



Updated September 24, 2020

The Freedom of Information Act (FOIA): An Introduction

The Freedom of Information Act (FOIA), codified at 5 U.S.C. § 552, provides the public a right to access federal agency information. Subject to statutorily enumerated exemptions and exclusions, agencies must disclose records covered by the act in one of three ways. First, FOIA directs agencies to publish certain important government materials in the Federal Register. Second, on a proactive basis, agencies must electronically disclose certain agency information. And third, FOIA requires agencies to disclose all covered records, except those made available through the aforementioned affirmative disclosure provisions, to individuals, corporations, and other entities on request. This In Focus provides a brief introduction to FOIA. For a more detailed discussion, see CRS Report R46238, *The Freedom of Information Act (FOIA): A Legal Overview*, by Daniel J. Sheffner.

Key Terms

Three terms inform FOIA’s general scope: “agency,” “agency records,” and “any person.” Their definitions effectively determine which entities must comply with FOIA, what materials those entities must disclose, and to whom FOIA grants the right to request and receive records.

“Agency”

Only agencies are required to disclose records under FOIA. An “agency” includes “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.” 5 U.S.C. § 552(f)(1).

This definition does not encompass all federal government components, including Congress, the federal courts, or territorial governments. And although FOIA covers the Executive Office of the President (EOP), the Supreme Court has held that the statute does not reach “the President’s immediate personal staff” or those EOP units “whose sole function is to advise and assist the President.” *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980).

“Agency Records”

Just as only agencies are subject to FOIA’s disclosure requirements, only “agency records” are disclosed under the act. See 5 U.S.C. § 552(a)(4)(B). FOIA does not define “agency records,” but the Supreme Court has held that the term covers materials that were created or obtained by an agency, and controlled by the agency at the time the FOIA request was made. An agency is in control of materials if “the materials have come into the agency’s possession in the legitimate conduct of its official duties.” *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

“Any Person”

FOIA directs agencies to disclose covered agency records to “any person” upon request. 5 U.S.C. § 552(a)(3)(A). A “person” is “an individual, partnership, corporation, association, or public or private organization other than an agency.” 5 U.S.C. § 551(2).

Access to Government Information Under FOIA

FOIA sets forth a three-part system for disclosing government information.

First, under 5 U.S.C. § 552(a)(1), an agency must publish certain government information, such as generally applicable substantive rules, in the Federal Register.

Second, under 5 U.S.C. § 552(a)(2) (often called the “reading room provision”), an agency must “make available for public inspection in an electronic format” a separate set of information—including final agency adjudicative opinions and certain previously released records—unless the information has been promptly published and copies were made available for sale.

Lastly, under 5 U.S.C. § 552(a)(3), an agency must, after receiving a request, release covered records the agency has not made available under the aforementioned affirmative disclosure provisions. If an agency receives a request that reasonably describes the requested records and complies with the agency’s published rules governing “the time, place, fees (if any), and procedures to be followed,” the agency must promptly release the requested records.

Once an agency receives a valid FOIA request, it has twenty business days to make a “determination” about whether it will comply with the request. It must immediately notify the requester of its determination and the requester’s right to appeal an “adverse determination” within the agency. In “unusual circumstances” an agency may extend the twenty-day period by ten additional working days. 5 U.S.C. § 552(a)(6)(A), (B).

To make a “determination,” the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has held that an “agency must at least inform the requester of the scope of the documents that the agency will produce” and “the scope of the documents that the agency plans to withhold under any FOIA exemptions.” An agency need not *produce* requested records when it makes its initial determination. Instead, it may fulfill its responsibility to disclose records promptly *after* it indicates the scope of the records it will disclose and the exemptions it will invoke. *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180, 186, 188-89 (D.C. Cir. 2013) (Kavanaugh, J.).

Before challenging an agency's nondisclosure decision in federal court, a requester typically must exhaust any remedies that an agency affords. Generally, a requester has not exhausted administrative remedies unless the requester has submitted a valid FOIA request to the agency and internally appealed the agency's adverse decision. But if the agency does not adhere to the FOIA deadlines, a requester is deemed to have constructively exhausted his administrative remedies and may seek review in federal court.

Exemptions

While FOIA's main purpose is to inform the public of the federal government's operations, the act excludes certain private and governmental interests from disclosure. FOIA lists nine exemptions from its disclosure requirements that permit, but do not require, agencies to withhold information or records that are otherwise subject to release. 5 U.S.C. § 552(b). Agencies may only withhold information under an exemption if disclosing the information is legally prohibited or "the agency reasonably foresees that disclosure would harm an interest protected by an exemption." 5 U.S.C. § 552(a)(8)(A)(i).

Exemption 1 (National Defense or Foreign Policy) allows agencies to withhold matters from disclosure when (1) those matters are specifically authorized under an executive order to be kept secret because of national defense or foreign policy interests and (2) the matters are properly classified as such under the order. 5 U.S.C. § 552(b)(1).

Exemption 2 (Internal Personnel Rules and Practices) authorizes agencies to exempt from disclosure matters that are related solely to the agency's internal personnel rules and practices. 5 U.S.C. § 552(b)(2).

Exemption 3 (Matters Exempted by Other Statutes) allows agencies to withhold matters if they are "specifically exempted from disclosure by" certain categories of statutes described in the exemption. Statutes enacted after October 28, 2009, that would otherwise be incorporated must cite Exemption 3 to qualify as a withholding statute. 5 U.S.C. § 552(b)(3).

Exemption 4 (Trade Secrets and Commercial or Financial Information) authorizes agencies to exempt from disclosure trade secrets and privileged or confidential commercial or financial information obtained from a person. 5 U.S.C. § 552(b)(4).

Exemption 5 (Inter- or Intra-Agency Memoranda or Letters) applies to inter- or intra-agency documents that would normally be privileged from disclosure in civil discovery, including documents protected by the deliberative process, attorney-client, or attorney work-product privileges. 5 U.S.C. § 552(b)(5).

Exemption 6 (Personnel, Medical, and Similar Files) exempts personnel, medical, and "similar" files when disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

Exemption 7 (Law Enforcement Records or Information) applies to records "compiled for law enforcement purposes," but only if disclosure would or could reasonably be expected to result in certain specified harms. 5 U.S.C. § 552(b)(7).

Exemption 8 (Financial Institution Reports) protects matters in or associated with financial reports created by agencies that regulate financial institutions, or in or associated with financial reports created for or on behalf of such agencies. 5 U.S.C. § 552(b)(8).

Exemption 9 (Geological and Geophysical Information and Data Concerning Wells) exempts from disclosure "geological and geophysical information and data, including maps, concerning wells." 5 U.S.C. § 552(b)(9).

Exclusions

FOIA also excludes three classes of particular law enforcement records from its disclosure requirements. These exclusions, listed in 5 U.S.C. § 552(c)(1)-(3), allow an agency, in response to a request for such records, to treat the records as not subject to FOIA.

Judicial Review

FOIA grants federal district courts "jurisdiction to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B). The agency has the burden of proving that it properly withheld information under a FOIA exemption. Courts review agency withholding decisions de novo (i.e., no deference is given to the agency's decision that withholding was proper).

Selected Issues of Potential Interest for Congress

Although Congress is not subject to FOIA, the act may inform communications between the legislative branch and FOIA-covered entities. Under 5 U.S.C. § 552(d), an agency may not invoke a FOIA exemption to "withhold information from Congress." The executive branch has interpreted this provision to apply to each house of Congress and congressional committees, but it generally treats individual Members' requests for information as subject to the same FOIA rules as requests from the public. This interpretation is not uniformly shared, with at least one federal appellate court interpreting § 552(d) to include individual Members acting in their official capacities. See *Murphy v. Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1979).

In addition, although Congress is under no obligation to disclose its materials under FOIA, the D.C. Circuit has held that whether a congressional document possessed by an agency is subject to disclosure under FOIA depends on whether Congress clearly expressed its intention to retain control over the document. See *ACLU v. CIA*, 823 F.3d 655, 662-63 (D.C. Cir. 2016).

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