Overview of the Freedom of Information Act, President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines

Achieving a New Era of Open Government
The Freedom of Information Act

July 4, 1966

President Lyndon Johnson signed into law the Freedom of Information Act (FOIA)
The Freedom of Information Act

FOIA provides any person with a right of access to federal agency records unless those records are protected from disclosure under the law.
The Freedom of Information Act

United States Supreme Court:

“The basic purpose of [the Freedom of Information Act] 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.”
The Freedom of Information Act

FOIA is often described as a means for the public to know “what their Government is up to”
The Freedom of Information Act

- Freedom of Information laws are spreading around the world
- Sweden had first such law adopted in 1766
United States FOIA Statistics

Total Number of Requests Received

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<th>Fiscal Year 2008</th>
<th>Fiscal Year 2009</th>
<th>Fiscal Year 2010</th>
<th>Fiscal Year 2011</th>
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United States FOIA Statistics

Number of "Full-Time FOIA Staff" Across the Government

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United States FOIA Statistics

Approximate Cost of all FOIA Related Activities (in millions of dollars)

- **Fiscal Year 2008**: Processing Costs: $321.4 million, Litigation-Related Costs: $11.6 million, Recouped Costs Through FOIA Fees: $17 million
- **Fiscal Year 2009**: Processing Costs: $354.22 million, Litigation-Related Costs: $9.06 million, Recouped Costs Through FOIA Fees: $28 million
- **Fiscal Year 2010**: Processing Costs: $394.22 million, Litigation-Related Costs: $5.93 million, Recouped Costs Through FOIA Fees: $22.18 million
- **Fiscal Year 2011**: Processing Costs: $412.65 million, Litigation-Related Costs: $6.9 million, Recouped Costs Through FOIA Fees: $23.36 million
- **Fiscal Year 2012**: Processing Costs: $405.46 million, Litigation-Related Costs: $4.7 million, Recouped Costs Through FOIA Fees: $24.16 million
- **Fiscal Year 2013**: Processing Costs: $419.6 million, Litigation-Related Costs: $4.3 million, Recouped Costs Through FOIA Fees: $27.18 million
The Freedom of Information Act

FOIA applies to the Executive Branch of the federal government
The Freedom of Information Act

States have their own access laws for state records
Basic Structure

- Subsection (a) – The FOIA Disclosure Provisions
- Subsection (b) – The FOIA Exemptions
- Subsection (c) – The Law Enforcement Exclusions
- Subsection (d) – FOIA & Congressional Access
- Subsection (e) – FOIA Annual Report Req.
FOIA requires certain automatic disclosures, including records that are frequently requested under the FOIA.
The Freedom of Information Act

FOIA provides a right to request federal agency records.
Time Limits for Responding to a Request

 Basic time period: twenty working days

 In “unusual circumstances,” time period may be extended by written notice
The Freedom of Information Act

FOIA provides for expedited processing of requests in certain instances
FOIA provides for charging of fees
The Freedom of Information Act

- FOIA establishes three categories of requesters and three types of fees

- Different fees are assessed based on requester category
Fee Waivers – The Standard

Documents shall be furnished without any charge or at reduced rate . . . If disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.
Adequacy of Search for FOIA Request

Reasonably calculated to uncover all relevant documents
Congress sought to create a workable balance between “right of the public to know and need of the government” to protect certain information.

Reviewing Records for Disclosure
Congress included nine exemptions in the FOIA in order to protect certain information from disclosure.
Exemptions protect interests such as national security, personal privacy, privileged communications, and law enforcement.
President Obama’s Freedom of Information Act Memorandum

January 21, 2009
A democracy requires accountability and accountability requires transparency.
President Obama’s FOIA Memorandum

FOIA should be administered with a clear presumption: “In the face of doubt, openness prevails.”
Information should not be kept confidential merely because:

- officials might be embarrassed,
- errors and failures might be revealed, or
- because of speculative or abstract fears
Attorney General Holder’s
Freedom of Information Act Guidelines

March 19, 2009
The Attorney General’s FOIA Guidelines were written to underscore our nation’s “fundamental commitment to open government.”
New Era of Open Government

When applying FOIA exemptions under Attorney General Holder’s FOIA Guidelines, agencies must consider whether they reasonably foresee that disclosure would harm an interest protected by one of the exemptions.
In the absence of such harm, agencies are encouraged to make a disclosure of the information in keeping with the President’s call for greater transparency.
The Attorney General “strongly encourage[s] agencies to make discretionary disclosures of information.”
United States FOIA Statistics

Disposition of Fiscal Year 2013 Requests Processed for Exemption Applicability

- Release in Full (49.3%)
- Release in Part (42.1%)
- Denied in Full Based on FOIA Exemptions (8.6%)

91.4% total Release in Full or in Part
FOIA operations should be efficient.
The Attorney General highlights the key roles played by both the agency Chief FOIA Officers and the FOIA professionals in each agency.
Chief FOIA Officers:

- Senior official at Assistant Secretary or higher level
- Agency-wide responsibility for “efficient and appropriate compliance” with FOIA
Chief FOIA Officers:

- monitor compliance and keep agency head and Attorney General informed

- recommend “adjustments to agency practices, policies, personnel, and funding as may be necessary”

- report to the Attorney General on agency’s performance
FOIA Public Liaisons:

- serve as supervisory officials to whom requesters can raise concerns after initial response from FOIA Requester Service Center

- assist in:
  - reducing delays
  - increasing transparency and understanding of status of requests
  - resolving disputes
FOIA Public Liaisons:

- when extending the time to respond to a request, agency must make FOIA Public Liaison available to requester
“Unnecessary bureaucratic hurdles have no place in the ‘new era of open Government’ that the President has proclaimed.”

Attorney General Holder
March 19, 2009
Proactive Releases

In addition to required disclosures, agencies should “proactively” post information online in advance of FOIA requests

Example: FBI’s “vault”
Utilize technology to improve FOIA administration

DOJ FOIA Information Technology Working Group
The Freedom of Information Act

All Three Branches of Government Have Role in FOIA
The Freedom of Information Act

Congress:

- Enacted FOIA in 1966 after decade of debate
- Amended FOIA periodically over the years
The Freedom of Information Act

Legislative Amendments to the FOIA:

- **1974**: narrowed law enforcement and national security amendments and broadened procedural provisions, such as requiring segregation
- **1976**: narrowed Exemption 3
- **1978 and 1984**: technical amendments
- **1986**: broadened law enforcement protection and created new fee and fee waiver standards
- **1996**: addressed electronic records and proactive disclosures
The Freedom of Information Act

Legislative Amendments to the FOIA:

- **2002**: precluded intelligence agencies from responding to requests made by foreign governments or international governmental organizations

- **2007**: addressed procedural issues such as tolling, document marking, recovery of attorney fees, tracking requests, providing status updates and created new Office of Government Information Services (OGIS) within NARA

- **2009**: substantively changed Exemption 3, which pertains to matters specifically exempted from release by statute.
The Freedom of Information Act

- Congress holds FOIA oversight hearings
- GAO conducts periodic audits of agencies
Judicial Branch:

- Courts issue opinions in FOIA cases
- Out of the hundreds of thousands of requests received each year by agencies, less than 1% go to litigation.
- Under Attorney General Holder’s FOIA Guidelines, agencies will now be defended “only if the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or disclosure is prohibited by law.”
The Freedom of Information Act

Supreme Court has decided over thirty FOIA cases:

- **Forsham** (agency records)

- **Reporters Committee** (privacy)

- **Grolier** (attorney work product privilege)

- **Dow Jones** (law enforcement threshold)

- **Milner** (internal personnel rules and procedures)
The Freedom of Information Act

Executive Branch:

- responsible for implementing FOIA

- ninety-nine agencies currently subject to the FOIA
Role of the United States Department of Justice In FOIA Administration

- Encouraging proper administration of FOIA
- Oversight of agency compliance
OIP encourages agencies to properly administer the FOIA in a variety of ways.
Responsibilities of the Department of Justice

Department of Justice prepares legal treatise analyzing court decisions interpreting the FOIA

United States Department of Justice

Guide to the Freedom of Information Act

http://www.justice.gov/oip/foia-guide.html
Responsibilities of the Department of Justice

Department of Justice develops and issues FOIA policy guidance to all agencies.
Responsibilities of the Department of Justice

Department of Justice provides FOIA training to all agencies

OIP regularly conducts training sessions throughout the year on all aspects of the FOIA and on a wide variety of FOIA-related topics. Here you will find descriptions and dates of various training seminars, meetings, and events offered by OIP, including yearly training offered in connection with the Office of Legal Education, specialized training sessions, as well as public training events, meetings, and town halls. Additionally, training materials such as slide presentations and handouts accompanying OIP’s most popular programs are provided below. Feel free to contact OIP if your agency is interested in specialized FOIA training.

YEARLY TRAINING COURSES OFFERED BY OIP AND DLE

The Freedom of Information Act for Attorneys and Access Professionals

This two-day program is designed for attorneys, FOIA specialists, and other FOIA professionals with limited previous experience working with the FOIA who are now or soon will be working extensively with the Act. This program provides an overview of the FOIA including a discussion of the President’s FOIA Memorandum and the Attorney General’s FOIA Guidelines. This course also provides lectures on the various FOIA exemptions and on procedural issues, as well as a discussion on proactive disclosures and the FOIA fee and fee waiver requirements.

- November 19-20, 2013 (Washington, DC)
- February 25-26, 2014 (Washington, DC)
- May 13-14, 2014 (Washington, DC)
- July 15-16, 2014 (Washington, DC)

Advanced Freedom of Information Act Seminar

This seminar is designed for FOIA professionals and legal advisors of all federal agencies. It provides advanced instruction on selected topics under the FOIA, including up-to-date policy guidance and views from the FOIA requester community. This program also serves as a forum for the exchange of ideas useful in dealing with problems that commonly arise in administering the FOIA.
Responsibilities of the Department of Justice

FOIA Counselor Service
(202) 514-FOIA

Office of Information Policy’s Website:
http://www.justice.gov/oip/
Understanding the FOIA

Sources for Guidance in Applying the FOIA

- Statute itself
- Judicial Opinions
- OIP Guidance
- Agency Regulations
- President Obama’s FOIA Memorandum of January 21, 2009
- Attorney General Holder’s FOIA Guidelines
The Department of Justice has oversight of agency FOIA compliance.
Agency Accountability

Chief FOIA Officer Reports

Chief FOIA Officers report each year to the Department of Justice on the steps “taken to improve FOIA operations and facilitate information disclosure at their agencies.”
Agency Accountability

Annual FOIA Reports

Agencies file each year with the Department of Justice an Annual FOIA Report with detailed statistics on numbers and disposition of FOIA requests, time to process, costs incurred.
Department of Justice compiles assessment of agency performance.
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<th>Agency</th>
<th>Conducted or Attended FOIA Training or Conferences</th>
<th>Made Discretionary Disclosures of Information</th>
<th>High Release Rate for Req. Processed for Disclosure</th>
<th>Release Rate</th>
<th>FOIA Staff Has Sufficient IT Support</th>
<th>FOIA Staff Works with Open Gov. Team</th>
<th>Taken Steps to Assess if there is Adequate Staffing</th>
<th>Taken Steps to Make Website More Useful to Public</th>
<th>Added New Material to Website</th>
<th>Offers Ability to Make FOIA Requests Electronically</th>
<th>Utilizing Advanced Tech. to Increase FOIA Efficiency</th>
<th>Processed Simple Req. in 20 Working Days or Less</th>
<th>Avg. No. of Days</th>
<th>Agency Decreased Number of Backlogged Req.</th>
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Agency Accountability

Quarterly FOIA Reports

Agencies are required to provide quarterly reporting of four key FOIA statistics to the Department of Justice that will be posted on FOIA.gov
Agency Accountability

- the number of requests received during the reporting period
- the number of requests processed during the reporting period
- the number of requests in an agency’s backlog at the end of the reporting period
- the progress being made to close the agency’s ten overall oldest pending FOIA requests from the prior fiscal year
Department of Justice website containing governmentwide FOIA statistics and information.
Learn:

- learn about FOIA, how it works, frequently asked questions
FOIA.gov

- **Measure**
  - measure how agencies perform by reviewing graphically numbers and dispositions of requests
FOIA.gov

➢ Find:

• find posted material by simply entering search term
The Freedom of Information Act

Nearly fifty years ago, the FOIA was signed into law

Today it is a vital part of our democracy