies Transfer or Dispose of Federal Records? .....   | 8  |
| Which Records Are Temporary? Which Records Are Permanent? .....   | 9  |
| What Is a Records Schedule? .....   | 9  |
| How Do Agencies Create Records Schedules or Plans for Federal Record<br>Disposition?.....                               | 9  |
| Are There Procedures in Place to Address Unlawful Removal or Destruction of Federal<br>Records? .....                   | 11 |
| How Does the Federal Records Act Relate to Accessing Records Pursuant to the Freedom<br>of Information Act (FOIA)?..... | 11 |

## **Contacts**

|                                 |    |
|---------------------------------|----|
| Author Contact Information..... | 12 |
|---------------------------------|----|

## Introduction

The Federal Records Act of 1950 (FRA; 44 U.S.C. Chapters 21, 29, 31, and 33) provided the Administrator of General Services authority to “make provisions for the economical and efficient management of records of the federal agencies.”<sup>1</sup> The FRA, as amended,<sup>2</sup> assigns these duties to the Archivist of the United States. The act requires federal agency employees to determine whether information they create qualifies as a federal record. It also governs how federal records are to be collected, retained, and eventually either destroyed or provided to the National Archives and Records Administration (NARA) for permanent archiving.

This report provides answers to commonly asked questions about the laws, regulations, and policies that govern recordkeeping in the federal government. This report does not address the recordkeeping requirements of Congress, the Supreme Court,<sup>3</sup> the President,<sup>4</sup> or the Architect of the Capitol.<sup>5</sup> This report also does not address the laws and regulations that govern access to and protection of federal records,<sup>6</sup> nor does it address federal record classification and declassification policies.<sup>7</sup>

## What Is a Federal Record?

On November 26, 2014, Congress passed and the President signed into law P.L. 113-187, the Presidential and Federal Records Act Amendments of 2014. Among the bill’s provisions was language amending the definition of a federal record.

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<sup>1</sup> P.L. 81-754, §505 (1950); 64 Stat. 585.

<sup>2</sup> P.L. 98-497, enacted in 1984, substituted the “Archivist” of the United States for the “Administrator” of General Services. Previously, the National Archives and Records Service had been a component of the General Services Administration.

<sup>3</sup> Congressional records might include materials created by Members of Congress as well as House and Senate committees and officers. Additionally, the floor proceedings of each chamber are considered congressional records. Supreme Court records might include filings, court opinions, records of verdicts, and transcripts. The authorities and practices governing the collection of, retention of, and access to these records are beyond the scope of this report.

<sup>4</sup> For background on the collection and retention of presidential records, see CRS Report R40238, *The Presidential Records Act: Background and Recent Issues for Congress*, by Wendy Ginsberg.

<sup>5</sup> According to a House Report published in 1949, the Architect of the Capitol was exempted from the Federal Records Act because “inclusion ... does not actually preserve the autonomy of Congress.” The report further detailed specific reasons for the exemption, stating

[u]nlike the heads of other agencies under the legislative establishment, the Architect of the Capitol does not function as an independent officer empowered by Congress to make and operate under his own rules and regulations, but actually performs most of his duties, under existing law, under the direction of committee and commissions of the Congress....

U.S. Congress, House Committee on Expenditures in the Executive Departments, *Clarifying the Status of the Architect of the Capitol Under the Federal Property and Administrative Services Act of 1949*, 81<sup>st</sup> Cong., 1<sup>st</sup> sess., August 25, 1949, S.Rept. 1333 (Washington: GPO, 1949), p. 2.

<sup>6</sup> For information on access to federal records, see CRS Report 97-71, *Access to Government Information In the United States: A Primer*, by Wendy Ginsberg; and CRS Report R41933, *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues*, by Wendy Ginsberg.

<sup>7</sup> For background and information on federal information classification policies, see CRS Report R41528, *Classified Information Policy and Executive Order 13526*, by Kevin R. Kosar.

Pursuant to P.L. 113-187, federal records are defined in 44 U.S.C. §3301 as follows:

Records includes all recorded information,<sup>8</sup> 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 Government or because of the informational value of the data in them.

According to the congressional reports to accompany P.L. 113-187, the amended definition of federal record seeks to “shift the emphasis away from the physical media used to store information to the actual information being stored, regardless of form or characteristic.”<sup>9</sup> Previously, the statutory definition of record included references to certain types of materials or platforms on which records could be created or captured, such as “books, papers, photographs” and “machine-readable formats.” The amended definition, instead, refers more generically to “recorded information.”

#### **Selected Authorities that Govern Federal and Presidential Records Management**

The *Federal Records Act* (44 U.S.C., Chapters 21, 29, 31, and 33), enacted in 1950, governs the collection, retention, preservation, and possible destruction of federal agency records.

The *Presidential Records Act* (44 U.S.C. §§2201-2209) governs record collection and retention associated with records created or received by the President and his immediate staff.

Both the Federal Records Act and the Presidential Records Act have been amended over time. The most recent amendments to both the FRA and the PRA were made by the *Presidential and Federal Records Act Amendments of 2014* (P.L. 113-187).

Records are further defined in the *Code of Federal Regulations* (36 C.F.R. §1222), which clarifies that the format or platform used to create the information would not affect whether it would qualify as a federal record.<sup>10</sup>

Additionally, the Archivist of the United States has stated that the system used to create the record should not affect an agency’s determination as to whether information qualifies as a record. For example, when federal employees use personal e-mail to conduct official business, the communication is considered a federal record.<sup>11</sup>

P.L. 113-187 expressly empowers the Archivist, in cases where there is disagreement over whether particular materials constitute a federal record, to determine “whether recorded information, regardless of whether it exists in physical, digital, or electronic form, is a record” for

<sup>8</sup> *Recorded information* is further defined in 44 U.S.C. 3301 as “all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form.”

<sup>9</sup> U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Presidential and Federal Records Act Amendments of 2014*, 113<sup>th</sup> Cong., 2<sup>nd</sup> sess., July 23, 2014, S.Rept. 113-218 (Washington: GPO, 2014), p. 5.

<sup>10</sup> Pursuant to the *Code of Federal Regulations*, “the medium may be paper, film, disk, or other physical type or form; and that the method of recording may be manual, mechanical, photographic, electronic, or any other combination of these or other technologies.” (36 C.F.R. §1222.10(b)(2)). Moreover, a record can be made “by agency personnel in the course of their official duties, regardless of the method(s) or medium used.” (36 C.F.R. §1222.10(b)(3)).

<sup>11</sup> U.S. Congress, House Committee on Oversight and Government Reform, *Presidential Records in the New Millennium: Updating the Presidential Records Act and Other Federal Recordkeeping Statutes to Improve Electronic Records Preservation*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., May 3, 2011, pp. 35-37, at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg70518/pdf/CHRG-112hhrg70518.pdf>.

purposes of the FRA and states that his determination “shall be binding on all Federal agencies.” Nothing in the FRA would suggest that an agency would have the authority to override the Archivist’s final determination.<sup>12</sup>

## What Is Not a Federal Record?

The Presidential and Federal Records Act Amendments of 2014 also amended the definition of what does not constitute a federal record. Pursuant to 44 U.S.C. §3301, as amended, neither of the following constitutes a federal record:

Library and museum material made or acquired and preserved solely for reference or exhibition purposes; or

duplicate copies of records preserved only for convenience.<sup>13</sup>

Pursuant to 36 C.F.R. §1220.18, examples of non-record materials would include copies of information “kept only for reference” and “museum materials intended solely for reference or exhibit.”

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.<sup>14</sup> As noted earlier in this report, pursuant to provisions in the Presidential and Federal Records Act Amendments of 2014 (P.L. 113-187), in any case where the Archivist determines recorded material to be a record, that final determination is binding on the agency. NARA’s regulations also state that items that are not considered records are to be “physically segregated from records” or “readily identified and segregable from records” and “purged when no longer needed for reference.”<sup>15</sup>

## Does the Federal Records Act Cover Presidential Records?

No, the Federal Records Act does not cover records that are determined to meet the statutory definition of a presidential record.

The Presidential Records Act (PRA; 44 U.S.C. §§2201-2209) is the primary law governing the collection of, preservation of, and access to records of a former President. The PRA details which presidential records and materials NARA is to assume responsibility for at the end of a

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<sup>12</sup> The FRA, however, contains various limitations on the review of records by the Archivist. For example, 44 U.S.C. §2906 provides that when inspecting agency records, “Records, the use of which is restricted by law or for reasons of national security or the public interest, shall be inspected, in accordance with regulations promulgated by the Administrator and the Archivist, subject to the approval of the head of the agency concerned or of the President.”

<sup>13</sup> Previously, the definition used the term “extra copies” instead of “duplicate copies,” among other linguistic differences.

<sup>14</sup> 36 C.F.R. §1222.16(b)(1).

<sup>15</sup> 36 C.F.R. §1222.16(b)(2)-(3). Pursuant to 36 C.F.R. §1222.16(3), “NARA’s approval is not required to destroy” nonrecord materials.

President's Administration. Records governed by the PRA are not subject to the requirements of the FRA.

Presidential records are defined in 44 U.S.C. §2201 as

documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and 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.<sup>16</sup>

As a consequence of this definition of presidential record, some components of the Executive Office of the President are governed by the PRA while other components are governed by the FRA. For example, within the EOP, the Council of Economic Advisers, the Office of the Vice President, and the Office of Administration are governed by the provisions of the Presidential Records Act. The Office of Management and Budget, the Office of Science and Technology Policy, and the Office of the United States Trade Representative, on the other hand, are generally governed by the FRA. The office of the EOP component that employs a record's creator or recipient would ultimately determine whether a particular piece of information would be treated as a federal record or a presidential record.

The central differences between the PRA and the FRA are (1) the presumption of the permanence of all presidential records; and (2) the PRA governs access to presidential records in addition to their collection and retention. Pursuant to the PRA, all presidential records are provided to NARA when the President leaves office. All of these presidential records are considered permanent records and are eventually preserved at the appropriate NARA-administered presidential library for public access.<sup>17</sup> On the other hand, only 2%-3% of all federal records are transferred to NARA for permanent retention. Additionally, the PRA's provisions detail presidential record collection, retention, and *access*. The FRA's provisions, in contrast, focus principally on records management and archival preservation, collection, and retention. As will be described in greater detail below, the Freedom of Information Act (5 U.S.C. §552) governs access to federal records maintained by executive branch entities.

## **Which Agencies Are Required to Comply with the Federal Records Act?**

Pursuant to 44 U.S.C. §3101 of the Federal Records Act,

[t]he head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

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<sup>16</sup> For more information on the laws and policies that govern presidential records, see CRS Report R40238, *The Presidential Records Act: Background and Recent Issues for Congress*, by Wendy Ginsberg.

<sup>17</sup> For more information on presidential libraries, see CRS Report R41513, *The Presidential Libraries Act and the Establishment of Presidential Libraries*, by Wendy Ginsberg and Erika K. Lunder.

Pursuant to 44 U.S.C. §2901(14) of the Federal Records Act, a federal agency is defined as follows:

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).

The FRA's provisions apply, for example, to the 15 Cabinet departments; many independent agencies, like the Environmental Protection Agency and the Board of Governors of the Federal Reserve; and some legislative branch entities. As noted in the section above, components of the EOP are governed by the Presidential Records Act and not the FRA.<sup>18</sup>

The Federal Records Act does not apply to the records of Congress. Information that Members of Congress or their staff send to the executive branch, however, may become executive branch records. For example, an e-mail sent from a congressional employee to an executive branch employee that relates to official business may be considered a federal record for the purposes of administering the Federal Records Act.

## **For What Purposes Are Agencies Required to Collect and Maintain Records?**

The *Code of Federal Regulations* details particular records that “are required to provide for adequate documentation of agency business.”<sup>19</sup> Agencies “must prescribe the creation and maintenance of” records that

- document the persons, places, things, or matters dealt with by the agency;
- facilitate action by agency officials and their successors in office;
- make possible a proper scrutiny by Congress or other duly authorized agencies of the government;
- protect the financial, legal, and other rights of the government and of persons directly affected by the government's actions;
- document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically; and
- document important board, committee, or staff meetings.<sup>20</sup>

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<sup>18</sup> Additional information on the difference between the Federal Records Act and the Presidential Records Act is provided in the section entitled “Does the Federal Records Act Cover Presidential Records?”

<sup>19</sup> 36 C.F.R. §1222.22.

<sup>20</sup> Ibid.

## What Authorities Govern Records Management?

Nearly all federal employees and many federal contractors create federal records and, therefore, have records management responsibilities. More specifically, however, the Federal Records Act requires the “head of each Federal agency” to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency.”<sup>21</sup> The records are “designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.”<sup>22</sup>

Agency heads must maintain an “economical and efficient” records management program that

- employs “effective controls over” the creation, maintenance, and use of records; and
- cooperates with the Archivist in applying “standards, procedures, and techniques designed to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value.”<sup>23</sup>

Agencies must “create and maintain authentic, reliable, and usable records and ensure that they remain so for the length of their authorized retention period.”<sup>24</sup> Pursuant to federal regulations, agencies are to assign records management responsibility to an authorized person and office within the agency;<sup>25</sup> issue a directive to establish recordkeeping program “objectives, responsibilities, and authorities for the creation, maintenance, and disposition of agency records”;<sup>26</sup> integrate records management “into the design, development, and implementation of electronic information systems”;<sup>27</sup> provide guidance and training to all agency personnel on records management responsibilities;<sup>28</sup> “develop records schedules”<sup>29</sup> for all records created and received by the agency and obtain NARA approval of the schedules prior to implementation;<sup>30</sup> and conduct formal evaluations of the effectiveness of their records management program.<sup>31</sup>

Pursuant to NARA regulations, an agency must perform all of the following recordkeeping requirements:

- identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties;

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<sup>21</sup> 44 U.S.C. §3101.

<sup>22</sup> *Ibid.*

<sup>23</sup> 44 U.S.C. §3102.

<sup>24</sup> 36 C.F.R. §1220.32.

<sup>25</sup> 36 C.F.R. §1220.34(a).

<sup>26</sup> 36 C.F.R. §1220.34(c).

<sup>27</sup> 36 C.F.R. §1220.34(e).

<sup>28</sup> 36 C.F.R. §1220.34(f)-(g).

<sup>29</sup> Records schedules are described in the section entitled “How Do Agencies Transfer or Dispose of Federal Records?”

<sup>30</sup> 36 C.F.R. §1220.34(g).

<sup>31</sup> 36 C.F.R. §1220.34(j).

- specify the use of materials and recording techniques that ensure the preservation of records as long as they are needed by the government;
- specify the manner in which these materials must be maintained wherever held;
- propose how long records must be maintained for agency business through the scheduling process;
- distinguish records from nonrecord materials and comply with all laws and requirements concerning records scheduling and disposition;
- include procedures to ensure that departing officials and employees do not remove federal records from agency custody and remove nonrecord materials only in accordance with federal regulations; and
- define the special recordkeeping responsibilities of program managers, information technology staff, systems administrators, and the general recordkeeping responsibilities of all agency employees.<sup>32</sup>

NARA's regulations require agencies to "inform all employees that they are responsible and accountable for keeping accurate and complete records of their activities."<sup>33</sup> Additionally, individual offices and their systems administrators are required by regulation to ensure "authenticity, protection, and ready retrieval of electronic records."<sup>34</sup>

The Presidential and Federal Records Act of 2014 appears to place an additional responsibility on federal employees when they use certain e-mail accounts to conduct official business. Similar to a new prohibition placed on those governed by the Presidential Records Act (PRA),<sup>35</sup> these amendments to the FRA would prohibit the use of a "non-official electronic messaging account" to create a record, unless that e-mail is concurrently sent or forwarded to an "official electronic messaging account" within 20 days.<sup>36</sup> The law, however, does not define "non-official electronic messaging account." Additionally, no definition is provided for "official electronic messaging account." The definition of *record*, as noted above, includes "all recorded information ... made or received by a Federal agency under Federal law."<sup>37</sup> The FRA's definition of record would seem to suggest that content of the information, and not the platform in which it was created, would determine whether it qualified as a federal record. The terms "official electronic messaging account" and "non-official electronic messaging account," therefore, might have no effect over whether a particular record qualifies as a federal record pursuant to the FRA. Alternatively, the Archivist could issue an interpretive rule in the *Federal Register* that could provide a clarifying definition for "non-official electronic messaging account."

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<sup>32</sup> 36 C.F.R. §1222.24(a).

<sup>33</sup> 36 C.F.R. §1222.24(b).

<sup>34</sup> 36 C.F.R. §1222.26(b). The public has presumed access to many records provided the records do not fall within certain statutory exemptions to public release outlined in the Freedom of Information Act (FOIA; 5 U.S.C. §552) or other records access laws or executive orders. For more information on FOIA, see CRS Report R41933, *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues*, by Wendy Ginsberg. For more information on classified information, see CRS Report R41528, *Classified Information Policy and Executive Order 13526*, by Kevin R. Kosar.

<sup>35</sup> 44 U.S.C. §2209, as amended by P.L. 113-187. For more information, see CRS Report R40238, *The Presidential Records Act: Background and Recent Issues for Congress*, by Wendy Ginsberg.

<sup>36</sup> 44 U.S.C. §2911, as amended by P.L. 113-187.

<sup>37</sup> 44 U.S.C. §3301, as amended by P.L. 113-187.

In many cases, the .gov e-mail addresses of federal employees are equipped with automated e-mail archiving technologies. To ensure the automated capture of all qualifying federal records, perhaps Congress could amend the law or the agency could promulgate a regulation to ensure that qualifying records created on any electronic messaging account without automated record capturing technology be forwarded to electronic messaging accounts equipped with such technology.<sup>38</sup>

## How Do Agencies Transfer or Dispose of Federal Records?

An agency may transfer inactive temporary or permanent records created in any format to an archival records center after (1) its head determines it is economical or efficient; and (2) after the Archivist approves a records transfer.<sup>39</sup> NARA's regulations require that after 30 years, most agency records are to be disposed of or, if they have permanent value, transferred to NARA for permanent preservation.<sup>40</sup>

Agencies may destroy temporary records that have no permanent value, provided the disposal is in compliance with all records schedules, federal laws, and regulations. NARA must send an annual report to Congress "concerning the disposal of records."<sup>41</sup>

Paper records cleared for destruction "must be sold as wastepaper, or otherwise salvaged."<sup>42</sup> Records that are not sold or otherwise salvaged "must be destroyed by burning, pulping, shredding, macerating, or other suitable" authorized means.<sup>43</sup>

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<sup>38</sup> In certain cases, federal employees may need to use e-mail or other record-creating platforms that are not equipped with automated archiving technologies. For example, in his May 3, 2011, testimony before the House Committee on Oversight and Government Reform, Brook M. Colangelo detailed three White House e-mail outages that occurred in 2009. During these times, EOP employees may have needed to access alternative e-mail servers without automated records capturing mechanisms to conduct federal business. See U.S. Congress, House Committee on Oversight and Government Reform, *Presidential Records in the New Millennium: Updating the Presidential Records Act and Other Federal Recordkeeping Statutes to Improve Electronic Records Preservation*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., May 3, 2011, at [http://oversight.house.gov/images/stories/Testimony/5-3-11\\_Colangelo\\_Testimony.pdf](http://oversight.house.gov/images/stories/Testimony/5-3-11_Colangelo_Testimony.pdf). On August 24, 2012, the Office of Management and Budget and NARA jointly released a records management directive that, among other things, required federal officials to work with private industry to "produce economically viable automated records management" options, including technologies that would be "suitable approaches for the automated management of email, social media, and other types of digital record content." See Jeffrey D. Zients and David S. Ferriero, *Managing Government Records Directive*, the Office of Management and Budget and the National Archives and Records Administration, M-12-18, Washington, DC, August 24, 2012, at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf>.

<sup>39</sup> 44 U.S.C. §3103.

<sup>40</sup> 36 C.F.R. §1235.12. The Presidential and Federal Records Act Amendments of 2014 codify that federal agencies should try to provide records to NARA in "digital or electronic form to the greatest extent possible." (P.L. 113-187, Sec. 9).

<sup>41</sup> 44 U.S.C. §3303a(f). NARA must publish a notice of intention to permit the destruction of any records or types of records in the *Federal Register* (known as records schedules) and permit public comment on that intended destruction prior to empowering agencies to destroy the records.

<sup>42</sup> 36 C.F.R. §1226.24.

<sup>43</sup> Ibid. The destruction of records that contain national security or other sensitive information must be witnessed by a federal employee or an authorized contractor. Agencies are responsible for ensuring that electronic records are "disposed of in a manner that ensures protection of any sensitive, proprietary, or national security information." (Ibid.)

## Which Records Are Temporary? Which Records Are Permanent?

Once information is determined to be a federal record, agencies must then work with NARA to determine whether the record has permanent value, which means it should be maintained in perpetuity by the federal government.

The FRA does not use the term “temporary record,” but provides NARA the authority to empower an agency to destroy certain records that do not “have sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government.”<sup>44</sup> NARA’s regulation (36 C.F.R. §1220.18), however, defines a *temporary record* to mean any federal record that has been determined by the Archivist to have insufficient value (on the basis of current standards) to warrant its preservation by NARA.

*Permanent records*, as defined by 36 C.F.R. §1220.18, are those for which the disposition is deemed permanent on NARA’s standardized records management form. The term includes all records accessioned into NARA and any federal record that has been determined by NARA to have sufficient value to warrant its preservation in NARA—even while it remains in agency custody.<sup>45</sup>

## What Is a Records Schedule?

A records schedule, created by agencies in consultation with NARA, provides agencies a timeline for the eventual disposition of temporary records or provision of permanent records to NARA.

Pursuant to 36 C.F.R. §1220.18, a *records schedule* or *schedule* can be any of the following:

- a standardized form that has been approved by NARA to authorize the disposition of federal records;
- a General Records Schedule (GRS) issued by NARA. A GRS is a schedule issued by the Archivist that authorizes, after specified periods of time, the destruction of temporary records or the transfer to NARA of permanent records that are common to several or all agencies;<sup>46</sup> or
- a published agency manual or directive containing the records descriptions and disposition instructions approved by NARA on one or more standardized forms or issued by NARA in the GRS.

## How Do Agencies Create Records Schedules or Plans for Federal Record Disposition?

All federal records—even those created or maintained for the government by a contractor—“must be covered by a NARA-approved disposition authority” or by NARA’s General Records

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<sup>44</sup> 44 U.S.C. §3303a(a).

<sup>45</sup> NARA provides agencies guidance on whether records have “archival value” in their “Strategic Directions: Appraisal Policy” document, which is available at <http://www.archives.gov/records-mgmt/initiatives/appraisal.html>.

<sup>46</sup> 36 C.F.R. §1227.10.

Schedules.<sup>47</sup> The disposition authority or schedule determines whether records are considered to be of permanent utility to the federal government. Records of permanent utility are turned over to NARA for preservation and eventually made available to the public.

To create a records schedule, an agency should perform the following tasks, among others:<sup>48</sup>

- conduct an analysis to identify all offices' and organizations' recordkeeping requirements;
- prepare an inventory to identify all records series, systems, and nonrecord materials;
- evaluate the period of time the agency will need each record series or system based on use, value to agency operations and oversight agencies, and legal obligations;
- for records proposed as temporary, specify a retention period that meets agency business needs and legal requirements. For records proposed as permanent records, identify how long the records are needed by the agency before they are transferred to NARA;
- determine whether the proposed disposition should be limited to records in a specific medium;<sup>49</sup>
- compile a schedule for records, including descriptions and disposition instructions for each item, using NARA's standard records schedule form; and
- submit the standard form for new or revised record items to NARA for approval.<sup>50</sup>

The record schedule is to include a description of each type or series of records and note whether the records are temporary (to be discarded by the federal government) or permanent (to be permanently retained by NARA). If the record is a permanent record, the date at which the record would be transferred to NARA is to be included.

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<sup>47</sup> 36 C.F.R. §1225.10; 44 U.S.C. §3303. As noted earlier, pursuant to 36 C.F.R. §1227.10, a GRS is a schedule issued by the Archivist of the United States that authorizes, after specified periods of time, the destruction of temporary records or the transfer to the National Archives of the United States of permanent records that are common to several or all agencies.

<sup>48</sup> An additional records management resource for agencies is NARA's *Disposition of Federal Records: A Records Management Handbook*, which is available at <http://www.archives.gov/records-mgmt/publications/disposition-of-federal-records/>.

<sup>49</sup> Records schedules submitted to NARA for approval on or after December 17, 2007, are to be "media neutral"—the disposition instructions apply to the described records in any medium, unless the schedule identifies a specific medium for a specific series. See National Archives and Records Administration, "Frequently Asked Questions (FAQs) About Media Neutral Schedule Items," August 4, 2010, at <http://www.archives.gov/records-mgmt/faqs/media-neutral.html>.

<sup>50</sup> 36 C.F.R. §1225.12.

## **Are There Procedures in Place to Address Unlawful Removal or Destruction of Federal Records?**

The agency head is to establish safeguards against the “removal or loss of records” and to inform employees of the penalties of unlawful removal or destruction of records.<sup>51</sup> 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.<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup> 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 disqualified from holding federal office in the future.<sup>55</sup>

## **How Does the Federal Records Act Relate to Accessing Records Pursuant to the Freedom of Information Act (FOIA)?**

The FRA is a group of statutory provisions in Title 44 of the *U.S. Code* that governs the collection, retention, preservation, and disposal of federal records. The Freedom of Information Act (FOIA; 5 U.S.C. §552), on the other hand, is a law that provides the public presumed access to executive branch records—unless the records are protected from public release by any one of FOIA’s nine categories of exemption.<sup>56</sup> The FRA, therefore, can be viewed as ensuring the proper collection and retention of the raw materials that allow for executive branch agencies to administer FOIA or other records access laws and policies, such as the Privacy Act and declassification policies.

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<sup>51</sup> 44 U.S.C. §3105.

<sup>52</sup> 44 U.S.C. §3106, as amended by P.L. 113-187. The Presidential and Federal Records Act Amendments of 2014 added “corruption, deletion, and erasure” to the list of actions that would trigger the notification requirement.

<sup>53</sup> *Ibid.*

<sup>54</sup> 18 U.S.C. §2071.

<sup>55</sup> *Ibid.*

<sup>56</sup> National security, personal privacy, and trade secrets are among the categories of information that are protected from public release pursuant to 5 U.S.C. §552(b).

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