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Introduction

Enacted in 1966, and taking effect on July 5, 1967, 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 such records (or portions of them) 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 accountability, and accountability requires transparency."⁷ The FOIA "encourages accountability through transparency."⁸

¹ 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

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.

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 (Mar. 19, 2009) (declaring that FOIA "reflects our nation's fundamental commitment to open government"), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

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 information such as descriptions of agency organizations, functions, and procedures; substantive agency rules; and statements of general agency policy.

Subsection (a)(2) of the FOIA¹³ requires that certain types of records -- final agency opinions and orders rendered in the adjudication of cases, specific policy statements, certain administrative staff manuals, and some records previously processed for disclosure under the Act¹⁴ -- 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

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), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

¹² Id. § 552(a)(1).

¹³ Id. § 552(a)(2).

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).

be requested.¹⁷ When an agency receives a proper FOIA request for records it must make the records "promptly available" unless the records or portions of the records are exempt from mandatory disclosure under subsection (b), or excluded under subsection (c).¹⁸ (See Procedural Requirements, below, for a discussion of the procedural aspects of administering the FOIA.)

Subsection (b) of the FOIA establishes nine exemptions from disclosure, which were created by Congress to permit agencies to protect from disclosure certain specific types of information.¹⁹ (See the discussion of the FOIA's nine exemptions, below.)

Subsection (c) of the FOIA,²⁰ which was added as part of the Freedom of Information Reform Act of 1986,²¹ establishes three special categories of law enforcement-related records that are entirely excluded from the coverage of the FOIA in order to safeguard against specific types of harm.²² The extraordinary protection embodied in subsection (c) permits an agency to respond to a request for such records as if the records in fact did not exist.²³ (See the discussion of the operation of these special provisions under Exclusions, below.)

Subsection (d) of the FOIA²⁴ provides that the FOIA was not intended to authorize any new withholding of information, including from Congress.

Subsection (e) of the FOIA²⁵ requires each agency to submit to the Attorney General a detailed annual report regarding its FOIA operations and also requires an annual report from the Department of Justice to Congress regarding both FOIA litigation and the Department of Justice's efforts (primarily through the Office of Information Policy) to encourage agency compliance with the FOIA.²⁶

¹⁷ See id. § 552(a)(3).

¹⁸ See id. § 552(a)(3)(A).

¹⁹ See id. § 552(b).

²⁰ See id. § 552(c).

²¹ Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207, 3207-48.

²² See generally Attorney General's 1986 Amendments Memorandum 18-30.

²³ See id. 18, 27.

²⁴ 5 U.S.C. § 552(d).

²⁵ Id. § 552(e).

²⁶ See id. § 552(e)(6); see also *FOIA Post*, "2008 Guidelines for Agency Preparation of Annual FOIA Reports" (posted 5/22/08, supplemented 10/16/08).

Subsection (f) of the FOIA²⁷ 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.) Subsection (g) of the FOIA²⁸ requires agencies to prepare FOIA reference guides describing their information systems and their processes of FOIA administration, as an aid to potential FOIA requesters.

Subsection (h) of the FOIA²⁹ created the Office of Government Information Services within NARA. Subsection (i) of the FOIA³⁰ mandates that GAO conduct audits and issue reports on agencies' implementation of the FOIA.

Subsection (j) of the FOIA³¹ requires each agency to designate a Chief FOIA Officer and subsection (k)³² delineates the responsibilities of that position, including designating a FOIA Public Liaison. Subsection (l) of the FOIA³³ defines the obligations of the FOIA Public Liaison.

History of the FOIA

The FOIA evolved after a decade of debate among agency officials, legislators, and public interest group representatives.³⁴ It revised the public disclosure section of the Administrative Procedure Act,³⁵ which generally had been recognized as "falling far short" of its disclosure goals³⁶ and had come to be looked upon as more a withholding statute than a disclosure statute.³⁷

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

²⁷ 5 U.S.C. § 552(f)(1)-(2).

²⁸ Id. § 552(g).

²⁹ Id. § 552(h).

³⁰ Id. § 552(i).

³¹ Id. § 552(j).

³² Id. § 552(k).

³³ Id. § 552(l).

³⁴ See 112 Cong. Rec. H13641-42 (daily ed. June 20, 1966) (statement of Rep. John Moss describing protracted legislative efforts, including decade of hearings, required to develop and achieve enactment of FOIA).

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

³⁶ EPA v. Mink, 410 U.S. 73, 79 (1973).

³⁷ See S. Rep. No. 89-813, at 5 (1965).

from disclosure or specially excluded from the Act's coverage in the first place.³⁸ The nine exemptions of the FOIA ordinarily provide the only bases for nondisclosure,³⁹ and generally they are discretionary, not mandatory, in nature.⁴⁰ Dissatisfied record requesters are given a relatively speedy 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.⁴¹

After the FOIA was originally enacted in 1966, the courts created certain additional procedural devices, such as the requirement of a "Vaughn Index" -- a detailed index of withheld documents and the justification for their exemption, established in Vaughn v. Rosen⁴² -- and the requirement that agencies release reasonably segregable, nonexempt portions of a partially exempt record, which was first articulated in EPA v. Mink.⁴³

The FOIA was substantially amended in 1974.⁴⁴ 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.⁴⁵

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.⁴⁶ A technical change was made in 1978 to update the FOIA's provision for

³⁸ See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

³⁹ See 5 U.S.C. § 552 (b), (d) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

⁴⁰ See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979); see also Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines] (encouraging agencies to make discretionary disclosures), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *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).

⁴¹ See 5 U.S.C. § 552(a)(4)(B)-(C).

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

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

⁴⁴ See Pub. L. No. 93-502, 88 Stat. 1561.

⁴⁵ 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).

⁴⁶ See Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976) (single FOIA amendment enacted
(continued...))

administrative disciplinary proceedings,⁴⁷ 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."⁴⁸

In 1986, Congress enacted the Freedom of Information Reform Act of 1986,⁴⁹ which amended the FOIA to provide broader exemption protection for law enforcement information, plus special law enforcement record exclusions, and also created a new fee and fee waiver structure.

In 1996, Congress enacted the Electronic Freedom of Information Act Amendments of 1996,⁵⁰ which addressed the subject of electronic records, as well as the subject areas of proactive disclosures and agency backlogs of FOIA requests, among other procedural provisions.

The FOIA was further amended by the Intelligence Authorization Act of 2003, effective as of November 27, 2002.⁵¹ The FOIA now contains language that precludes agencies of the "intelligence community"⁵² 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.⁵³ Significantly, this is the first time that Congress has departed from the general rule that "any person" may submit a FOIA request.⁵⁴

⁴⁶(...continued)

together with Government in the Sunshine Act in 1976, 5 U.S.C. § 552b (2006)).

⁴⁷ See 5 U.S.C. § 552(a)(4)(F).

⁴⁸ 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)).

⁴⁹ Pub. L. No. 99-570, 100 Stat. 3207.

⁵⁰ Pub. L. No. 104-231, 110 Stat. 3048.

⁵¹ Pub. L. No. 107-306, 116 Stat. 2383 (2002).

⁵² 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").

⁵³ 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).

⁵⁴ 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).

Lastly, Congress amended the FOIA again in 2007 with the passage of the OPEN Government Act of 2007.⁵⁵ 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; codification of the key roles played by Chief FOIA Officers and FOIA Public Liaisons; and new marking requirements for documents.⁵⁶ (For further discussion of the OPEN Government Act of 2007, see Procedural Requirements, below.)

The most recent developments in the FOIA were the issuance of memoranda by President Obama and Attorney General Holder on the FOIA.⁵⁷ These statements of FOIA policy emphasize that the FOIA "should be administered with a clear presumption: [i]n the face of doubt, openness prevails."⁵⁸ The President also directed agencies to "take affirmative steps to make information public and not to "wait for specific requests from the public."⁵⁹ 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."⁶⁰ He stressed the need for agencies to "work proactively and [to] respond to requests promptly."⁶¹ (For a further discussion of the FOIA memoranda by President Obama and Attorney General Holder, see Procedural Requirements, below.)

⁵⁵ See Pub. L. No. 110-175, 121 Stat. 2524; see also *FOIA Post*, "Congress Passes Amendments to the FOIA" (posted 01/09/08).

⁵⁶ 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).

⁵⁷ 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 FOIA Guidelines, available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

⁵⁸ President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683.

⁵⁹ Id.

⁶⁰ Attorney General Holder's FOIA Guidelines, available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

⁶¹ Id.