Achieving Transparency Through Proactive Disclosures

The "FOIA is often explained as a means for citizens to know 'what their government is up to.'"

FOIA is **not only** about "FOIA Requests."

- *FOIA Subsection (a)(3)*

The law also requires agencies to make certain categories of records available to the public on a proactive basis.

These are called "proactive disclosures.

- *FOIA Subsection (a)(1)*
- *FOIA Subsection (a)(2)*

FOIA Subsection (a)(1)

- Published in the Federal Register "for the guidance of the public."
- Includes items such as: descriptions and locations of an agencies' central and field organizations, substantive and procedural rules, and statements of general policy.

FOIA Subsection (a)(2)

"Shall [be made] available for public inspection in an electronic format."

Proactive Disclosures

Enhance transparency

- Inform citizens about "the operations and activities" of government

…with more efficiency

- Reduce the need to respond to numerous requests for the same records.

In addition to the legal requirement to make (a)(2) proactive disclosures, agencies have also been directed to take additional steps to make information available to the public on a proactive basis.

Department of Justice FOIA Guidelines:

"Agencies should . . . post records online as soon as feasible . . . [and] maximize their efforts to post more records online quickly and systematically in advance of any public request."

During Sunshine Week 2015, OIP posted guidance on proactive disclosures which outline the lessons and principles of this lecture - *Proactive Disclosure of Non-Exempt Agency Information*

https://www.justice.gov/oip/oip-guidance/proactive_disclosure_of_non-exempt_information

Four Components to (a)(2) Proactive Disclosures

1. Types of information to disclose
2. How to identify information
3. How to make information available
4. How to make information useable

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Agencies must **routinely** make specific operational records proactively available without waiting for an initial or multiple FOIA requests.

Agencies are also required to proactively post online records that have been requested 3 or more times or that are likely to be frequently requested.

The FOIA's nine exemptions apply to records required to be disclosed proactively.

Agencies should review records and apply the foreseeable harm standard prior to posting.

If exemptions apply, they must be marked on the posted document.

Four Categories of Required Disclosures

Three types of *operational* documents:

1. Final Opinions & Orders
2. Specific Policy Statements
3. Administrative staff manuals and instructions to staff that affect a member of the public

Four Categories of Required Disclosures

And "*frequently requested records*":

4. FOIA-processed records on popular topics that are or are likely to be the subject of multiple FOIA requests

Frequently Requested Records

Records released in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."

Key Factors

- Repeated Requests: Agencies ***must*** post FOIA-processed records after multiple requests are made for them.
- Applies to popular topics.
- Applies only to records previously disclosed under FOIA.

Key Factors

The *FOIA Improvement Act of 2016* codified the "Rule of 3" for posting frequently requested records.

Agencies "shall make available for public inspection in an electronic format…copies of all records…that have been requested 3 or more times."

Three Types of Operational Documents

1. Final Opinions & Orders
2. Statements of Policy & Interpretations
3. Administrative Staff Manuals & Instructions

Final Opinions & Orders

"Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."

Final Opinions & Orders

Key Factors

- Final/conclusive agency action
- Adjudicatory in nature
- Precedential value applicable to similar circumstances

Examples

- Certain opinions from an immigration court
- Orders from a Commission

Specific Policy Statements

"[S]tatements of policy and interpretations which have been adopted by the agency."

Specific Policy Statements

Key Factors:

- Policies have been adopted by the agency
- Author of document has authority to articulate policy or interpretations thereof
- Articulations of policy/interpretations, not just "about" policy

Example:

- OIP FOIA Policy Guidance

Staff Manuals & Instructions

"Administrative staff manuals and instructions to staff that affect a member of the public."

Staff Manuals & Instructions

Key Factors:

- Administrative (i.e. not law enforcement) records
- Affect the public - of more than purely internal significance

Example:

- Sections of the U.S. Department of Justice Manual (JM)

Agencies may choose to proactively post other types of records online, beyond the four categories required under (a)(2).

Example: List of Exemption 3 Statutes

Knowledge Check

Shalini is a FOIA specialist with an Intelligence Community agency. She receives a FOIA request for materials related to reports of unidentified aerial phenomena. This is the first request for this material that the agency has ever received, but Shalini knows that her agency has records that would likely be responsive to the request. Later that same day, she receives two more FOIA requests from different requesters for the exact same materials.

True or False:

1. These materials would qualify as "frequently requested records."
2. Once the agency processes the FOIA requests for these materials, the records must be released in full, without any redactions, because they relate to a popular topic of great interest to the public.

Four Components to (a)(2) Proactive Disclosures

1. Types of information to disclose
2. **How to identify information**
3. How to make information available
4. How to make information useable

Frequently requested records or records of popular topics can be identified at any point throughout the FOIA request process.

Identifying and disclosing **operational documents** may require efforts beyond the FOIA staff.

Collaboration between the FOIA and program offices can help identify candidates for proactive disclosure.

Agencies should establish and maintain effective systems to identify records for posting online, which can include:

- Identify interest through FOIA requests,
- Conduct proactive records searches,
- Identify records as they are created, and
- Posting FOIA logs.

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Historically, agencies made proactive disclosures available in “Reading Rooms.”

Agencies now post proactive disclosures on their websites, usually in online **FOIA Libraries**.

FOIA Libraries should be located on agencies’ FOIA websites.

Operational Records may be posted in FOIA Libraries, elsewhere on the web, or both;

Frequently Requested Records and other FOIA releases should still be included in the FOIA Library.

Indexing Requirements

1. Agencies must “maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any” (a)(2) records.

Indexing Requirements

2. Agencies must make available a “general index” of FOIA-processed “frequently requested records.”

Four Components to (a)(2) Proactive Disclosures

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4. **How to make information useable**

Agencies are encouraged to make information available wherever, **and in whatever format**, is most useful to the public, considering the needs of the community of individuals who access their websites.

Modern technologies allow agencies to make proactive disclosures in new ways.

The Department of Justice's FOIA Guidelines emphasize the importance of **improving the organization and presentation** of all disclosed materials.

Department of Justice FOIA Guidelines:

"[A]gency FOIA websites should be easily navigable, and records should be presented in the most useful, searchable, and open formats possible."

Where possible, information should be not just be available, but also **useable**.

- Open formats – FOIA.gov
- Topical Websites – FEC's Campaign Finance Data page
- Social Media – FOIA Post
- Interactive Media – ABMC WWI Curriculum & Lessons
- Data sets – data.census.gov

Intra-agency collaboration can also help identify new ways to make proactive disclosures useable.

Programmatic, data, public affairs, or information technology offices may have ideas for new tools or formats that can be used to make information more useable to the public.

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Proactive disclosures inform the public about the operations of their government, and they efficiently satisfy the demand for records of interest to multiple people.

Agencies should, as a matter of discretion, be routinely posting material that is of interest to the public and taking advantage of technology and new tools to make information useable and easily accessible.

By doing so, agencies will be answering the call to post more information online than is required, allowing the public to be better informed "about what is known and done by their government."

Questions?