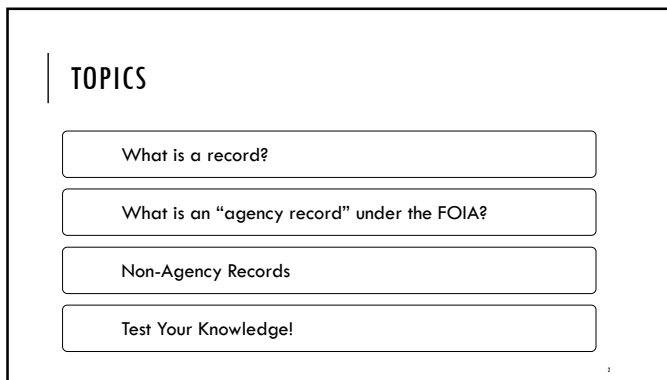


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THE FEDERAL RECORDS ACT

- 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.



National Archives, Constitution Avenue Northwest
National Archives Identifier: 100-2024

4

FEDERAL RECORD UNDER THE FRA

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** (44 U.S.C. §3301)

5

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

6

TYPES OF FEDERAL RECORDS

Materials that document government activities should be treated as a federal record, such as:

- E-messages including chats, texts, emails
- Textual, audiovisual, cartographic, geospatial records
- Documents, scanned images, photographs
- Webpages, social media, collaboration files
- Licensed information, data sets, case files
- Contract deliverables, R&D materials

7

EXCLUSIONS FROM FEDERAL RECORDS

By law (44 U.S.C. § 3301):

- Library and museum material made or acquired and preserved solely for reference or exhibition purposes; or
- Duplicate copies of records preserved only for convenience

By regulation (36 C.F.R. § 1222.12):

- Working files (sometimes!)

8

WORKING FILES (36 C.F.R. § 1222.12(C))

Working files, such as preliminary drafts and rough notes, and other similar materials, **are records** that must be maintained to ensure adequate and proper documentation if:

- (1) They were **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
- (2) They **contain 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

9

NON-RECORDS UNDER THE FRA

Usually recycled, discarded or destroyed when no longer needed

Examples:

- Library books
- Reference material
- Duplicate copies of records kept only for convenience
- Stocks of publications and blank forms

10

THE PRIVACY ACT, 5 U.S.C. § 552A

• **Privacy Act records are a subset of agency records under the FOIA**

• Enacted in 1974, amended several times through 2014

• Protects the **privacy of individuals** about whom the government maintains records by:

- i. Limiting the collection, maintenance, use, and disclosure of personally identifiable information.
- ii. Allowing individuals to request access to, amendment of, and an accounting of disclosures concerning records about themselves.



11

THE PRIVACY ACT, 5 U.S.C. § 552A

• **General presumption is the protection of information**

• The Privacy Act access provisions interface with the FOIA

• Understanding the Privacy Act records allows you to identify what records are protected and properly determine releasability

12

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)

13

13

PRIVACY ACT RECORDS MUST BE...

1. About an individual,

- ✦ - A citizen of the United States or a lawfully admitted permanent resident
- ✦ - Excludes organizations and deceased individuals

2. Stored in a system of records, and

“a group of records under the control of any agency from which information is retrieved by [personal identifier]”

3. Retrieved by personal identifier.

- the agency must in fact access the records using a personal identifier
- Examples of personal identifier: name, SSN, CSA, DOB+

14

14

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



Richard M. Nixon
National Archives, RG226-100000, 101-102000-10000

15

15

RECORDS UNDER 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)].

16

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

These EOP components **fall outside the scope of the FOIA and the FRA**.

17

PRA INTERFACE WITH FOIA

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

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**

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

1. National security information properly classified under Executive Order [FOIA Ex. 1]
2. Information relating to appointments to Federal Office
3. Exempted from disclosure by statute [FOIA Ex. 3]
4. Trade secrets and confidential business information [FOIA Ex. 4]
5. Confidential communications requesting or submitting advice, between the President and his advisors or between such advisors
6. Information which if disclosed would cause a clearly unwarranted invasion of personal privacy [FOIA Ex. 6]

18

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.



19

ENTITIES SUBJECT TO THE FOIA

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

20

DEFINITION OF RECORDS UNDER THE FOIA

"Records" is **NOT** a statutorily defined term under the FOIA, but is described as:

- (A) 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

→ **TWO-PART TEST** (next section)

- (B) any information described under subparagraph (A) that is **maintained for an agency** by an entity **under Government contract**, for the **purposes of records management**.

21

AGENCY RECORDS SUBJECT TO THE FOIA

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 (alpha-numeric 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

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

1. Phone calls
2. Memories
3. Museum Objects

22

WHAT IS AN "AGENCY RECORD"?

- Two-part test
- 4 Factors of "agency control"
- Agency records subject to the FOIA

23

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:

1. **Created or obtained** by agency, and
2. under **agency control** when request received

- See *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989)

24

4 AGENCY CONTROL FACTORS

1. Creator's intent to control
2. Ability of the agency to use
3. Extent to which personnel have read/relied
4. Degree of integration into agency files

25

25

IF MULTI-SUBJECT DOCUMENTS...

What happens when a requester seeks information on a particular topic, and only a portion of a document concerns the topic of the request?

- Cannot mark as "non-responsive"
- Exemptions are exclusive means of redacting information
- Agency must carefully define what is a "record" responsive to a particular request, and then process it in its entirety for exemption applicability.

26

26

OIP GUIDANCE ON DEFINING A RECORD

1. Be Guided by the Privacy Act's Definition of "Record"
2. Link Records to Subject of the Request

WORKABLE DEFINITION: any item, collection, or grouping of information that pertains to the subject of a specific FOIA request.

27

27

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.

28

28

WHAT ARE NON-AGENCY RECORDS?

- Personal Records
- Congressional Records

29

29

PERSONAL RECORDS

- Are about personal life outside of work
- Are owned by the employee
- Do not reflect agency business
- Examples:
 - Personal medical and insurance files
 - Copies of one's own personnel documents
 - Material created prior to service
 - Personal diaries, journals, notes and calendars
- **BUT** → Commingling of personal materials and federal records makes all information a federal record (36 C.F.R. § 1222.20)



30

30

PERSONAL RECORDS (CONT'D)

To distinguish "personal records" from "agency records," an agency should examine "the totality of the circumstances surrounding the creation, maintenance, and use" of the record.

1. the **purpose** for which the document was created;
2. the **degree of integration** of the record into the agency's filing system; and
3. the extent to which the record's author or other employees **used the record to conduct agency business.**

31

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.



Photo by Alejandro Barba on Unsplash

32

CONGRESSIONAL RECORDS (CONT'D)

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 particular contours of that reservation of control?
 - i.e.: Is Congress retaining control over all or parts of the records at issue?

33

TEST YOUR KNOWLEDGE!

- What type of record is it?
- Is it subject to the FOIA?

34



35
