



Proactive Disclosures

Proactive disclosures – where agencies make records available to the public by posting them online – are an integral part of the Freedom of Information Act.¹ There are two distinct provisions in the FOIA requiring proactive disclosure of nonexempt records or information in one of two different ways.² The FOIA's nine exemptions apply as appropriate to any records that are required to be disclosed under the FOIA's proactive disclosure provisions.³

¹ See [5 U.S.C. § 552\(a\)\(1\), \(a\)\(2\) \(2012 & Supp. V 2017\)](#); see *Jordan v. DOJ*, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc) (observing that subsection (a)(2) records must be made "automatically available for public inspection; no demand is necessary"); see also OIP Guidance: [Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request](#) (posted 2015, updated 1/11/2017) (emphasizing that "[p]roactive disclosures inform the public about the operations of their government, and they efficiently satisfy the demand for records of interest to multiple people").

² See [5 U.S.C. § 552\(a\)\(1\)-\(a\)\(2\)](#).

³ See [5 U.S.C. § 552\(b\)](#); see also *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 n.23 (1979) (applying commercial privilege to subsection (a)(1) record and recognizing that subsection (a)(2) records likewise may be protected by FOIA exemptions in determining that (a)(2) document could still be withheld pursuant to work-product privilege); *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 n.21 (1975) (acknowledging that subsection (a)(2) records may be protected by FOIA exemptions); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 160 (1975) (finding it unnecessary to decide whether documents were subsection (a)(2) records, because attorney work-product privilege protected them in any event); *Sladek v. Bensinger*, 605 F.2d 899, 901 (5th Cir. 1979) (applying Exemption 2 to portions of subsection (a)(2)(C) record); *Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot.*, No. 04-0377, 2006 WL 1826185, at *3 n.2 (D.D.C. June 30, 2006) (recognizing that contents of subsection (a)(2)(C) documents can be withheld pursuant to FOIA exemptions), [summary affirmance granted](#), No. 06-5427 (D.C. Cir. May 24, 2007); *Tax Analysts v. IRS*, No. 94-923, 1996 WL 134587, at *6-7 (D.D.C. Mar. 15, 1996) (applying attorney work-product privilege to subsection (a)(2)(B) records).

Subsection (a)(1) – Federal Register Publication

Subsection (a)(1) of the Freedom of Information Act requires agencies to "publish in the Federal Register for the guidance of the public" certain useful information about the agency and its functions, specifically:

- (A) descriptions of agency organization and the established places and methods for obtaining information;
- (B) general statements regarding the agency's methods of operation;
- (C) rules of procedure and descriptions of forms;
- (D) substantive agency rules and policies of general applicability; and
- (E) each amendment, revision, or repeal of the above four categories.⁴

Publication of these categories of information in the Federal Register is intended "to enable the public 'readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies.'"⁵ Such publication serves as a "guide [to] the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests."⁶

Subsection (a)(2) – Public Inspection in an Electronic Format

The second proactive disclosure provision requires federal agencies to "make available for public inspection in an electronic format" four specific categories of records.⁷ This provision also serves "to afford the private citizen the essential information to enable him to deal effectively and knowledgably with the Federal agencies."⁸ The four categories

⁴ [5 U.S.C. § 552\(a\)\(1\)\(A-E\) \(2012 & Supp. V 2017\)](#).

⁵ [Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act](#) 4 (June 1967) (quoting S. Rep. No. 88-1219, at 3 (1964)).

⁶ *Id.* at 5 (quoting S. Rep. No. 88-1219, at 11 (1964)).

⁷ See [5 U.S.C. § 552\(a\)\(2\)\(A-D\)](#); see also OIP Guidance: [Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request](#) (posted 2015, updated 1/11/2017) (describing four categories of records required to be proactively disclosed under subsection (a)(2)).

⁸ [Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act](#) 14 (June 1967) [hereinafter 1967 Attorney General's Memorandum] (quoting S. Rep. No. 88-1219 at 12) ; see [NLRB v. Sears, Roebuck & Co.](#), 421 U.S. 132, 153 (1975) (holding that "[t]he affirmative portion of the Act, expressly requiring indexing of 'final opinions,' 'statements of policy and interpretations which have been adopted by the agency,' and 'instructions to staff that affect a member of the public,' . . . represents a strong congressional aversion to 'secret (agency) law,' . . . and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.'"); [Skelton v. USPS](#), 678 F.2d 35, 41 (5th Cir. 1982) ("That [proactive disclosure] requirement was designed to help the citizen find agency statements 'having precedential

of information required to be made available for public inspection in an electronic format consist of:

- (A) "final opinions [and] . . . orders" rendered in the adjudication of administrative cases;⁹
- (B) specific agency policy statements;¹⁰

significance' when he becomes involved in 'a controversy with an agency.'" (quoting H.R. Rep. No. 89-1497, at 8 (1966)); [Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act](#) 19 (Feb. 1975) (explaining that the "primary purpose of subsection (a)(2) was to compel disclosure of what has been called 'secret law,' or as the 1966 House Report put it, agency materials which have 'the force and effect of law in most cases'" (quoting H.R. Rep. No. 89-1497, at 7)); see also [Smith v. NTSB](#), 981 F.2d 1326, 1328 (D.C. Cir. 1993) (stating that the purpose of this "requirement is obviously to give the public notice of what the law is so that each individual can act accordingly"); [Viet. Veterans of Am. v. Dep't of the Navy](#), 876 F.2d 164, 165 (D.C. Cir. 1989) (rejecting argument that legal opinions issued by Judge Advocates General of Army and Navy must be proactively disclosed, because those opinions are not statements of policy that "operate as law"); [Pa. Dep't of Pub. Welfare v. United States](#), No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *78 (W.D. Pa. Feb. 7, 2001) (holding that a FOIA subsection (a)(2) index "must include those matters that the agency considers to be of precedential value"); [Stanley v. DOD](#), No. 98-4116, slip op. at 9-10 (S.D. Ill. June 22, 1999) (holding that administrative staff manuals that do not have any "precedential significance," "are akin to 'housekeeping matters' and fall outside the requirements of §552(a)(2)").

⁹ [5 U.S.C. § 552\(a\)\(2\)\(A\)](#); see, e.g., [Sears](#), 421 U.S. at 155-59 (holding that NLRB "advice and appeals" memorandum deciding not to file unfair labor complaint was "final opinion" when decision not to file effectively put an end to formal complaint procedure); [Rockwell Int'l Corp. v. DOJ](#), 235 F.3d 598, 603 (D.C. Cir. 2001) (finding that agency report of voluntarily conducted internal investigation into propriety of Rocky Flats prosecution was not "final opinion" because determination of propriety of prosecution was neither "case" nor "adjudication"); [Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review](#), 830 F.3d 667, 669 (D.C. Cir. 2016) (holding that complaint resolution decisions for immigration judges are not "final opinions" rendered in the "adjudication of cases" because they do not reflect a final decision about the rights of outside parties); [Nat'l Prison Project v. Sigler](#), 390 F. Supp. 789, 792-93 (D.D.C. 1975) (determining that parole board decisions denying inmate applications for parole were subsection (a)(2) records because they are agency orders made in adjudication of cases).

¹⁰ [5 U.S.C. § 552\(a\)\(2\)\(B\)](#); see, e.g., [Pa. Dep't of Pub. Welfare](#), 2001 U.S. Dist. LEXIS 3492, at *90 (holding that HHS documents that advised regional offices of agency's view on policy matters pertaining to certain welfare programs were "interpretations adopted by the agency"); [Tax Analysts v. IRS](#), No. 94-923, 1996 WL 134587, at *3 (D.D.C. Mar. 15, 1996) (holding that IRS Field Service Advice Memoranda, even though not binding on IRS personnel, were "statements of policy"), aff'd on other grounds, 117 F.3d 607 (D.C. Cir. 1997); [Pub. Citizen v. Office of U.S. Trade Representative](#), 804 F. Supp. 385, 387 (D.D.C. 1992) (concluding that agency submissions to trade panel containing agency's interpretation of U.S.'s international legal obligations were "statements of policy and interpretations adopted by the [agency]"); see also [Viet. Veterans of Am.](#), 876 F.2d at 165

- (C) certain administrative staff manuals "that affect a member of the public;"¹¹ and
- (D) records which have been released in response to a request and "that because of the nature of their subject matter, the agency determines have become, or are likely to become, the subject of subsequent requests for substantially the same records; or . . . that have been requested 3 or more times."¹²

During the first thirty years of the FOIA's implementation, only the first three of these categories (i.e., final opinions and orders, policy statements, and staff manuals) were required to be made available for public inspection by agencies.¹³ The fourth category of records required to be made available for public inspection – also known as the "frequently requested" records category¹⁴ – was established pursuant to the Electronic

(finding that opinions in which Judge Advocates General of Army and Navy have authority only to dispense legal advice – rendered in subject areas for which those officials do not have authority to act on behalf of agency – were not "statements of policy or interpretations adopted by" those agencies and were not required to be published or made available for public inspection).

¹¹ [5 U.S.C. § 552\(a\)\(2\)\(C\)](#); see, e.g., [Sladek v. Bensinger](#), 605 F.2d 899, 901 (5th Cir. 1979) (finding DEA manual concerning treatment of confidential informants and search warrants to be subsection (a)(2)(C) record because manual only discussed DEA procedures for these law enforcement techniques and therefore was administrative in nature); [Stokes v. Brennan](#), 476 F.2d 699, 701-02 (5th Cir. 1973) (rejecting defendant's contention that "Training Course for Compliance Safety and Health Officers," was a law enforcement manual and determining that it must be made available for public inspection and copying because it is "administrative in nature" and merely focuses on "educating new officers as to the scheme of the [law enforcement] standards as a whole"); [Firestone Tire & Rubber Co. v. Coleman](#), 432 F. Supp. 1359, 1364-65 (N.D. Ohio 1976) (ruling that memoranda approved by Office of Standards Enforcement, which set forth agency's policy regarding sampling plans that office must follow when tire fails lab test under Federal Motor Vehicle Safety Standards, were subsection (a)(2) records because they are "'instructions to staff that affect a member of the public'"); see also [Stanley](#), No. 98-4116, slip op. at 9-10 (S.D. Ill. June 22, 1999) (finding that administrative staff manuals pertaining to military hospital procedures did not "affect the public" and were not required to be proactively disclosed).

¹² [5 U.S.C. § 552\(a\)\(2\)\(D\)](#).

¹³ See OIP Guidance: [Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request](#) (posted 2015, updated 1/11/2017) (explaining that requirement to proactively disclose "frequently requested" records not original to FOIA).

¹⁴ See [id.](#) (explaining that "the obligation to post 'frequently requested' records was added to the FOIA for a more pragmatic reason [than that used for other three categories, i.e.], to help agencies achieve greater efficiencies by reducing the need to respond to numerous requests for the same records"); FOIA Update, [Vol. XVII, No. 4](#), at 1 (describing obligations for frequently requested records).

Freedom of Information Act Amendments of 1996¹⁵ which, as discussed below, also introduced a requirement for the electronic availability of (a)(2) records.¹⁶

The "frequently requested" records provision originally required agencies to proactively disclose records that had been released under the FOIA and that due to their subject matter the agency determined either were, or were likely to be, requested again.¹⁷ The FOIA Improvement Act of 2016 further amended this provision to specify that records released in response to a request "that have been requested 3 or more times" are required to be made proactively available.¹⁸ The FOIA Improvement Act also replaced the requirement that agencies make (a)(2) records available for "public inspection and copying," with the requirement that agencies make such records available "for public inspection in an electronic format."¹⁹

Subsection (a)(2) requires agencies to make the specified categories of material available for public inspection in an electronic format "unless the materials are promptly published and copies offered for sale."²⁰ Relatedly, subsection (a)(3) of the FOIA, which affords the public the right to request access to agency records, applies "[e]xcept with respect to the records made available under paragraphs (1) and (2) of this subsection."²¹

¹⁵ Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).

¹⁶ *Id.* at 3048 (explaining that the purpose of the amendment is "to provide for public access to information in an electronic format, and for other purposes").

¹⁷ See Electronic FOIA Amendments; OIP Guidance: [Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request](#) (posted 2015; updated 1/11/2017) (explaining that the Department of Justice has long used a "rule of three" where anticipated (or actual) receipt of three requests means records are "frequently requested" and so triggers posting requirement).

¹⁸ [FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 \(2016\)](#); see also OIP Guidance: [OIP Summary of the FOIA Improvement Act of 2016](#) (posted 8/17/2016) (noting that 2016 amendments codified "rule of three").

¹⁹ [FOIA Improvement Act of 2016](#).

²⁰ [5 U.S.C. § 552\(a\)\(2\)](#); see *Jackson v. Heckler*, 580 F. Supp. 1077, 1081 (E.D. Pa. 1984) (holding that Social Security Ruling relied on by administrative law judge need not be made "available for inspection and copying" pursuant to subsection (a)(2)(B) because it was "published for sale"); see also 1967 Attorney General's Memorandum *supra* note 8, at 15 (noting that the exclusion of records which are published and offered for sale from the proactive disclosure obligation "is to afford the agency 'an alternative means of making these materials available through publication'" (quoting S. Rep. No. 89-813, at 7 (1966))).

²¹ [5 U.S.C. § 552\(a\)\(3\)\(A\)](#) (excluding from subsection (a)(3) those records which are "made available" under subsections (a)(1) or (a)(2)); see also *DOJ v. Tax Analysts*, 492 U.S. 136, 152 (1989) ("Under subsection (a)(3) . . . an agency need not make available those materials

Electronic Availability of Proactive Disclosures

The use of technology in the proactive disclosure of information under the FOIA was first recognized in a key provision of the Electronic FOIA amendments that required agencies to make records created on or after November 1, 1996, in all four categories of Subsection (a)(2) available to the public by "electronic means."²² The FOIA Improvement Act of 2016 further updated subsection (a)(2) to specify that records covered by this subsection must be made available "for public inspection in an electronic format."²³ Agencies often accomplish this electronic availability requirement by posting records on their FOIA websites in a designated area known as a "FOIA Library"²⁴ (previously referred to as an "electronic Reading Room").²⁵

that have already been disclosed under subsections (a)(1) and (a)(2)."); Renewal Servs. v. U.S. Patent & Trademark Office, 723 F. App'x. 491, 492 (9th Cir. 2018) ("by its own terms, § 552(a)(3) does not apply to records already made available in an electronic format by an agency pursuant to § 552(a)(2)"); Schwarz v. U.S. Patent & Trademark Office, 80 F.3d 558, 558 (D.C. Cir. 1996) (unpublished table decision) (finding that agency was not required to disclose records from patent files in response to a subsection (a)(3) request because patent files are available for public inspection and copying under subsection (a)(2)); Crews v. IRS, No. 99-8388, 2000 U.S. Dist. LEXIS 21077, at *16 (C.D. Cal. Apr. 26, 2000) (declaring that policy statements and administrative staff manuals made available under subsection (a)(2) are not required to be made available in response to subsection (a)(3) requests); cf. Citizens for Responsibility and Ethics in Washington v. DOJ, 846 F.3d 1235, 1246 (D.C. Cir. 2017) (holding that FOIA offers adequate remedy in subsection (a)(3) for requesters seeking access to information required to be disclosed under subsection (a)(2)); Animal Legal Def. Fund v. Dep't of Agric., No. 17-00949, 2017 WL 2352009, at *1 (N.D. Cal. May 31, 2017) (holding that "there is no public remedy for violations of the reading room provision – courts may order production of documents to specific plaintiffs but cannot mandate publication to the public as a whole."); Campaign for Accountability v. DOJ, 278 F.Supp.3d 303, 316-17 (D.D.C. 2017) (while "[the] Court cannot order OLC to 'make available for public inspection and copying' all documents that are subject to the reading-room provision, . . . [the] Court is authorized to order that OLC produce any documents that it has improperly withheld in violation of the reading-room provision to [plaintiff]").

²² Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).

²³ FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

²⁴ See FOIA.gov (providing easily accessible links to all agency FOIA libraries from a single website).

²⁵ See OIP Guidance: [Agency FOIA Websites 2.0](#) (posted 11/30/2017) (explaining that agency FOIA websites including link to FOIA libraries on homepage, can be vital resources for users to find information that is already publically available without need for making request); OIP Guidance: [Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request](#) (posted 2015, updated 1/11/2017) (explaining that frequently requested records should be posted in agencies' FOIA

Indexing Proactive Disclosures

Subsection (a)(2) of the FOIA creates two separate but overlapping indexing requirements. First, agencies must "maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public" of subsection (a)(2) records.²⁶ Second, agencies are also required by the FOIA to make available for public inspection in an electronic format a "general index" of the FOIA-processed records in Subsection (a)(2)'s fourth category (i.e., "frequently requested" records).²⁷

Libraries); OIP Guidance: [Using Metadata in FOIA Documents Posted Online to Lay the Foundation for Building a Government-Wide FOIA Library](#) (posted 2013, updated 7/16/2015) (explaining that FOIA Libraries provide a centralized location for agency FOIA disclosures while allowing flexibility for agencies in how they post records); OIP Guidance: [Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements](#) (posted 2008, updated 8/22/2014) (instructing agencies to organize their records "from a citizen-centered perspective" in a way that allows for efficient and easy location of specific documents, and suggesting that agencies list the records under separate links or headings on their websites); see also FOIA Update, [Vol. XIX, No. 2, at 2](#) (emphasizing importance of keeping websites accurate and up-to-date); FOIA Update, [Vol. XIX, No. 3, at 4](#) (recommending that agencies check both accuracy and viability of their FOIA websites links and text content of their FOIA websites on regular basis); FOIA Update, [Vol. XIX, No. 3, at 3](#) (advising that "[c]larity to the website user is essential to the effectiveness of the site"); FOIA Update, [Vol. XIX, No. 4, at 5](#) (observing that "an agency's FOIA website has become an essential means by which its FOIA obligations are satisfied," so FOIA website support "should be a primary mission of each agency's IT staff").

²⁶ [5 U.S.C. § 552\(a\)\(2\) \(2012 & Supp. V 2017\)](#); see OIP Guidance: [Agency FOIA Websites 2.0](#) (posted 11/30/2017) (explaining that agency FOIA websites should be designed to help users easily find information of interest that might obviate need to make request); see also [Church of Scientology v. IRS](#), 792 F.2d 153, 159 (D.C. Cir. 1986) (noting that the FOIA requires an agency's subsection (a)(2) records to be reflected in a "current index" for public distribution); [Irons & Sears v. Dann](#), 606 F.2d 1215, 1223 (D.C. Cir. 1979) (requiring agency to provide "reasonable index" of requested decisions); [Taxation With Representation Fund v. IRS](#), 2 Gov't Disclosure Serv. (P-H) ¶ 81,028, at 81,080 (D.D.C. Apr. 22, 1980) (recognizing agency's "continuing duty" to make subsection (a)(2) records and indices available); see also [Pa. Dep't of Pub. Welfare v. United States](#), No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *82 (W.D. Pa. Feb. 7, 2001) (finding agency in violation of indexing requirement because index was incomplete and it was "nearly impossible" to distinguish precedential material from obsolete material).

²⁷ [5 U.S.C. § 552\(a\)\(2\)\(E\)](#); see OIP Guidance: [Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request](#) (posted 2015, updated 1/11/2017) (encouraging agencies to review their FOIA Libraries to ensure that they are organized and user-friendly); OIP Guidance: [Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements](#) (posted 2008, updated 8/22/2014) (indexing requirement is generally satisfied by simply providing distinct "link" to each document in this category); OIP Guidance: [Using Metadata in FOIA](#)

[Documents Posted Online to Lay the Foundation for Building a Government-Wide FOIA Library](#) (posted 2013, updated 7/16/2015) (explaining that using metadata when posting records can improve access to information on agency websites).