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Federal Records: Types and Treatments

The Federal Records Act

The Federal Records Act (FRA; 44 U.S.C. Chapters 21, 29, 31, and 33), enacted in 1950 and amended since, governs the collection, retention, and preservation of federal agency records. Congress deemed federal records worthy of preservation because they document the "organization, functions, policies, decisions, procedures, operations, or other activities" of the government (44 U.S.C. §3301). The FRA also governs how and when federal records are to be destroyed or provided to the National Archives and Records Administration (NARA) for "permanent" archiving within NARA's facilities.

What Is a Federal Record?

The FRA provides a definition of *federal records* that is used to determine whether a particular piece of recorded information should be retained and managed.

Key Terms: Federal Record

44 U.S.C. §3301

(a) Records Defined.—

(1) In general.—As used in this chapter, the term "records"—

(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.

Prior to the adoption of the Presidential and Federal Records Act Amendments of 2014 (P.L. 113-187), the FRA's statutory definition of *federal 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." According to the Senate report accompanying P.L. 113-187, the act amended the definition of *federal record* to include the phrase "regardless of form or characteristics" in order to "shift the emphasis away from the physical media used to store information to the actual information being stored."

Additionally, the Archivist of the United States (the head of NARA) 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 and that the content of the information is the primary determinant. For example, when federal employees use personal email to conduct official business, the communication is considered a federal record. Likewise, materials created or maintained for the government by a contractor may be considered a federal record if the material provides information on the agency's transaction of public business.

What Is Not a Federal Record?

Incorporating the statutory definitions of non-record materials, NARA's guidance (36 C.F.R. §1220.18) similarly suggests that *non-record materials* would include copies of information "kept only for reference" and "museum materials intended solely for reference or exhibit." In cases where there is disagreement over whether particular recorded information constitutes a federal record, the Presidential and Federal Records Act Amendments of 2014 expressly empower the Archivist to determine "whether recorded information, regardless of whether it exists in physical, digital, or electronic form, is a record" for purposes of the FRA and states that this determination "shall be binding on all Federal agencies." NARA's regulations also state that non-records are to be "physically segregated from records" or "readily identified and segregable from records" and "purged when no longer needed for reference" (36 C.F.R. §1222.16).

Presidential Records and Their Treatment

Presidential records are separate from federal records. However, they are administered similarly by NARA. The Presidential Records Act (PRA; 44 U.S.C. §§2201-2209) governs the collection and retention of records created or received by the President, immediate presidential staff, and certain units or individuals within the Executive Office of the President (see CRS Infographic IG10060, *The Creation of Presidential Records*, by Meghan M. Stuessy, for more information). Presidential records include, among other types of information, documentary materials relating to certain political activities or information that relates to the constitutional, statutory, or other official or ceremonial duties of the President. The PRA also codifies public access to presidential records.

Under Chapter 22 of Title 44 of the *U.S. Code*, on leaving office, an outgoing President may restrict access to specific categories of presidential records for up to 12 years. Certain presidential records may be excepted from public access indefinitely if they qualify under any of six criteria (44 U.S.C. §2204), including materials related to appointments and confidential communications requesting or submitting advice to the President or the President's advisors, among other possible restrictions.

According to NARA, "while only a small percentage of agency records are permanent, all presidential records are considered permanent, unless the President obtains the written views of the Archivist to dispose of particular records—e.g., public mail and routine administrative files." For more information about the PRA, see CRS Report R46129, *The Presidential Records Act: An Overview*, by Meghan M. Stuessy.

Temporary Versus Permanent Records

Once recorded information is determined to be a federal record, agencies must then work with NARA to determine whether it is a *permanent record*, which means it has permanent value and should be maintained in perpetuity by the federal government, or whether it is a *temporary record*, which means the document may be destroyed after a period of time.

More specifically, permanent records are those for which the disposition is deemed permanent on NARA's standardized records management form (Standard Form [SF] 115). Only permanent records (which include some federal records and all presidential records) may be transferred to the National Archives. According to NARA, "less than 5 percent of the mountain of documents created by agencies every year comes to the Archives," with the remainder being considered temporary records.

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" (44 U.S.C. §3303a). NARA's regulation (36 C.F.R. §1220.18), however, defines *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.

What Is a Records Schedule?

A *records schedule* is created by agencies in consultation with NARA and sets a timeline for the eventual disposition of temporary records or transfer of permanent records to NARA.

A records schedule can be any of the following:

- a standardized form (SF 115) that has been approved by NARA to authorize the disposition of federal records (i.e., disposition authority);
- a General Records Schedule (GRS) issued by NARA, which authorizes, after specified periods of time, the destruction of temporary records or the transfer of permanent records to the Archives that are common to several or all agencies; 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?

All federal records must be covered by a NARA-approved records schedule or a GRS.

The records schedule should 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). For permanent records, the schedule includes the date the record would be transferred to NARA.

Records schedules must be cleared by internal agency stakeholders, the Government Accountability Office when required by 43 C.F.R. §1225.20(a), and by NARA. Disposition instructions approved by NARA are mandatory (44 U.S.C. §3314). In addition, according to 44 U.S.C. §3303a(a), NARA must publish a notice of agency requests for the disposal of records in the *Federal Register*. If NARA has previously approved a request to dispose of the records covered in an agency request, a notice is published only if the proposed retention period is shorter. The publication of these notices allows interested persons to submit written comments on the records to NARA before disposal is approved or reapproved with a shorter retention period.

What Procedures Address Unlawful Removal or Destruction of Federal Records?

Per the FRA, the head of each agency 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. Under 44 U.S.C. §3106, if any agency head learns of any "actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other 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 also requires the Archivist to notify Congress of instances in which he or she must initiate such action with the Attorney General. The Archivist may not independently initiate action without 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 (18 U.S.C. §2071). 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.

Meghan M. Stuessy, Analyst in Government Organization and Management

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