



Introduction

Enacted on July 4, 1966, and taking effect on one year later, the Freedom of Information Act provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that any portions of such records are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions.¹ The FOIA thus established a statutory right of public access to Executive Branch information in the federal government.²

The United States Supreme Court has explained that "[t]he basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."³ The "FOIA is often explained as a means for citizens to know 'what their Government is up to.'"⁴ The Supreme Court stressed that "[t]his phrase should not be dismissed as a convenient formalism."⁵ Rather, "[i]t defines a structural necessity in a real democracy."⁶ As President Obama has declared, "[a] democracy requires

¹ [5 U.S.C. § 552 \(2006 & Supp. IV 2010\)](#).

² See [John Doe Agency v. John Doe Corp.](#), 493 U.S. 146, 150 (1989) ("This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA.").

³ [NLRB v. Robbins Tire & Rubber Co.](#), 437 U.S. 214, 242 (1978).

⁴ [NARA v. Favish](#), 541 U.S. 157, 171-72 (2004) (quoting [DOJ v. Reporters Comm. for Freedom of the Press](#), 489 U.S. 749, 773 (1989)).

⁵ [Id.](#) at 172.

⁶ [Id.](#)

accountability, and accountability requires transparency."⁷ The FOIA "encourages accountability through transparency."⁸

At the same time, the Supreme Court has also recognized that in enacting the FOIA "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government'" to protect certain information.⁹ The FOIA's "broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present the 'balance' Congress has struck."¹⁰

Structure of the FOIA

The FOIA contains twelve subsections, the first two of which establish certain categories of information that must "automatically" be disclosed by federal agencies.¹¹ Subsection (a)(1) of the FOIA¹² requires disclosure through publication in the Federal Register of general agency information such as descriptions of agency organization, functions, rules of procedure; substantive agency rules; and statements of general agency policy.

Subsection (a)(2) of the FOIA¹³ requires that certain other types of records -- final agency opinions and orders rendered in the adjudication of cases, specific policy statements, certain administrative staff manuals and instructions to staff, as well as records previously processed for disclosure under the FOIA that are likely to be

⁷ [Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 4683 (Jan. 21, 2009).

⁸ [Id.](#); accord [Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 51879 (Oct. 8, 2009) (declaring that FOIA "reflects our nation's fundamental commitment to open government"); see *FOIA Post*, "[OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government](#)" (posted 4/17/09).

⁹ [John Doe Agency](#), 493 U.S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2423)).

¹⁰ [Id.](#) at 153; see also [Dep't of the Air Force v. Rose](#), 425 U.S. 352, 361 (1976) (holding that "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act").

¹¹ See [5 U.S.C. § 552\(a\)\(1\), \(a\)\(2\) \(2006 & Supp. IV 2010\)](#).

¹² [Id.](#) [§ 552\(a\)\(1\)](#).

¹³ [Id.](#) [§ 552\(a\)\(2\)](#).

requested again,¹⁴ -- be routinely made "available for public inspection and copying."¹⁵ This was commonly referred to as the "Reading Room" provision and now as the "proactive disclosure" provision of the FOIA, and it requires that certain records be proactively disclosed, typically on agency websites.¹⁶ (For a discussion of the operation of this FOIA subsection, see Proactive Disclosures, below.)

Subsection (a)(3) of the FOIA -- by far the most commonly utilized part of the Act -- provides that records not made available to the public under subsections (a)(1) or (a)(2) can be requested by the public.¹⁷ When an agency receives a proper FOIA request for records it must make the records "promptly available"¹⁸ unless the records or portions of the records are exempt from mandatory disclosure under subsection (b),¹⁹ or excluded under subsection (c).²⁰ (See Procedural Requirements, below, for a discussion of the procedural aspects of administering the FOIA.)

Subsection (a)(3) also requires agencies to provide the requester with the requested records in the form or format requested if the records are "readily reproducible" in that form or format.²¹ Agencies are required to "make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system."²² Subsections (a)(4) through (a)(7) of the FOIA address, among other things, fees and time limits, and require agencies to provide on request information about the status of the processing of a request that will take longer than ten days to process.²³

¹⁴ See [id. § 552\(a\)\(2\)\(A\)-\(D\)](#); see also *FOIA Post*, "[FOIA Counselor Q&A: 'Frequently Requested' Records](#)" (posted 7/25/03).

¹⁵ [5 U.S.C. § 552\(a\)\(2\)](#); see *Fed. Open Market Comm. v. Merrill*, 443 U.S. 340, 360 n.23 (1979) (acknowledging that portions of subsection (a)(2) records may nevertheless be protected by FOIA exemptions).

¹⁶ See [5 U.S.C. § 552\(a\)\(2\)](#).

¹⁷ See [id. § 552\(a\)\(3\)](#).

¹⁸ See [id. § 552\(a\)\(3\)\(A\)](#).

¹⁹ See [id. § 552\(b\)](#).

²⁰ See [id. § 552\(c\)](#).

²¹ See [id. § 552\(a\)\(3\)\(B\)](#).

²² See [id. § 552\(a\)\(3\)\(C\)](#).

²³ See [id. § 552\(a\)\(4\)-\(7\)](#).

Subsection (b) of the FOIA establishes nine exemptions from disclosure, which were created by Congress to permit agencies to withhold certain specific types of information to protect, for example, personal privacy, national security and law enforcement interests.²⁴ (See the discussion of the FOIA's nine exemptions, below.)

Subsection (c) of the FOIA,²⁵ which was added as part of the Freedom of Information Reform Act of 1986,²⁶ establishes three special categories of particularly sensitive law enforcement-related records that Congress made "not subject to the requirements of" the FOIA in order to safeguard against specific types of harm.²⁷ (See the discussion of the operation of these special provisions under Exclusions, below.)

Subsection (d) of the FOIA²⁸ provides that the FOIA was not intended to authorize any new withholding of information, including from Congress.

Subsection (e) of the FOIA²⁹ requires each agency to submit to the Attorney General a detailed annual report regarding its FOIA operations³⁰ and also requires a yearly report from the Department of Justice to Congress regarding both FOIA litigation and the Department of Justice's efforts to encourage agency compliance with the FOIA.³¹

Subsection (f) of the FOIA³² defines the terms "agency" and "record." (See the discussions of these terms under Procedural Requirements, Entities Subject to the FOIA, below, and Procedural Requirements, "Agency Records," below.)

²⁴ See [id. § 552\(b\)](#).

²⁵ See [id. § 552\(c\)](#).

²⁶ Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207, 3207-48.

²⁷ [5 U.S.C. § 552\(c\)](#); see also DOJ, OIP Guidance: "[Implementing FOIA's Statutory Exclusion Provisions](#)" (2012).

²⁸ [5 U.S.C. § 552\(d\)](#).

²⁹ [Id. § 552\(e\)](#).

³⁰ See OIP, Reports, <http://www.justice.gov/oip/reports.html>; see also *FOIA Post*, "[2008 Guidelines for Agency Preparation of Annual FOIA Reports](#)" (posted 5/22/08, supplemented 10/16/08); *FOIA Post*, "[Open Format Requirements for Agency Annual FOIA Reports](#)" (posted 08/17/11).

³¹ See [5 U.S.C. § 552\(e\)\(6\)](#); see also OIP, Reports, <http://www.justice.gov/oip/reports.html>.

³² [5 U.S.C. § 552\(f\)](#).

Subsection (g) of the FOIA³³ requires agencies to prepare FOIA reference guides describing their information systems and providing requesters a handbook to aid them in making requests.

Subsection (h) of the FOIA³⁴ created the Office of Government Information Services within NARA to "offer mediation services to resolve disputes," to review agency policies, procedures, and compliance, and to make recommendations to Congress and the President to improve FOIA administration.

Subsection (i) of the FOIA³⁵ mandates that GAO conduct audits and issue reports on agencies' implementation of the FOIA.

Subsection (j) of the FOIA³⁶ requires each agency to designate a Chief FOIA Officer. Subsection (k)³⁷ delineates the responsibilities of that position, which include having agency-wide responsibility for providing oversight and support to FOIA programs, evaluating agency practices in order to improve FOIA administration and ensure compliance with the FOIA statute, submitting an annual Chief FOIA Officer Report to the Department of Justice, facilitating public understanding of the FOIA, and designating a FOIA Public Liaison. Subsection (l) of the FOIA³⁸ defines the obligations of FOIA Public Liaisons, who are responsible for acting as a point of contact for requesters who raise concerns about issues with FOIA administration.³⁹ FOIA Public Liaisons are responsible for assisting in "reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes."⁴⁰

History of the FOIA

The FOIA evolved after a decade of debate among agency officials, legislators, and public interest group representatives.⁴¹ It revised the public disclosure section of

³³ Id. [§ 552\(g\)](#).

³⁴ Id. [§ 552\(h\)](#).

³⁵ Id. [§ 552\(i\)](#).

³⁶ Id. [§ 552\(j\)](#).

³⁷ Id. [§ 552\(k\)](#).

³⁸ Id. [§ 552\(l\)](#).

³⁹ Id.

⁴⁰ Id.

⁴¹ See 112 Cong. Rec. H13641-42 (daily ed. June 20, 1966) (statement of Rep. John Moss describing extensive legislative efforts, including decade of hearings, required to develop and achieve enactment of FOIA).

the Administrative Procedure Act,⁴² which generally had been recognized as "falling far short" of its disclosure goals⁴³ and had come to be looked upon as more a withholding statute than a disclosure statute.⁴⁴

By contrast, under the FOIA, virtually every record of a federal Executive Branch agency must be made available to the public in one form or another, unless it is specifically exempted from disclosure or specially excluded from the Act's coverage in the first place.⁴⁵ The nine exemptions of the FOIA describe specific categories of information that are protected from disclosure,⁴⁶ and generally they are discretionary, not mandatory, in nature.⁴⁷ The FOIA provides an administrative appeal process⁴⁸ and also affords requesters a remedy in the United States district courts, where judges determine the propriety of agency withholdings de novo and agencies bear the burden of proof in defending their nondisclosure actions.⁴⁹

After the FOIA was originally enacted in 1966, the courts created certain additional procedural devices, such as the requirement that agencies provide FOIA plaintiffs and the court a "Vaughn Index" -- a detailed index of withheld documents and the justification for their exemption, established in Vaughn v. Rosen⁵⁰ -- and the requirement that agencies release reasonably segregable, nonexempt portions of a partially exempt record, which was first articulated in EPA v. Mink.⁵¹

⁴² 5 U.S.C. § 1002 (1964) (enacted in 1946, amended in 1966, and now codified at 5 U.S.C. § 552).

⁴³ EPA v. Mink, 410 U.S. 73, 79 (1973).

⁴⁴ See S. Rep. No. 89-813, at 5 (1965).

⁴⁵ See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975); see also [5 U.S.C. § 552\(b\),\(c\) \(2006 & Supp. IV 2010\)](#).

⁴⁶ See [5 U.S.C. § 552\(b\)](#).

⁴⁷ See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979); see also [Attorney General Holder's FOIA Guidelines](#) (encouraging agencies to make discretionary disclosures); *FOIA Post*, "[OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government](#)" (posted 4/17/09) (providing guidance on making discretionary disclosures).

⁴⁸ See [5 U.S.C. § 552\(a\)\(6\)\(A\)\(i\)](#).

⁴⁹ See [5 U.S.C. § 552\(a\)\(4\)\(B\)-\(C\)](#).

⁵⁰ 484 F.2d 820, 827 (D.C. Cir. 1973).

⁵¹ 410 U.S. at 91; see [5 U.S.C. § 552\(b\)](#) (sentence immediately following exemptions requiring disclosure of any "reasonably segregable" nonexempt information); see also

The FOIA was substantially amended in 1974.⁵² The 1974 FOIA amendments considerably narrowed the overall scope of the Act's law enforcement and national security exemptions, and also broadened many of its procedural provisions -- such as those relating to fees, time limits, segregability, and in camera inspection by the courts.⁵³

In 1976, Congress again limited what could be withheld as exempt from disclosure under the FOIA, this time by narrowing the Act's incorporation of the nondisclosure provisions of other statutes.⁵⁴ A technical change was made in 1978 to update the FOIA's provision for administrative disciplinary proceedings,⁵⁵ and in 1984 Congress repealed the expedited judicial review provision previously contained in former subsection (a)(4)(D) of the Act, replacing it with a more general statutory provision that allows courts to expedite a FOIA lawsuit only if "good cause therefor is shown."⁵⁶

In 1986, Congress enacted the Freedom of Information Reform Act of 1986,⁵⁷ which amended the FOIA to provide broader exemption protection for law enforcement information, added special law enforcement record exclusion provisions,⁵⁸ and also created a new fee and fee waiver structure.

[Attorney General Holder's FOIA Guidelines](#) (reminding agencies to "always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information.").

⁵² See Pub. L. No. 93-502, 88 Stat. 1561.

⁵³ See [Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act](#) 1-26 (Feb. 1975) (addressing provisions of 1974 FOIA amendments).

⁵⁴ See Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976) (single FOIA amendment enacted together with Government in the Sunshine Act in 1976, 5 U.S.C. § 552b (2006)).

⁵⁵ See [5 U.S.C. § 552\(a\)\(4\)\(F\)](#).

⁵⁶ See Federal Courts Improvement Act of 1984, Pub. L. No. 98-620, § 402, 98 Stat. 3335, 3357 (codified at 28 U.S.C. § 1657 (2006)) (repealing provision formerly codified at 5 U.S.C. § 552(a)(4)(D) (1982)).

⁵⁷ Pub. L. No. 99-570, 100 Stat. 3207; see, e.g., [FOIA Update, Vol. VII, No. 4](#) ("FOIA Reform Legislation Enacted").

⁵⁸ See DOJ, OIP Guidance: "[Implementing FOIA's Statutory Exclusion Provisions](#)" (2012) (establishing multi-tiered approach for agencies to use to implement FOIA's statutory exclusion provisions).

In 1996, Congress enacted the Electronic Freedom of Information Act Amendments of 1996,⁵⁹ which addressed the subject of electronic records, as well as proactive disclosures and agency backlogs of FOIA requests, among other procedural provisions.⁶⁰ (For a further discussion of these fee provisions, see FOIA Fees and Fee Waivers, below).

The FOIA was further amended by the Intelligence Authorization Act of 2003, which added language that precludes agencies of the "intelligence community"⁶¹ from disclosing records in response to any FOIA request that is made by any foreign government or international governmental organization, either directly or through a representative.⁶² Significantly, this was the first time that Congress departed from the general rule that "any person" may submit a FOIA request.⁶³

Congress amended the FOIA again in 2007 with the passage of the OPEN Government Act of 2007.⁶⁴ These amendments addressed several procedural issues that concern FOIA administration, including the definition of news media requesters; the recovery of attorney fees and litigation costs; computing and tolling (or stopping) the time limits for responding to requests; tracking requests; agency annual reporting requirements; Attorney General and Special Counsel reporting requirements; treatment of agency records maintained by government contractors; creation of a new office in NARA to offer mediation services; codification of the key roles played by Chief FOIA

⁵⁹ Pub. L. No. 104-231, 110 Stat. 3048.

⁶⁰ See FOIA Update, [Vol. XVII, No. 4](#) ("Congress Enacts FOIA Amendments"); FOIA Update, [Vol. XVIII, No. 1](#) ("Amendment Implementation Questions"); FOIA Update, [Vol. XIX, No. 1](#) ("Electronic FOIA Amendments Implementation Guidance Outline"); FOIA Post, "[Electronic Compilation of E-FOIA Implementation Guidance](#)" (posted 2/28/03).

⁶¹ See 50 U.S.C. § 401a(4) (2006) (provision of National Security Act of 1947, as amended, that specifies federal agencies and agency subparts that are deemed "elements of the intelligence community").

⁶² Pub. L. No. 107-306, 116 Stat. 2383, § 312 (codified at [5 U.S.C. § 552\(a\)\(3\)\(A\),\(E\) \(2006\)](#)); see also FOIA Post, "[FOIA Amended by Intelligence Authorization Act](#)" (posted 12/23/02) (advising that "for any FOIA request that by its nature appears as if it might have been made by or on behalf of a non-U.S. governmental entity, a covered agency may inquire into the particular circumstances of the requester in order to properly implement" this FOIA provision).

⁶³ [5 U.S.C. § 552\(a\)\(3\)\(A\)](#); see Favish, 541 U.S. at 170 (observing that FOIA has "a general rule" that "the identity of the requester" is not taken into consideration).

⁶⁴ See Pub. L. No. 110-175, 121 Stat. 2524; see also FOIA Post, "[Congress Passes Amendments to the FOIA](#)" (posted 01/09/08).

Officers and FOIA Public Liaisons; and new marking requirements for documents.⁶⁵ (For further discussion of the OPEN Government Act of 2007, see below.)

In 2009, Congress amended the FOIA once more with the "OPEN FOIA Act of 2009."⁶⁶ This amendment only changed one section of the FOIA, adding a new requirement under Exemption 3 that the statute must "specifically cite to this paragraph."⁶⁷

The most recent developments in the FOIA were the issuance of memoranda by President Obama and Attorney General Holder on the FOIA.⁶⁸ These statements of FOIA policy emphasize that the FOIA "should be administered with a clear presumption: [i]n the face of doubt, openness prevails."⁶⁹ The President also directed agencies to "take affirmative steps to make information public" and not to "wait for specific requests from the public."⁷⁰ The Attorney General's FOIA Guidelines emphasized that "[o]pen government requires not just a presumption of disclosure but also an effective system for responding to FOIA requests."⁷¹ He stressed the need for

⁶⁵ See, e.g., *FOIA Post*, "[OIP Guidance: New Requirements to Route Misdirected FOIA Requests](#)" (posted 11/18/2008); *FOIA Post*, "[OIP Guidance: New Limitations on Assessing Fees](#)" (posted 11/18/08); *FOIA Post*, "[OIP Guidance: New Limitations on Tolling the FOIA's Response Time](#)" (posted 11/18/08); *FOIA Post*, "[OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests](#)" (posted 11/18/08); *FOIA Post*, "[OIP Guidance: Segregating and Marking Documents for Release in Accordance with the Open Government Act](#)" (posted 10/23/08); *FOIA Post*, "[Treatment of Agency Records Maintained For an Agency By a Government Contractor for Purposes of Records Management](#)" (posted 9/9/08); *FOIA Post*, "[2008 Guidelines for Agency Preparation of Annual FOIA Reports](#)" (posted 5/22/08, supplemented 10/16/08).

⁶⁶ See Pub. L. No. 111-83, 123 Stat. 2142.

⁶⁷ *Id.* at 2184.

⁶⁸ See [Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum]; [Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 51879 (Oct. 8, 2009) [hereinafter Attorney General Holder's FOIA Guidelines].

⁶⁹ [President Obama's FOIA Memorandum](#), 74 Fed. Reg. 4683.

⁷⁰ *Id.*; see also [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879-03 (emphasizing that agencies should post information online in advance of receiving FOIA requests from public).

⁷¹ [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879-02.

agencies to "work proactively and [to] respond to requests promptly."⁷² Attorney General Holder directed agency Chief FOIA Officers to file a report each year detailing the steps taken to apply the Attorney General's FOIA Guidelines, specifically the steps taken to apply the presumption of openness, to ensure agencies have efficient and effective systems in place for responding to requests, to increase proactive disclosures, to improve the use of technology, to reduce backlogs of pending FOIA requests and appeals, and to improve timeliness in responding to requests.⁷³ Finally, in 2011, the Department issued a new reporting requirement that agencies report whether any of the FOIA's statutory exclusions were used in the preceding fiscal year.⁷⁴ (See the chapter on [President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines](#) for a further discussion of these memoranda.)

⁷² Id.; see also *FOIA Post*, "[OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government](#)" (posted 04/17/2009).

⁷³ See [Attorney General Holder's FOIA Guidelines](#), 74 Fed. Reg. at 51879-03.

⁷⁴ See DOJ, OIP Guidance: "[Implementing FOIA's Statutory Exclusion Provisions](#)" (2012); see also OIP, Reports, <http://www.justice.gov/oip/reports.html>.