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Federal Agency Records Management:
Safeguarding an Essential American Right

Molly L. Fischer

Research Paper, LSTD300

Professor Jay Carlin

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Nearly a half-century ago, Congress passed a seminal piece of legislation giving its citizenry unprecedented access to federal government records. The Freedom of Information Act, or FOIA, which was signed by President Johnson in 1966 and went into effect the following year, allowed Americans access to previously-unreleased federal agency records not falling under one of nine defined exemptions. To ensure access to these federal records, as well as to ensure the preservation of the history of the United States government, numerous statutes have been instituted to assure that federal records are preserved, organized, and curated in a way that is helpful to both the agencies that created them and to the general public. These statutes, which govern records management by federal agencies, allow the National Archives and Records Administration to approve schedules for the maintenance and disposal of federal records, and to acquire those records that it deems to have permanent value. In examining the history of federal agency records management, the different regulations that govern this management, and the modern challenges faced by federal agency records managers, we gain a greater understanding of this immense and multifaceted endeavor and its value to American society.

To begin this examination, it is helpful to become familiar with the vocabulary commonly used by archivists and records managers. Included below are definitions from Richard Pearce-Moses's *Glossary of Archival and Records Terminology* published by the Society of American Archivists, the premiere professional organization for archivists in the United States:

- Active records: “Records that continue to be used with sufficient frequency to justify keeping them in the office of creation; current records.”¹ Active records can be contrasted with inactive or noncurrent records, which are not used in an organization’s daily business.
- Appraisal: “The process of determining whether records and other materials have permanent (archival) value.”²
- Disposition/disposal: “Materials’ final destruction or transfer to an archives as determined by their appraisal.”³ Note that disposition and disposal can refer to *either* maintenance (temporary or permanent) *or* destruction, and the terms are not synonymous with the latter.
- Enduring value: “The continuing usefulness or significance of records, based on the administrative, legal, fiscal, evidential, or historical information they contain, justifying their ongoing preservation.”⁴
- Records center: in both governmental and general archival use, a records center is “A facility used for low-cost storage of inactive and semicurrent records before those records are destroyed or transferred to an archives.”⁵ These facilities are general similar to warehouses.

¹ Richard Pearce-Moses, *Active records*, A GLOSSARY OF ARCHIVAL AND RECORDS TERMINOLOGY (2005), <http://www2.archivists.org/glossary/terms/a/active-records>.

² Richard Pearce-Moses, *Appraisal*, A GLOSSARY OF ARCHIVAL AND RECORDS TERMINOLOGY (2005), <http://www2.archivists.org/glossary/terms/a/appraisal>.

³ Richard Pearce-Moses, *Disposition*, A GLOSSARY OF ARCHIVAL AND RECORDS TERMINOLOGY (2005), <http://www2.archivists.org/glossary/terms/d/disposition>.

⁴ Richard Pearce-Moses, *Enduring value*, A GLOSSARY OF ARCHIVAL AND RECORDS TERMINOLOGY (2005), <http://www2.archivists.org/glossary/terms/e/enduring-value>.

⁵ Richard Pearce-Moses, *Records center*, A GLOSSARY OF ARCHIVAL AND RECORDS TERMINOLOGY (2005), <http://www2.archivists.org/glossary/terms/r/records-center>.

In moving into the discussion of United States federal record policy and law, a brief historical examination is helpful. The development of such policy was an extended process. In his history of federal records disposal prior to the 1949 creation of the National Archives and Records Service (NARS), James Gregory Bradsher notes that for the first century of its history, the United States government had no formal records management plan.⁶ There was certainly no provision for the destruction of unnecessary federal records. February 1853 legislation, “An act to prevent frauds upon the Treasury of the United States,” made destruction of federal records (specifically with the intent of defrauding the government) a felony; unfortunately, the lack of statute authorizing the destruction of even papers *without* value led to the indefinite preservation of all federal records. It was not until after the Civil War that the federal government started to consider that perhaps all federal records were not deserving of perpetual preservation.⁷

In 1889, Congress finally passed legislation allowing for the destruction of select federal records. In “An Act to Authorize and Provide for the disposition of useless papers in the Executive Departments,” Congress allowed the heads of executive departments to make recommendations for destruction of certain series of records.⁸ While this act allowed for the disposal of records without long-term value, it still required the approval of each list of specific records by Congress before disposal could occur. In a 1912 Executive Order, President Taft allowed for departments to submit their lists to the Librarian of Congress

⁶ James Gregory Bradsher, *An Administrative History of the Disposal of Federal Records, 1789-1949*, 3 PROVENANCE: JOURNAL OF THE SOCIETY OF GEORGIA ARCHIVISTS 1 (1985),

<http://digitalcommons.kennesaw.edu/cgi/viewcontent.cgi?article=1307&context=provenance>.

⁷ Frank Wells, et al., *Historical Development of The Records Disposal Policy of The Federal Government Prior to 1934*, 7 THE AMERICAN ARCHIVIST 181 (1944),

<http://americanarchivist.org/doi/pdf/10.17723/aarc.7.3.l403805446475352>.

⁸ *Id.* at 186.

rather than to Congress itself.⁹ The National Archives was established by Congress in 1934 and charged with preserving and maintaining the records of the U.S. government; the National Archives thereafter accepted the process of reviewing individual records disposal lists.¹⁰

The passage of the Federal Records Disposal Act of 1943 finally allowed for continuing records schedules, which authorized for the specific disposition of particular types of records. This act also removed the requirement that the National Archives review and appraise each separate list of records that the federal agencies wished to destroy. Instead, the National Archives simply approved ongoing records disposal schedules.¹¹ In 1949, the renamed National Archives and Records Service was absorbed by the General Services Administration (GSA); the addition of “Records Service” in the new name indicated the agency’s interest in not only inactive documents with enduring value (those that might be placed in an archives), but also in active governmental records. This interest in active agency records, as well as those maintained permanently, continued after the once-again renamed National Archives and Records Agency (NARA) became its own independent agency in 1985.¹²

In 1950, Congress (with the aid of the National Archives and Records Service) passed the Federal Records Act of 1950, later codified into 44 U.S. Code Chapter 31. This chapter of code remains the central set of statutes governing the disposition of federal agency records. The Federal Records Act of 1950, as Bradsher describes, charged the GSA

⁹ Bradsher, *supra* note 6, at 5.

¹⁰ Bradsher, *supra* note 6, at 6.

¹¹ Bradsher, *supra* note 6, at 12.

¹² Richard Pearce-Moses, *National Archives and Records Administration, A GLOSSARY OF ARCHIVAL AND RECORDS TERMINOLOGY* (2005), <http://www2.archivists.org/glossary/terms/n/national-archives-and-records-administration>.

and the National Archives and Records Service with “improving procedures, methods, and standards relating to the creation of records; their maintenance and use when current; their disposition when they were no longer current; and authorized it to operate record centers.”¹³ This act required that agency leaders both create and preserve records documenting their agencies’ work and structure, and establish and maintain records management programs. It also allowed the Archivist of the United States to inspect federal agency records to ensure compliance with records management plans and schedules.¹⁴

Today, the disposition of all federal records is governed by multiple federal laws. The bulk of the statutes governing federal agency records are included in the codified Federal Records Act in the aforementioned Chapter 31 of Title 44 of U.S. Code (the title dedicated to public printing and documents). However, in addition to this chapter, which specifically applies to federal *agency* records, several other titles include laws concerning other federal records that are to be maintained by NARA, such as presidential election results¹⁵, the records of former Presidents¹⁶, the Foreign Relations of the United States Historical Series produced by the State Department¹⁷, and tribal records deposited in the Oklahoma Historical Society by the Secretary of the Interior.¹⁸ In addition to these statutes that summarize NARA disposition, there are also dozens of other statutes that regulate how federal documents should be maintained without NARA involvement, from the statute

¹³ Bradsher, *supra* note 6, at 15.

¹⁴ *Id.*

¹⁵ 3 U.S.C. §§ 6, 11-13.

¹⁶ 3 U.S.C. § 102 note.

¹⁷ 22 U.S.C. § 4352.

¹⁸ 25 U.S.C. § 199(a).

authorizing creation and maintenance of the Federal Library Depository Program¹⁹ to the statute outlining the Paperwork Reduction Act of 1995²⁰.

As mentioned, the main area of federal code governing federal agency document disposition is the Federal Records Act, 44 U.S.C. § 31, under the official heading of Records Management by Federal Agencies. This statute includes seven sections, covering the following areas: § 3101, the general records management duties of heads of federal agencies; § 3102, the mandate to create a program to manage agency documents in cooperation with the Archivist of the United States and the Administrator of General Services; § 3103, the directive to transfer applicable records to records centers as necessary; § 3104, allowing for a government official to certify the transfer of specific records to records centers; § 3105, which requires that federal agency heads institute “safeguards” to ensure that agency records are not removed or lost by accident or purposefully; § 3106, which indicates the process to be instituted should an agency head find that records have been unlawfully destroyed or otherwise removed (specifically, notification of the Archivist, who initiates action through the Office of the Attorney General); and § 3107, confirming that this title of code does not limit the authority of the Comptroller General of the United States in recommending software, forms, and other recordkeeping devices.²¹ Related to § 3106, destruction of federal records is also prohibited by Title 18 of U.S. Code (Crimes and Criminal Procedure), allowing for fines or no more than three years of jail time for anyone who “conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away

¹⁹ 44 U.S.C. §§ 1901-1916.

²⁰ 44 U.S.C. §§ 3501-3520.

²¹ 44 U.S.C. §§ 3101-3017.

any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States.”²²

Currently, to best obey these statutes, federal agencies maintain their records through the use of Records Control Schedules (RCS). These schedules specify the length of retention and duration before disposal for specific types of records created by each federal agency, as well many of each agency’s discrete offices, bureaus, and other subagencies. For example, consider the RCS for the Clinical Practice Guidelines created by the Agency for Health Care Policy and Research within the Department of Health and Human Services. Within these Guidelines are two separate series: 1) Literature Analysis Reports and Meeting Minutes related to the production of the clinical practice guidelines, which are to be maintained permanently, transferred to a Federal Record Center one year after creation, and transferred to the National Archives twenty years after creation; and 2) remaining records related to the guidelines but not included within the first series, which are considered temporary, and are to be transferred to a Federal Record Center one year after creation and destroyed after twenty-five years.²³ This disposition schedule was approved by four different managers within the Agency for Healthcare Research and Quality: the Management Officer, the Chief of the Information Resource Management Branch, the Senior Attorney for the Office of General Counsel, and the Director of the Office of Management. Finally, the schedule was approved by the Archivist of the United States. Records are maintained with varying levels of granularity, with many (such as those in the previous

²² 18 U.S.C. § 2071(a).

²³ *Request for Records Disposition Authority*, AGENCY FOR HEALTHCARE POLICY AND RESEARCH, Apr. 15, 1994, http://www.archives.gov/records-mgmt/rcs/schedules/departments/department-of-health-and-human-services/rg-0510/n1-510-94-003_sf115.pdf.

example) being quite precise. A complete list of RCS by agency is available at the National Archives' website for federal records managers.²⁴

Of course, the development and proliferation of electronically-born records has necessitated the creation of new procedures. Handling gigabytes of data or folders of email is certainly different from shuttling boxes of paper to one of seventeen regional Federal Records Centers. In response to these advances in records technology, Congress has made amendments to the Federal Records Act of 1950, most recently in November 2014. These most recent amendments modernized the Federal Records Act by amending it in the following ways: 1) expanding the definition of Federal Record to include all electronic records, the first change to the term's definition since the Act's creation in 1950; 2) specifying that electronic records are to be transferred to the National Archives in their electronic form; 3) "granting the Archivist of the United States final determination as to what constitutes a Federal record;" 4) allowing Presidential and federal electronic records to be transferred to the national Archives permanently while also still in custody of the President or agency; 5) "clarifying the responsibilities of Federal government officials when using non-government email systems;" 6) providing for further security in preventing the loss or theft of original records and classified records; and 7) creating procedures by which current Presidents can review former Presidential records for constitutional privileges.²⁵

In addition to the general governance provided by the Federal Records Act, there are specific guidelines on how various types of records are managed. For example, the

²⁴ *Records Control Schedules*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, <http://www.archives.gov/records-mgmt/racs/> (last visited June 17, 2015).

²⁵ *National Archives Welcomes Presidential and Federal Records Act Amendments of 2014*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (Dec. 1, 2014), <http://www.archives.gov/press/press-releases/2015/nr15-23.html>.

Office of Management and Budget's 2012 *Managing Government Records Directive (M-12-18)* laid out specific guidelines for agency heads on needed steps for insurance of compliance with federal agency records laws, including managing all types of records in the format in which they were created, requiring that designated agency records officers receive federal records management training, and ensuring that email and other electronic records are included in records schedules.²⁶ In addition to such official directives, NARA regularly creates bulletins offering federal records managers guidance on managing their records, such as "Frequently Asked Questions about Instant Messaging."²⁷ NARA has also created such resources as *The Toolkit for Managing Electronic Records* which includes such tools as a survey of records management applications used by different federal agencies and tips for scheduling potentially permanent email messages, scanned images, and PDF documents.²⁸

Federal courts have addressed federal agency records issues as well. Most federal records cases, however, have regarded the scope of the Freedom of Information Act (which is discussed in further detail to follow) and its applicability to specific agency records (*Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't. of Justice*, 742 F.2d 1484 (D.C. Cir. 1984)). The courts have generally left decisions related to the specifics of federal records management in the hands of NARA or Congress.

²⁶ *Managing Government Records Directive (M-12-18)*, OFFICE OF MANAGEMENT AND BUDGET (Aug. 24, 2012), <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf>.

²⁷ *Frequently Asked Questions about Instant Messaging*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, <http://www.archives.gov/records-mgmt/initiatives/im-faq.html> (last visited June 10, 2015).

²⁸ *The Toolkit for Managing Electronic Records*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, <http://www.archives.gov/records-mgmt/toolkit/> (last visited June 10, 2015).

Despite this extensive series of statutes, directives, bulletins, and tools, federal agency records regulations do have a tendency to be ignored or go unenforced until issues are pressed. Enforcement is generally reactive, as NARA is not an enforcement organization that fines or jails those agencies or individuals found to be disposing of or not properly maintaining federal records. Because of this, agencies do not always maintain records as required by federal law or as indicated by the steps laid out in the Managing Government Records Directive. In May 2015, the United States Government Accountability Office (GAO) issued a report to the Committee on Homeland Security and Government Affairs of the U.S. Senate entitled *Additional Actions Are Needed to Meet Requirements of the Managing Government Records Directive*. This report indicated that while the majority of federal agencies are meeting records management goals, some are still falling behind. Twenty-four federal agencies were surveyed for their attainment of seven key goal areas in the directive, with specific benchmarks such as “Ensure that permanent records that have been in existence for more than 30 years are identified for transfer and reported to NARA”²⁹ and “Issue new guidance describing methods for managing, disposing of, and transferring e-mail.”³⁰ In none of the seven areas had all twenty-four agencies met the stated goals, though twenty or more agencies had done so for each area. The report’s conclusion lists the areas of noncompliance:

Specifically, not all agencies had designated Senior Agency Officials at the assistant secretary level; reported to NARA on how they planned to manage permanent electronic records, including e-mails; identified and reported on permanent records that have been in existence for 30 years or more; or

²⁹ *Information Management: Additional Actions Are Needed to Meet Requirements of the Managing Government Records Directive*, Report to the Committee on Homeland Security and Government Affairs, U.S. Senate, GAO-15-339, United States Government Accountability Office (May 2015), at 4, <http://www.gao.gov/assets/680/670195.pdf>.

³⁰ *Id.* at 5.

identified unscheduled records. Further, the Departments of Commerce, Defense, and Energy had not fully implemented the requirement to develop records management training for all employees, or had not ensured that all agency records officers held the NARA certificate for Federal Records Management Training.³¹

Due to these results, the GAO made specific recommendations for the agencies that were noncompliant. For example, “We recommend that the Secretary of Veterans Affairs take the following action: Designate a Senior Agency Official at or equivalent to the level of assistant secretary who has direct responsibility for ensuring that the agency complies with applicable records management statutes, regulations, and NARA policy ... ”³² However, there is no particular consequence for the Department of Veterans Affairs’ noncompliance, nor any other department’s noncompliance, despite that fact that 44 U.S.C. § 3101-3102 has already required that leadership ensure the creation and maintenance of a suitable records management plan.

Or consider, for example, a recent federal agency records management story reported in the news cycle. In March 2015, Former Secretary of State Hillary Clinton admitted to using her personal email account for official State Department emails, “circumvent[ing] a federal process that could have automatically preserved Clinton's email communications in government archives.”³³ *The New York Times* reported, “Her expansive use of the private account was alarming to current and former National Archives and Records Administration officials and government watchdogs, who called it a serious

³¹ *Id.* at 32.

³² *Id.* at 33.

³³ Bill Chappell, *Hillary Clinton's Use Of Personal Email At State Department Raises Questions*, THE TWO-WAY, NPR (Mar. 3, 2015, 10:29 AM), <http://www.npr.org/sections/thetwo-way/2015/03/03/390429337/hillary-clinton-s-use-of-personal-email-account-at-state-draws-scrutiny>.

breach.”³⁴ Ms. Clinton has cited convenience as the reason for the personal email use; rather than juggling two phones, she could simply use one. All of those emails, which were stored on a server in her home, have been wiped.³⁵ Ms. Clinton, however, was not the first federal government official to use a personal email account for official government business. As was noted in the weeks following the Clinton revelation, both former Secretary of State Colin Powell³⁶ and Senior Advisor to the President Karl Rove and other members of the George W. Bush Administration used personal email accounts to conduct official state business as well, the latter having been embroiled in a controversy over the loss of official state emails stored on the Republican National Committee’s server.³⁷ That controversy led to an investigation by the House Committee on Oversight and Government Reform,³⁸ though ultimately there were no punitive legal consequences to the Bush Administration for having lost up to five million official emails.³⁹ The potential remains that Ms. Clinton may face legal consequences for having lost official government records, but it is highly unlikely.

There is, however, some history of federal officials having faced criminal consequences for the destruction of federal records. In 1935, the Supreme Court heard the

³⁴ Michael S. Schmidt, *Hillary Clinton Used Personal Email Account at State Dept., Possibly Breaking Rules*, THE NEW YORK TIMES (Mar. 2, 2015), <http://www.nytimes.com/2015/03/03/us/politics/hillary-clintons-use-of-private-email-at-state-department-raises-flags.html>.

³⁵ Domenico Montanaro, *Fact Check: Hillary Clinton, Those Emails And The Law*, IT’S ALL POLITICS, NPR (Apr. 2, 2015, 6:03 AM), <http://www.npr.org/sections/itsallpolitics/2015/04/02/396823014/fact-check-hillary-clinton-those-emails-and-the-law>.

³⁶ Perry Bacon, Jr., *Hillary Clinton's Personal Email Use Differed From Other Top Officials*, NBC NEWS (Mar. 3, 2015, 7:36 PM), <http://www.nbcnews.com/politics/elections/hillary-clintons-personal-email-use-differed-other-top-officials-n316611>.

³⁷ Lauren Carroll, *The Media Reaction to George W. Bush's Email Controversy*, PUNDITFACT, POLITIFACT.COM (Mar. 15, 2015, 5:49 PM), <http://www.politifact.com/punditfact/statements/2015/mar/15/juan-williams/media-reaction-george-w-bushs-email-controversy/>.

³⁸ Michael Abramowitz, *Bush Aides' Misuse of E-Mail Detailed by House Committee*, THE WASHINGTON POST (June 19, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/18/AR2007061800809.html>.

³⁹ Ed Henry & Lisa Goddard, *White House: Millions of E-mails May Be Missing*, CNN.COM (Apr. 13, 2007), <http://www.cnn.com/2007/POLITICS/04/13/white.house.email/index.html>.

case of former Assistant Secretary of Commerce for Aeronautics William P. MacCracken, Jr., who had been called before a special Senate committee convened to investigate inconsistencies in airmail and ocean mail contracts (referred to in the press as the Air Mail Scandal). MacCracken was found to have allowed documents to be removed from official government files in an attempt to protect the Hoover Administration before this hearing. The Senate held him in contempt of Congress and he was sentenced to ten days in jail.⁴⁰ MacCracken argued that Congress did not have the power to punish a private citizen in such a way, but the Supreme Court held that Congress's actions were constitutional.⁴¹

The retention of emails and other federal records in compliance with U.S. Code has come into particular focus in recent years due to the existence of (and ever-increasing use of) the Freedom of Information Act (5 U.S.C. § 552), its 1996 amendments to ensure the availability of electronic documents, and the OPEN Government Act of 2007 (Pub. L. 110-175, an amendment to FOIA). These laws ensure the general public access to previously unreleased documents, if not exempted for reasons such as containing classified national defense information or possibly invading another individual's personal privacy.⁴² As noted in the House of Representatives' OPEN Government Act of 2007, FOIA was enacted

... because the American people believe that —

- A) our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends upon the consent of the governed;
- B) such consent is not meaningful unless it is informed consent; and
- C) as Justice Black noted in his concurring opinion in *Barr v. Matteo* (360 U.S. 564 (1959)), "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This

⁴⁰ *Special Committee to Investigate Air Mail and Ocean Mail Contracts*, SENATE HISTORY, UNITED STATES SENATE, <http://www.senate.gov/artandhistory/history/common/investigations/MailContracts.htm> (last visited June 16, 2015).

⁴¹ *Jurney v. MacCracken*, 294 U.S. 125 (1935).

⁴² *What Are FOIA Exemptions?*, FOIA.gov, <http://www.foia.gov/faq.html#exemptions> (last visited June 16, 2015).

calls for the widest possible understanding of the quality of government service rendered by all elected or appointed public officials or employees.”⁴³

Access to federal documents, as the House of Representatives noted, is a foundation of an informed electorate. As the public has been given the right to obtain these documents, they must be adequately managed and organized to make such a process possible.

FOIA requests are indeed being submitted by members of the public. The Department of Homeland Security has received the most requests of any federal agency in previous years (291,242 requests in fiscal year 2014), followed by the Department of Justice (64,488) and the Department of Defense (61,055).⁴⁴ At the FOIA website, individuals can run reports on the number of requests made to each department during fiscal years, the disposition of the requests (grants, partial grants, and denials), and to which particular subagencies the requests were made (such as Customs and Border Patrol, the Federal Emergency Management Agency, or the Transportation Security Administration, all within the Department of Homeland Security). Clearly, the proper disposition and organization of agency records is vital to ensuring that citizens can receive the documents to which they are granted access under federal law in a timely manner. The accurate and complete maintenance of federal records is important not simply in legal, political, or records management circles; every citizen in the United States has a legal right to access these records under federal law. Under FOIA, enforcement of records management regulations is vital.

⁴³ OPEN Government Act of 2007, S. 2488, 110th Cong. § 1 (2007) (enacted), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/amendment-s2488.pdf>.

⁴⁴ *Reports*, FOIA.GOV, <http://www.foia.gov/reports.html> (last visited June 16, 2015).

NARA will continue to face challenges as it encounters new types of media, new platforms for the organization of information, and continued Congressional amendments to the statutes that govern its work. However, the foundation of its duty to manage federal agency records will remain the same, as elucidated in its mission: to “drive openness, cultivate public participation, and strengthen our nation's democracy through public access to high-value government records.”⁴⁵ Such a mission is only accomplished through the continued maintenance and enforcement of the essential federal records management regulations that ensure that the citizens of the United States can attain the rights to which they are entitled.

⁴⁵ *Our Vision and Mission*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, <http://www.archives.gov/about/info/mission.html> (last visited June 17, 2015).