

**Records,  
Agency Records  
and  
Agency Control**

Ramona Branch Oliver  
Department of Labor

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**Objectives**

- o Broad discussion of governmental records oversight responsibilities
- o Types of records that may be found among agency files
- o How to deal with records that fall outside the scope of FOIA
- o Maintaining sound administrative records
- o Disposition of FOIA case files

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○ **Why Should YOU Care About Records?**



Laws and regulations govern Federal records



Increased efficiency of operations



Adequate and proper documentation



Litigation and FOIA response



Disaster recovery

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## ○ Key Laws and Regulations

- 44 U.S.C. Chapters 21, 29, 31, 33, 35
  - Documentary materials, regardless of physical form or characteristics
  - Made or received by an agency of the United States Government
  - Preserved or appropriate for preservation
- 36 CFR 1220-1239
  - Creation, maintenance, and disposition of Federal records (36 CFR 1220-1239)
  - Micrographic records (36 CFR 1238)
  - Audiovisual records (36 CFR 1237)
  - Electronic records (36 CFR 1236)
  - Vital Records (36 CFR 1223)



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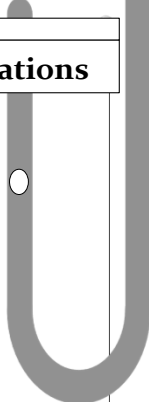
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## Agency Record Obligations

- Comply with Federal Records Management laws and regulations
- Comply with its NARA approved records schedule
- Use Records Management standards and practices
- Facilitate the disposition of inactive records
- Guard against unauthorized destruction



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## The Federal Records Act

- **Federal records are a subset of agency records under the FOIA**
- Enacted in 1950, updated in 2014 and 2020
- Reflects modern recordkeeping and archival practices
- Legislates responsibilities for federal agencies and for NARA
- Understanding the FRA helps you understand how agencies create, manage and dispose of federal records.
- Knowing how the FRA works helps FOIA officers identify records, request access to records, and conduct searches of records.



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## Definition of a Federal Record

- 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
  - does not include:
    - library and museum material made or acquired and preserved solely for reference or exhibition purposes; or
    - duplicate copies of records preserved only for convenience.
- 44 U.S.C. 3301, Definition of Records

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## What That Really Means...



Whatever you create or receive in the process of doing the work of the US Government is a record.



Materials that document the work done, decisions made, correspondence sent and received, transactions, what events took place, who was involved, and other related topics.



**Key difference with FOIA records → federal records exclude (some) working files**

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## Examples of Federal Records

- Rulemaking Documents
- Litigation Case Files
- Advice and Opinion Files
- Organization charts
- Agency histories
- Press releases
- Internal and external directives
- Reports and publications
- Project files
- Correspondence
- Time and attendance records
- Payroll databases
- Personnel files

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## Other Types of Federal Records

- o Materials that document government activities should be treated as a federal record, such as:
- o E-messages including chats, texts, emails
- o Textual, audiovisual, cartographic, geospatial records
- o Documents, scanned images, photographs
- o Webpages, social media, collaboration files
- o Licensed information, data sets, case files
- o Contract deliverables, R&D materials

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## Non-records

- > Federally owned documentary materials that do not meet the definition of a record
- > Extra copies of documents kept only for reference (*information or convenience copies*)
- > Stocks of publications and processed documents
- > Library or museum materials intended solely for reference or exhibit



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## Examples of Non-records

- > Reference copies and "info" copies of documentary material
- > Drafts, worksheets, and notes that do not represent significant steps in preparation of final documents
- > Duplicate copies of documents maintained in the same file
- > How-to manuals
- > Blank forms
- > Stocks of publications
- > Personal copies of personnel-related documents such as performance evaluations, TSP deductions, CFC contributions

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## Important Concept: Records vs. Non-records

- o Records cannot be destroyed without NARA's written approval (via Agency Records Schedule/GRS)
- o Non-records can be destroyed at agency discretion
- o Don't interfile records and non-records
- o On collaborative projects, determine who holds the record file

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## Working Papers & Drafts

- Drafts and working papers or files, such as preliminary drafts and rough notes, that relate to routine program or administrative operations, or that contain only corrections, or editorial or stylistic changes are non-records and can be disposed of as such
- However, working papers, preliminary drafts, rough notes and other similar materials, that have **substantive value** are **records** and must be treated as such



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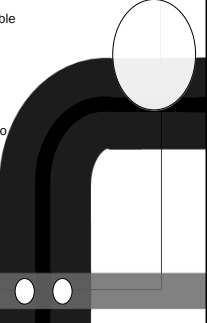
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### When Working Papers & Drafts are Records - Two-part Test!

- The recorded information was circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and
- The recorded information contains unique information, such as substantive annotations or comments that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities

36 CFR 1222.12(c)



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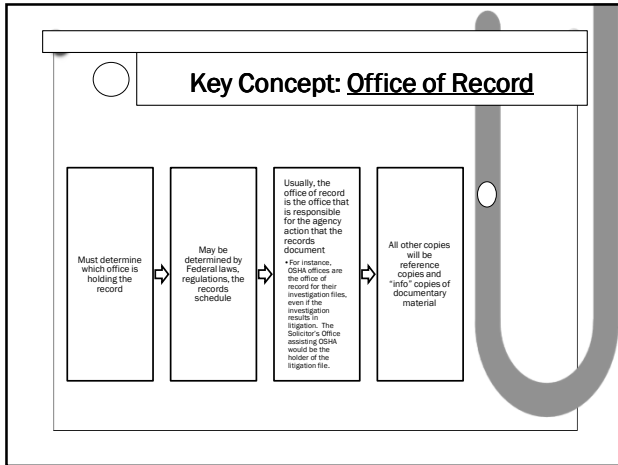
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### Personal Papers

- Non-records that are classified as documentary materials which belong to an individual and are not being used to conduct agency business
- Should never be interfiled with agency records filed in your office or central file room
- Private papers that belong to you that you can take with you when you leave Unauthorized removal of any agency records is illegal. This is called "Alienation of Records."

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### Other Types of Records

**Transitory Records** have short-term (180 days or less) interest, and have minimal or no documentary or evidential value

**Unscheduled Records** do not have an approved disposition from NARA

- Unscheduled records must NOT be destroyed

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## The Privacy Act, 5 U.S.C. § 552a

- o **Privacy Act records are a subset of agency records**
- o Enacted in 1974, amended several times through 2014
- o Protects the **privacy of individuals** about whom the government maintains records by:
- o Limiting the collection, maintenance, use, and disclosure of personally identifiable information.
- o Allowing individuals to request access to, amendment of, and an accounting of disclosures concerning records about themselves.

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## The Privacy Act, 5 U.S.C. § 552a

- o **General presumption is the protection of information**
- o The Privacy Act access provisions interface with the FOIA
- o Understanding the Privacy Act records allows you to identify what records are protected and properly determine releasability

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## Records Under the Privacy Act

"any item, collection, or grouping of information **about an individual** that is maintained by an agency..." 5 U.S.C. §552a(a)(4)

Generally, "must both be 'about' an individual and include his name or other identifying particular."  
*Tobey v. NLRB*, 40 F.3d 469, 471 (D.C. Cir. 1994)

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## Privacy Act Records Must be...

- **About an individual.**
  - - A citizen of the United States or a lawfully admitted permanent resident
  - - Excludes organizations and deceased individuals
- **Maintained in a system of records, and**
  - "a group of records under the control of any agency from which information is retrieved by [personal identifier]"
- **Retrieved by personal identifier.**
  - the agency must in fact access the records using a personal identifier
  - Examples of personal identifiers: name, SSN, DOB, Case File #, Voice or Fingerprint.

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## The Presidential Records Act, 44 U.S.C. §§ 2201-2209

- Enacted in 1978, took effect on January 20, 1981 (Reagan Administration), and amended in 2014
- Applies to the records of the President and the Vice-President
- Official records (created or received by the President as part of his constitutional, statutory, or ceremonial duties) are owned by the United States, not by the President/VP
- The Archivist takes custody of Presidential records when the President leaves office

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## Records Under the Presidential Records Act

- "documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's 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." [44 U.S.C. § 2201(2)].

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## ○ Who creates Presidential records?

The PRA applies to records created by components of the Executive Office of the President (EOP) that **solely advise and assist the President**.

The White House Office	The Office of the Vice President	The Office of Policy Development	The Council of Economic Advisors	The National Security Council	The President's Foreign Intelligence Advisory Board	The President's Intelligence Oversight Board	The National Economic Council	The Office of Administration
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\*\*\*These EOP components **fall outside the scope of the FOIA and the FRA**\*\*\*

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## ○ PRA Interface with FOIA

Presidential records are **eligible for access under FOIA five (5) years** after the President leaves office.

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The President may restrict access to six (6) specific kinds of information for up to 12 years after leaving office.

→

12 years after leaving office, Presidential records are reviewed for the 8 applicable FOIA exemptions only.

• **→ BUT FOIA Exemption 5 is "not available" to withhold Presidential records**

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PRA restriction categories (44 U.S.C. § 2204a):

- National security information program classified under Executive Order **(FOIA Ex. 1)**
- Information relating to appointments to Federal Office
- Exemptions from disclosure by statute **(FOIA Ex. 3)**
- Trade secrets and confidential business information **(FOIA Ex. 4)**
- Confidential communications, requesting or submitting advice, between the President and his advisors or between such advisors
- Information which if disclosed would cause a "substantial and identifiable invasion of personal privacy" **(FOIA Ex. 6)**

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## The Freedom of Information Act (FOIA), 5 U.S.C. § 552

- Enacted in 1967, amended several times; most recently, in 2016
- Provides the public the right to request access to records from any federal agency.
- Keeps citizens informed about what their government is up to.
- Primary interest is in the **disclosure of information**.
- Covers the **broadest category of records** when compared to other record statutes.

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## Entities Subject to the FOIA

- o Agencies within the Executive Branch of the federal government
- o Independent regulatory agencies
- o Some components within the Executive Office of the President:
  - o Office of Management and Budget
  - o Council on Environmental Quality
  - o Office of Science and Technology
  - o Office of the U.S. Trade Representative
  - o Office of National Drug Control Policy

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## Definition of Records Under the FOIA

- o "Records" is **NOT** a statutorily defined term under the FOIA, but is described as:
- o Any information that would be an **agency record** subject to the requirements of [this section] **when maintained by an agency** in any format, including an electronic format; and **under the agency's control** at the time the request is received.

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## Agency Records Subject to the FOIA

o **Materials not qualifying as agency records include, but are not limited to:**

- o Phone calls
- o Memories
- o Museum Objects

Agency records include, but are not limited to:

1. Policies, Handbooks, and Manuals
2. Directives and other Guidance
3. Memorandums, Briefings, and Reports
4. Letters
5. Email Correspondence
6. Data that can be retrieved and/or copied (alphanumeric and geo-spatial)
7. Calendars
8. Photos, Slides, Audio and Video Recordings, and Spatial Imagery
9. Visitor's Logs
10. Handwritten Notes
11. Drafts (electronic or hard copy)
12. Instant Messages (e.g., Skype, Microsoft Teams)
13. Text messages in agency-issued devices
14. Transcripts

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○ **What is an “Agency Record?”**

-  **Two-part test**
-  **4 Factors of “agency control”**
-  **Agency records subject to the FOIA**

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**Two-part Test for “Agency Records”**

- The Supreme Court articulated a two-part test for determining when a “record” constitutes an “agency record” under the FOIA:
- **Created or obtained** by agency, and
- under **agency control** when request received
- - See *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136 (1989)

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○ **Four Agency Control Factors**

-  **Creator’s intent to control**
-  **Ability of the agency to use**
-  **Extent to which personnel have read/relied**
-  **Degree of integration into agency files**

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## Agency Records Maintained By a Government Contractor

- What if the agency handed the records over to a contractor to store, organize, or manage the records requested?
- Agency records remain subject to the FOIA even if they have been placed in the physical possession of a government contractor for purposes of records management.
- The contractor must have in place appropriate procedures to allow it to search for and identify agency records in its possession that may be responsive to a FOIA request.
- Such records must be identified and handled by the agency just as if they had been in the possession of the agency in the first instance.

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## Congressional Records

- The FOIA does not cover congressional documents
- Congressional records include:
  - (1) records received by an agency from Congress, OR
  - (2) records generated by an agency in response to a confidential congressional inquiry
- Not subject to the FOIA simply because the material may have been deposited with the Archives.



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## Congressional Records

- Is it an "agency record" or a congressional record?
- Did Congress manifest an intent to retain control over the records?
- Must be evident from the circumstances surrounding creation or transmittal
- Congress doesn't need to restate each time a previous expressions of intent to control certain documents to retain control
- If **yes**, what are the contours of that reservation of control?
  - i.e.: Is Congress retaining control over all or parts of the records at issue?

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## Records Have A Life Cycle

- o Creation – Records made or received by agency
- o Retiring inactive records to a records center
- o Maintenance and Use – Active filing, retrieval, and handling of records
- o Disposing of temporary records past their retention period
- o Disposition – Actions taken when records no longer needed for current agency business, such as:
- o Transferring permanent records past their retention period to the National Archives

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## Two Types of Record Schedules

### Agency Records Schedule

Governs the disposition of program and administrative records specific to the agency. Examples: Advice and Opinion Files, Litigation Case Files, Rulemaking Records, and Activity Reports

### General Records Schedule (GRS)

The National Archives and Records Administration (NARA) issued schedules governing the disposition of records common to several or all Federal agencies such as: FOIA, Privacy, Ethics, Travel, Payroll, Procurement, Budget, and Personnel



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## Only Two Dispositions

**Temporary Records** (95 – 98%) are approved by NARA for destruction, either immediately or after a specified retention period

**Permanent Records** (2 – 5%) are determined by SOL and NARA to have sufficient historical or other value to warrant continued preservation by the Federal Government

Unscheduled records are deemed permanent and must be kept *until* a schedule is created to cover the record

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## Proper Disposition of Records

Remember "disposition" does not always = destruction

Ways to properly dispose of records in accordance with the *Agency Record Schedules and NARA General Records Schedule* include:

Sending records to the Federal Records Centers for storage until records are eligible for destruction or transfer to NARA for permanent accession	Sending permanent records to NARA when eligible
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## FOIA Case Files as Records

Records documenting all action taken while responding to a FOIA request	Initial request	Clarifying letters, including acknowledgments
Internal documents discussing disclosure determinations	Complete copy of all records reviewed (unredacted file)	Complete copy of all records provided to requester (redacted file)
E.O. 12,600 correspondence, Exemption 4	Final response letters	

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## Disposition of FOIA Case Files

- o GRS 4.2, Information Access and Protection Records, Item 20
  - o GRS states that FOIA files can be disposed of 6 years after final agency action or 3 years after final adjudication by the courts, whichever is later
  - o Longer retention is authorized if required for business
  - o Applies whether the request is granted in full, in part, denied for any reason (including inability to process), and if case is appealed

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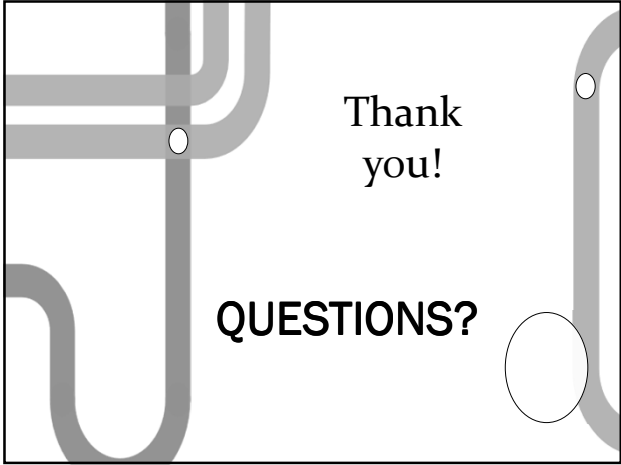
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