

**Society of American Archivists
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**DRAFT Issue Brief: Freedom of Information Act
(Prepared by the Committee on Advocacy and Public Policy)**

This issue brief addresses the following priority within SAA's Advocacy Agenda, as adopted by the SAA Council in June 2012:

The Public's Right to Equal and Equitable Access to Government Information

American citizens have a right to know the actions and intentions of their government and its leaders. Government officials at all levels should assume that the public has the right of access to documents prepared by a government official or entity, including communications between government officials or entities. To ensure access, government officials have an obligation to preserve such records properly until they are appropriately reviewed, appraised, and declassified when appropriate. This preservation requirement applies to all records, regardless of format.

SUMMARY

SAA supports all efforts to strengthen the federal Freedom of Information Act (FOIA) to ensure that:

- Agencies follow both the letter and the spirit of the law,
- Delays and backlogs in the FOIA request process are reduced to a minimum,
- Communication between agencies and FOIA requesters is improved, and
- Communication between the government and the public regarding FOIA matters is improved.

SAA will:

- Consider joining legal actions to ensure proper and thorough application of FOIA,
- Advocate for pertinent legislation and agency regulations, and
- Suggest alterations to both court filings and current and proposed legislation in pursuit of these goals.

THE ISSUE

Although the [current FOIA law](#) has improved citizen access to government records and overall government transparency, it still suffers from some significant flaws:

- A number of agencies are resistant to fully implementing FOIA.
- Exemptions granted under the law for certain types of information are often too broadly applied. This is especially true for Exemption 1 (national security information), Exemption 3 (exempted by statute), and Exemption 5 (the “deliberative process” privilege, in which the internal processes of the executive branch are immune from disclosure).
- Most exemptions have no mechanism that allows balancing of the public interest in seeing information released against the potential harm of releasing the information.
- There is no single standard for ensuring the public’s “right to know,” resulting in varying interpretations of the law by the President and individual agencies. For example, various Executive Orders have significantly affected the ways in which the Act has been administered.
- The FOIA process itself suffers from persistent delays and backlogs due to the interagency referrals process, the policy of the Department of Justice to defend all actions undertaken by federal agencies under FOIA, the tendency of agencies to litigate FOIA requests due to this policy, out-of-date regulations, and a lack of incentives for agencies to follow the law.
- Communication between agencies and FOIA requesters and between the government and the public can be problematic. Requesters must visit one of “the more than 100 disparate systems that currently exist”¹ in order to submit and track FOIA requests. In the case of interagency referrals, it can be difficult to find out to whom the request has been referred and its status.
- Legislation affecting FOIA can be difficult to track because provisions that affect the Act may not be clearly stated. This can lead to inadvertent loopholes or to deliberate loopholes that are enacted without an opportunity for public input.
- There is no federal advisory committee regarding FOIA that would allow non-government FOIA experts to help shape its policy.

THE SOLUTION

To ensure that agencies follow both the letter and the spirit of the law, SAA urges Congress to:

¹ “One Step Forward, One Step Missed: House Committee Approves Limited FOIA Improvements” by Gavin Baker, Center for Effective Government website, March 21, 2013, <http://www.foreffectivegov.org/one-step-forward-one-step-missed-house-committee-approves-limited-foia-improvements> (accessed January 6, 2014).

- Legislate the following standards:
 - That agencies must implement FOIA with a presumption of openness,
 - That agencies may withhold information only when they are required by law to do so or can foresee actual harm from disclosure, and
 - That agencies must proactively disclose information rather than simply waiting for requests. The requirements for proactively disclosing information should be specific and enforceable.
- Incorporate a public interest balancing test into each exemption, with the possible exception of Exemption 3 (exempted by statute).
- Explain how the foreseeable harm standard for withholding information should be applied. The burden should fall squarely on the agency to show that harm would result from disclosure and to explain the agency's rationale for that decision. Allow judges to review these decisions.
- Strengthen oversight, compliance, and communication mechanisms.

To reduce persistent delays and backlogs, Congress should:

- Require agencies to post more information online to increase transparency and reduce duplicative processing.
- Require agencies to bring FOIA regulations up to date.
- Encourage agencies to resolve FOIA disputes rather than force requesters into court.
- Encourage the Department of Justice to implement a mechanism to determine which FOIA cases to litigate, rather than litigating the majority of FOIA requests. Provide for transparency in this decision-making process.
- Increase incentives for agencies to respond in a timely manner, such as denying the agency's right to claim that records are protected by the deliberative process privilege if the agency fails to respond to a FOIA request regarding those records in a timely manner.
- Establish a commission to study methods of reducing delays in response to FOIA requests.

To improve communication between agencies and FOIA requesters, and between the government and the public, Congress should:

- Establish a single website for the public to submit and track requests at any agency. Requesters should be able to track a request that is sent from one agency to another and know who in the new agency is responsible for tracking the request.

- Strengthen the impact of the FOIA ombudsman, the Office of Government Information Services (OGIS), by requiring other agencies to cooperate with the Office's activities.
- Identify proposed and current exemptions to FOIA so that the public may comment.
- Create a federal advisory committee for FOIA, giving the National Archives and Records Administration primary responsibility and including participation by the Department of Justice. The committee should have a broad mandate to initiate recommendations and provide advice on rulemakings, guidance, and other relevant activities.

BACKGROUND

In 1966 President Lyndon Johnson signed the Freedom of Information Act (U.S. Code Title 5) into law; it became effective the following year. The Act was designed “to clarify and protect the right of the public to information” and sought to balance the public’s “right to know” with the sensitivity of some government information and private interests. President Johnson opposed the law, however, citing concerns about national security, privacy, personnel matters, investigatory records, and records relating to the government’s deliberative process. Amendments to the original legislation followed in 1974, 1976, 1986, 1996, 2002, 2007, and 2010.

1974: The 1974 amendments, part of the Privacy Act of 1974, made substantial revisions to the original Act by establishing judicial review of executive secrecy claims; enumerating the specific instances when Exemption 7, the investigatory file exemption, could be used; and changing certain definition and administrative procedures. Additional amendments in the Privacy Act of 1974 regulated government control of documents which concern a specific individual. President Gerald Ford vetoed the bill over concerns about these changes and the constitutionality of the Act but Congress overwhelmingly overrode his veto.

1976: The Government in the Sunshine Act of 1976 amendments further specified the exemptions under Exemption 3 of the original Act relating to material exempted by statute. Amendments under the 1986 Omnibus Anti-Drug Abuse Act related to the scope of access to law enforcement and national security records and the fees various categories of requesters were charged.

1996 and 2002: The Electronic Freedom of Information Act Amendments of 1996 addressed electronic access to records. These amendments also doubled an agency’s required response time to twenty days. In response to the 2001 terror attacks Congress in 2002 precluded disclosure of records by U.S. intelligence agencies in response to FOIA requests by foreign governments or international governmental agencies whether directly or through a representative.

2007: The Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007 defined who constituted a “representative of the media,” extended the 20 day deadline by up to 10 days between the FOIA office of an agency and the part of the agency that actually holds the records, required agencies to assign a tracking number to FOIA requests that take longer than 10 days and create a system for determining its status, and directed that attorney’s fees be paid from the agency’s own appropriations. The Act also codified agency annual reporting requirements,

directed that data used to create reports be available electronically, required that agencies specify the exemption used for each deletion or redaction, and defined an agency record to include those held for an agency by a government contractor. Finally, the Act required agencies to designate a FOIA Public Liaison to assist in dispute resolution and established the Office of Government Information Services within the National Archives and records Administration to review agency FOIA compliance.

2010: Congress passed legislation that would have shielded the Securities and Exchange Commission from FOIA disclosure but then almost immediately repealed those provisions.

Executive Orders

A number of Executive Orders have greatly affected the administration of the law, including the following:

- President Ronald Reagan's Executive Order 12356 allowing agencies to withhold a wider variety of information under Exemption 1 (national security information).
- President William Clinton's Executive Order 12958 releasing previously classified material more than twenty-five years old and of historical interest.
- President George W. Bush's Executive Order 13233 restricting access to Presidential records.
- President Barack Obama's Executive Order 13489 rescinding E.O. 13233 and Executive Order 13526 allowing retroactive classification of material after it has been requested.

ADDITIONAL REFERENCE SOURCES

The following government resources include reports and statistics that are useful in tracking FOIA implementation by government agencies, as well as information about FOIA generally.

- United States Department of Justice FOIA page: <http://www.foia.gov/>
- National Archives and Records Administration's Office of Government Information Services (OGIS) page: <https://ogis.archives.gov/>

The National Security Archive FOIA site includes the text of the Act, an extensive legislative history, as well as articles on FOIA, National Security Archive FOIA audits, and Knight Open Government surveys.

- National Security Archive Freedom of Information Act page: <http://www2.gwu.edu/~nsarchiv/nsa/foia.html>

OpenTheGovernment.org is a coalition of 80+ organizations (including SAA) that are interested in government openness and accountability. Its website includes articles on FOIA, activities by members regarding FOIA, and Open the Government's Secrecy Report, which includes statistics on FOIA requests and backlogs, use of exemptions, and cost of processing FOIA requests.

- <http://www.openthegovernment.org/>

The following watchdog group websites include articles on each group's FOIA litigation, reports on FOIA, and suggestions on how to improve both the Act and the process.

- Center for Effective Government [formerly OMB Watch] Freedom of Information page: <http://www.foreffectivegov.org/category/categories/open-accountable-government/freedom-information>
- Citizens for Responsibility and Ethics in Washington (CREW) Open Government page: <http://www.citizensforethics.org/policy/c/open-government>
- Judicial Watch page: <http://www.judicialwatch.org/>
- Public Citizen Freedom of Information and Government Transparency page: <http://www.citizen.org/Page.aspx?pid=3194>

All sites were accessed on October 15, 2013.