



Introduction

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

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

¹ [5 U.S.C. § 552 \(2018\)](#); see also [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.").

² See [5 U.S.C. § 552 \(a\)\(3\), \(a\)\(4\)\(B\), \(b\), \(c\)](#).

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.](#)

and the need of the Government" to protect certain information.⁷ The FOIA's "broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present the 'balance' Congress has struck."⁸

Structure of the FOIA

The FOIA contains thirteen main subsections, the first of which⁹ establishes certain categories of information that must be proactively disclosed by federal agencies. Subsection (a)(1) of the FOIA¹⁰ requires disclosure through publication in the Federal Register of general agency information such as descriptions of agency organization, functions, and rules of procedure; substantive agency rules; and statements of general agency policy.

Subsection (a)(2) of the FOIA¹¹ requires that certain other types of records be routinely made "available for public inspection in an electronic format" – which typically is accomplished by posting on agency websites.¹² Specifically, subsection (a)(2) requires that final agency opinions and orders rendered in the adjudication of cases, specific policy statements, and certain administrative staff manuals and instructions to staff be proactively disclosed.¹³ This subsection also requires agencies to proactively disclose records that have been released under the FOIA and are likely to be requested again or, in fact have been requested three or more times.¹⁴ (For a discussion of the operation of this FOIA section, see Proactive Disclosures, below.)

⁷ 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).

⁸ 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").

⁹ See [5 U.S.C. § 552\(a\)\(1\), \(a\)\(2\) \(2018\)](#).

¹⁰ Id. [§ 552\(a\)\(1\)](#).

¹¹ Id. [§ 552\(a\)\(2\)](#).

¹² See OIP Guidance: [Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request](#) (posted 3/16/2015).

¹³ See [5 U.S.C. § 552\(a\)\(2\)](#).

¹⁴ See id. [§ 552\(a\)\(2\)\(A\)-\(D\)](#); see also [OIP Summary of the FOIA Improvement Act of 2016](#) (posted 8/17/2016); OIP Guidance: [Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request](#) (posted 3/16/2015).

Subsection (a)(3) of the FOIA¹⁵ – 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. Requests must reasonably describe the records sought and be made in accordance with an agency's published rules.¹⁶ When an agency receives a proper FOIA request for records, it must make the records "promptly available"¹⁷ unless the records or portions of the records are exempt from mandatory disclosure under subsection (b),¹⁸ or are excluded from the FOIA's requirements under subsection (c).¹⁹ (See Procedural Requirements, below, for a discussion of the procedural aspects of administering the FOIA.)

Subsection (a)(3) also requires agencies to provide the requested records in the form or format requested provided the records are "readily reproducible" in that form or format.²⁰ This subsection also specifies that 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."²¹

Subsections (a)(4) through (a)(6) of the FOIA²² address, among other things, fees, time limits, judicial review, and multitrack and expedited processing. Subsection (a)(7)²³ requires agencies to establish a telephone number or website service to provide information about the status of the processing of a request. Subsection (a)(8) of the FOIA,²⁴ added to the FOIA by the FOIA Improvement Act of 2016,²⁵ codifies the Department of Justice's "foreseeable harm" standard.

Subsection (b) of the FOIA establishes nine exemptions from disclosure, which were created by Congress to permit agencies to protect, for example, personal privacy,

¹⁵ See [5 U.S.C. § 552\(a\)\(3\)](#).

¹⁶ See [id. § 552\(a\)\(3\)\(A\)](#).

¹⁷ See [id.](#)

¹⁸ See [id. § 552\(b\)](#).

¹⁹ See [id. § 552\(c\)](#).

²⁰ See [id. § 552\(a\)\(3\)\(B\)](#).

²¹ See [id. § 552\(a\)\(3\)\(C\)](#).

²² See [id. § 552\(a\)\(4\)-\(6\)](#).

²³ See [id. § 552\(a\)\(7\)](#).

²⁴ See [id. § 552\(a\)\(8\)](#).

²⁵ [Pub. L. No. 114-185, 130 Stat. 538](#).

national security and law enforcement interests.²⁶ (See the discussion of the FOIA's nine exemptions, below.)

Subsection (c) of the FOIA,²⁷ which was added as part of the Freedom of Information Reform Act of 1986,²⁸ establishes three special categories of particularly sensitive law enforcement and national security-related records that Congress made "not subject to the requirements of" the FOIA in order to safeguard against specific types of harm.²⁹ (See the discussion of the operation of these special provisions under Exclusions, below.)

Subsection (d) of the FOIA³⁰ provides that the FOIA was not intended to authorize any new withholding of information, including from Congress.

Subsection (e) of the FOIA³¹ requires each agency to submit a detailed annual report regarding its FOIA operations³² to the Attorney General and to the Director of the Office of Government Information Services. This subsection 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.³³

Subsection (f) of the FOIA³⁴ 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.)

²⁶ See [5 U.S.C. § 552\(b\)](#).

²⁷ See [id. § 552\(c\)](#).

²⁸ Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207, 3207-48.

²⁹ [5 U.S.C. § 552\(c\)](#); see also OIP Guidance: [Implementing FOIA's Statutory Exclusion Provisions](#) (posted 9/14/2012).

³⁰ [5 U.S.C. § 552\(d\)](#).

³¹ [Id. § 552\(e\)](#).

³² See OIP Guidance: [Department of Justice Handbook for Agency Annual FOIA Reports](#), (posted 2013, updated 11/4/2019); see also OIP Guidance: [New Requirements for Agency Annual FOIA Reports](#) (posted 10/06/2016); OIP Guidance: [Open Format Requirements for Agency Annual FOIA Reports](#) (posted 8/17/2011); [OIP, Reports](#).

³³ See [5 U.S.C. § 552\(e\)\(6\)](#); see also [OIP, Reports](#).

³⁴ [5 U.S.C. § 552\(f\)](#).

Subsection (g) of the FOIA³⁵ requires agencies to prepare and make available for public inspection in an electronic format FOIA reference guides describing their information systems and providing requesters a handbook to aid them in making requests.

Subsection (h) of the FOIA³⁶ created the Office of Government Information Services within the National Archives and Records Administration to "offer mediation services to resolve disputes;" to review agency policies, procedures, and compliance; and to identify procedures and methods for improving compliance with the FOIA.

Subsection (i) of the FOIA³⁷ mandates that the Government Accountability Office conduct audits and issue reports on agencies' implementation of the FOIA.

Subsection (j) of the FOIA³⁸ requires each agency to designate a Chief FOIA Officer and delineates the responsibilities of that position, which include having agency-wide responsibility for efficient and appropriate compliance with the FOIA; reporting to the Department of Justice; evaluating agency practices, policies, personnel, and funding as may be necessary to improve FOIA administration; facilitating public understanding of the FOIA; offering training to agency staff; serving as the primary agency liaison; and designating a FOIA Public Liaison.

Subsection (k) of the FOIA³⁹ establishes the Chief FOIA Officers Council, specifically describing its makeup and duties.

Subsection (l) of the FOIA⁴⁰ defines the obligations of FOIA Public Liaisons, who supervise agency FOIA Requester Service Centers and are responsible for acting as a point of contact for requesters who raise concerns about issues with FOIA administration. 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."⁴¹

³⁵ [Id. § 552\(g\)](#).

³⁶ [Id. § 552\(h\)](#).

³⁷ [Id. § 552\(i\)](#).

³⁸ [Id. § 552\(j\)](#).

³⁹ [Id. § 552\(k\)](#).

⁴⁰ [Id. § 552\(l\)](#).

⁴¹ [Id.](#); see also OIP Guidance: [The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons](#) (posted 6/12/2018).

Subsection (m) of the FOIA⁴² requires the Director of the Office of Management and Budget, in consultation with the Attorney general to "ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records under subsection (a) to any agency from a single website."⁴³

History of the FOIA

The FOIA evolved after a decade of debate among agency officials, legislators, and public interest group representatives.⁴⁴ It revised the public disclosure section of the Administrative Procedure Act,⁴⁵ which generally had been recognized as "falling far short" of its disclosure goals⁴⁶ and had come to be looked upon as more of a withholding statute than a disclosure statute.⁴⁷

By contrast, under the FOIA, virtually any person can make a request for any reason and records must be made available to the public except to the extent they contain information that is specifically exempted from disclosure or specially excluded from the Act's coverage in the first place.⁴⁸ The nine exemptions of the FOIA describe specific categories of information that are protected from disclosure,⁴⁹ and generally they are discretionary, not mandatory, in nature.⁵⁰ The FOIA provides an administrative appeal

⁴² [5 U.S.C. § 552\(m\)](#).

⁴³ *Id.*; see also www.FOIA.gov (serving as National FOIA Portal where requests can be made by public to any agency from single website); OIP Guidance: [Joint DOJ/OMB Guidance for Achieving Interoperability with the National Freedom of Information Act Portal on FOIA.gov](#) (posted 2/12/2019); FOIA Post: [DOJ Announces the First Iteration of the New National FOIA Portal on FOIA.gov](#) (posted 3/8/2018).

⁴⁴ 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).

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

⁴⁶ [EPA v. Mink](#), 410 U.S. 73, 79 (1973).

⁴⁷ See S. Rep. No. 89-813, at 5 (1965).

⁴⁸ See [NLRB v. Sears, Roebuck & Co.](#), 421 U.S. 132, 136 (1975); see also [5 U.S.C. § 552 \(2018\)](#).

⁴⁹ See [5 U.S.C. § 552\(b\)](#).

⁵⁰ See [Chrysler Corp. v. Brown](#), 441 U.S. 281, 293 (1979).

process,⁵¹ and also affords requesters a remedy in the United States district courts, where judges generally determine the propriety of agency withholdings de novo and agencies bear the burden of proof in defending their nondisclosure actions.⁵²

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 description of the withheld information – and how it qualifies for protection under one of the FOIA's exemptions⁵³ – and the requirement that agencies release reasonably segregable, nonexempt portions of a partially exempt record, which was first articulated by the Supreme Court in EPA v. Mink.⁵⁴

The FOIA was substantially amended in 1974.⁵⁵ 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.⁵⁶

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.⁵⁷ A technical change was made in 1978 to update the FOIA's provision for administrative disciplinary proceedings,⁵⁸ and in 1984 Congress repealed

⁵¹ See 5 U.S.C. § 552(a)(6)(A)(i); see also OIP Guidance: [Adjudicating Administrative Appeals Under the FOIA](#) (posted 2/14/2019).

⁵² See 5 U.S.C. § 552(a)(4)(B)-(C).

⁵³ See Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973) (determining that agency's burden to demonstrate legality of withholdings with adequate specificity "could be achieved by formulating a system of itemizing and indexing that would correlate statements made in the [agency's] refusal justification with the actual portions of the document").

⁵⁴ 410 U.S. at 91 (finding that "purely factual material appearing . . . in a form that is severable without compromising the private remainder of the documents" is releaseable); see 5 U.S.C. § 552(b) (sentence immediately following exemptions requiring disclosure of any "reasonably segregable" nonexempt information); see also DOJ FOIA Guidelines (reminding agencies to "always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information").

⁵⁵ See Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561.

⁵⁶ 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).

⁵⁷ See Act of Sept. 13, 1976, Pub. L. No. 94-409, 90 Stat. 1241, 1247 (single FOIA amendment enacted together with Government in the Sunshine Act in 1976, 5 U.S.C. § 552b (2006)).

⁵⁸ See 5 U.S.C. § 552(a)(4)(F).

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."⁵⁹

In 1986, Congress enacted the Freedom of Information Reform Act of 1986,⁶⁰ which amended the FOIA to provide broader exemption protection for law enforcement information, added special law enforcement record exclusion provisions,⁶¹ and also created a new fee and fee waiver structure.

In 1996, Congress enacted the Electronic Freedom of Information Act Amendments of 1996,⁶² which addressed the subject of electronic records, as well as proactive disclosures and agency backlogs of FOIA requests, among other procedural provisions.⁶³

The FOIA was further amended by the Intelligence Authorization Act for Fiscal Year 2003,⁶⁴ which added language that precludes agencies of the "intelligence community"⁶⁵ from disclosing records in response to any FOIA request that is made by any foreign government or international governmental organization, either directly or

⁵⁹ See Federal Courts Improvement Act of 1984, Pub. L. No. 98-620, § 402, 98 Stat. 3335, 3357 (codified at 28 U.S.C. § 1657 (2018)) (repealing provision formerly codified at 5 U.S.C. § 552(a)(4)(D) (1982)).

⁶⁰ Pub. L. No. 99-570, 100 Stat. 3207; see, e.g., FOIA Update, [Vol. VII, No. 4](#) ("FOIA Reform Legislation Enacted").

⁶¹ See OIP Guidance: [Implementing FOIA's Statutory Exclusion Provisions](#) (posted 9/14/2012) (establishing multi-tiered approach for agencies to use to implement FOIA's statutory exclusion provisions).

⁶² Pub. L. No. 104-231, 110 Stat. 3048.

⁶³ 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"); OIP Guidance: [Electronic Compilation of E-FOIA Implementation Guidance](#) (posted 2/28/2003).

⁶⁴ Pub. L. No. 107-306, 116 Stat. 2383 (2002).

⁶⁵ See 50 U.S.C. § 401a(4) (2018) (provision of National Security Act of 1947, as amended, that specifies federal agencies and agency subparts that are deemed "elements of the intelligence community").

through a representative.⁶⁶ This provision constitutes an exception to the general rule that "any person"⁶⁷ may submit a FOIA request.

Congress amended the FOIA again in 2007 with the passage of the OPEN Government Act of 2007.⁶⁸ 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 an office in NARA to offer mediation services; codification of the key roles played by Chief FOIA Officers and FOIA Public Liaisons; and new marking requirements for documents.⁶⁹

In 2009, Congress amended the FOIA once again with the "OPEN FOIA Act of 2009."⁷⁰ This amendment only changed one section of the FOIA, adding a new requirement under Exemption 3 that newly enacted nondisclosure statutes must "specifically cite to this paragraph" in order to operate as Exemption 3 statutes.⁷¹

⁶⁶ [5 U.S.C. § 552\(a\)\(3\)\(E\)](#); see also OIP Guidance: [FOIA Amended by Intelligence Authorization Act](#) (posted 12/23/2002) (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).

⁶⁷ [5 U.S.C. § 552\(a\)\(3\)\(A\)](#).

⁶⁸ See Pub. L. No. 110-175, 121 Stat. 2524; see also OIP Guidance: [Congress Passes Amendments to the FOIA](#) (posted 01/09/2008).

⁶⁹ See, e.g., OIP Guidance: [New Requirements to Route Misdirected FOIA Requests](#) (posted 11/18/2008); OIP Guidance: [New Limitations on Assessing Fees](#) (posted 11/18/2008); OIP Guidance: [New Limitations on Tolling the FOIA's Response Time](#) (posted 11/18/2008); OIP Guidance: [Assigning Tracking Numbers and Providing Status Information for Requests](#) (posted 2008, updated 7/18/2014); OIP Guidance: [Segregating and Marking Documents for Release in Accordance with the Open Government Act](#) (posted 10/23/2008); OIP Guidance: [Treatment of Agency Records Maintained For an Agency By a Government Contractor for Purposes of Records Management](#) (posted 9/9/2008); OIP Guidance: [2008 Guidelines for Agency Preparation of Annual FOIA Reports](#) (posted 2008, supplemented 10/16/2008).

⁷⁰ See Pub. L. No. 111-83, 123 Stat. 2142.

⁷¹ *Id.* at 2184; see also OIP Guidance: [Congress Passes Amendment to Exemption 3 of the FOIA](#) (posted 3/10/2010).

The most recent amendments to the FOIA were made by the FOIA Improvement Act of 2016.⁷² The 2016 amendments addressed proactive disclosures, requiring agencies to make available "for public inspection in an electronic format," records "that have been requested 3 or more times[.]"⁷³ The amendments also codified the Department of Justice's "foreseeable harm" standard⁷⁴ and included a sunset provision on the deliberative process privilege.⁷⁵ Exemption 5 now provides that "the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested[.]"⁷⁶

The 2016 FOIA amendments also addressed a range of procedural issues, encompassing new requirements for agency response letters,⁷⁷ limitations on assessing certain fees,⁷⁸ and required notification of dispute resolution services.⁷⁹ The amendments delineated additional duties and responsibilities of agency Chief FOIA Officers and created a new "Chief FOIA Officers Council."⁸⁰ The 2016 amendments revised the duties of the Office of Government Information Services and created new reporting obligations for that office.⁸¹ In addition, the amendments addressed the reporting obligations of the Department of Justice, added two elements to agency Annual FOIA Reports, and directed agencies to review their FOIA regulations.⁸²

⁷² [Pub. L. No. 114-185, 130 Stat. 538](#); see also [OIP Summary of the FOIA Improvement Act of 2016](#) (posted 8/17/2016).

⁷³ [FOIA Improvement Act](#); see also [5 U.S.C. § 552\(a\)\(2\)\(D\)\(ii\)\(II\)](#).

⁷⁴ [FOIA Improvement Act](#); see also [5 U.S.C. § 552\(a\)\(8\)\(A\)\(i\)\(I\)](#).

⁷⁵ [FOIA Improvement Act](#); see also [5 U.S.C. § 552\(b\)\(5\)](#).

⁷⁶ [5 U.S.C. § 552\(b\)\(5\)](#).

⁷⁷ [FOIA Improvement Act](#); see also [5 U.S.C. § 552\(a\)\(6\)\(A\)\(i\)](#); OIP Guidance: [Guidance on the New Requirements for FOIA Response Letters, Including Affording Ninety Days to File an Administrative Appeal, and New Notification Requirement for Notices Extending FOIA's Time Limits Due to Unusual Circumstances](#) (posted 7/16/2016).

⁷⁸ [FOIA Improvement Act](#); see also [5 U.S.C. § 552\(a\)\(4\)\(A\)\(viii\)](#); OIP Guidance: [Prohibition on Assessing Certain Fees When the FOIA's Time Limits are Not Met](#) (posted 10/19/2016).

⁷⁹ [FOIA Improvement Act](#); see also [5 U.S.C. § 552\(a\)\(6\)\(A\)\(i\)\(III\)\(bb\)](#).

⁸⁰ [FOIA Improvement Act](#); see also [5 U.S.C. § 552\(j\), \(k\)](#).

⁸¹ [FOIA Improvement Act](#); see also [5 U.S.C. § 552\(h\)](#).

⁸² [FOIA Improvement Act](#); see also [5 U.S.C. § 552\(j\)](#); OIP Guidance: [Guidance for Agency FOIA Regulations](#)" (posted 9/8/2016); OIP Guidance: [New Requirements for Agency Annual FOIA Reports](#) (posted 10/6/2016).

Lastly, the FOIA Improvement Act of 2016 required OMB and the Department of Justice to "ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records under [the FOIA] to any agency from a single website."⁸³

⁸³ [FOIA Improvement Act](#); see also [5 U.S.C. § 552\(m\)](#); OIP Guidance: [Joint DOJ/OMB Guidance for Achieving Interoperability with the National Freedom of Information Act Portal on FOIA.gov](#) (posted 2/12/2019).