



Access to Government Information In the United States

Wendy R. Ginsberg

Analyst in Government Organization and Management

August 31, 2009

Congressional Research Service

7-5700

www.crs.gov

97-71

Summary

The U.S. Constitution makes no specific allowance for any one of the three branches of the federal government to have access to information held by the others. No provision in the U.S. Constitution expressly establishes a procedure for public access to government information.

Congress has legislated various public access laws. Among these laws are two records access statutes,

- the Freedom of Information Act (FOI Act or FOIA; 5 U.S.C. § 552), and
- the Privacy Act (5 U.S.C. § 552a),

and two meetings access statutes,

- the Federal Advisory Committee Act (FACA; 5 U.S.C. App.), and
- the Government in the Sunshine Act (5 U.S.C. § 552b).

The American separation of powers model of government may inherently prompt interbranch conflicts over the accessibility of information. These conflicts are neither unexpected nor necessarily destructive. Although there is considerable interbranch cooperation in the sharing of information and records, such conflicts over access may continue on occasion.

This report offers an overview of the four information access laws noted above, and provides citations to additional resources related to these tools.

Contents

| | |
|---|---|
| History and Background..... | 1 |
| Public Access Laws..... | 2 |
| Freedom of Information Act (5 U.S.C. § 552)..... | 2 |
| Federal Advisory Committee Act (5 U.S.C. App.)..... | 3 |
| Privacy Act (5 U.S.C. § 552a)..... | 3 |
| Government in the Sunshine Act (5 U.S.C. § 552b)..... | 3 |
| Interbranch Access..... | 4 |
| Using the Information Access Laws..... | 4 |
| Statistics on Usage..... | 4 |
| FOIA..... | 4 |
| FACA..... | 5 |
| Litigation..... | 5 |
| Guides to Using the Information Acts..... | 6 |
| Selected CRS Reports..... | 6 |
| Selected Additional Resources..... | 7 |

Contacts

| | |
|---------------------------------|---|
| Author Contact Information..... | 8 |
| Acknowledgments..... | 8 |

History and Background

Throughout the first 150 years of the federal government, access to government information does not appear to have been a major issue for the federal branches or the public. There were a few instances during this period when the President, for reasons of maintaining the constitutional independence and equality of his branch, vigorously resisted attempts by Congress and the courts to obtain executive records.¹ Furthermore, during this same era, an active federal public printing program was established and effectively developed, making government documents more accessible.²

Following World War II, some information was available from certain federal departments and agencies.³ The public availability of records held by the executive branch was limited by narrow interpretation of the housekeeping statute of 1789 (5 U.S.C. § 301), which authorized the heads of departments to prescribe regulations regarding the custody, use, and preservation of the records, papers, and property of their entity. Prevailing law tolerated this state of affairs, offering citizens no clear avenue of access to agency information. Moreover, a provision of the Administrative Procedure Act of 1946 (5 U.S.C. § 551) indicated that matters of official record should be available to the public, but added that an agency could restrict access to its documents “for good cause found” or “in the public interest.” These discretionary authorities were relied upon to restrict the accessibility of unpublished agency records and documents.

In response, some congressional panels began examining information access issues and seeking responsive legislative solutions. Among these legislative responses was the creation of the four following statutes:

- the Freedom of Information Act (1966),
- the Federal Advisory Committee Act (1972),
- the Privacy Act (1974), and
- the Sunshine in Government Act (1976).

¹ The powers of Congress to access executive-branch records dates back to as early as 1790, when the House established a select congressional committee to investigate the actions of former Superintendent of Finance Robert Morris. For more information see 1 *Annals of Cong.* 1168 (February 8, 1790). See also *United States v. Nixon*, 418 U.S. 683, 711 (1974). In *U.S. v. Nixon*, the court said that if the extent of the President’s interest in withholding information for the purpose of confidentiality “relates to the effective discharge of a President’s powers, it is constitutionally based.” See also House Committee on the Judiciary, “House Judiciary Committee Releases Rove and Miers Interview Transcripts and Over 5,400 Pages of Bush White House Documents,” at <http://judiciary.house.gov/news/090811.html>.

² Harold C. Relyea, *American Federal Government Printing and Publication Reform: A Special Issue of Government Publications, Part A; Research Articles* (Oxford, England: Pergamon Press, 1982).

³ See U.S. Congress, Senate Committee on the Judiciary, *Bills to Amend the Administrative Procedure Act, and for Other Purposes*, hearing on S. 1160, S. 1336, S. 1758, and S. 1879, May 12-14 and 21, 1965, 89th Cong., 1st sess. (Washington: GPO, 1965). At the hearing, Chairman James O. Eastland stated the following:

Access to information about the activities of Government is crucial to the citizen’s ability to cope with the bigness and complexity of Government today.... There is no validity therefore, to the frequently heard argument that these [access to executive-branch information] proposals impinge on executive privilege for they would not affect the proper exercise of authority of the President and department heads. (p. 4)

This report offers an overview of each of these statutes, including the boundaries of their authority. This report then provides citations to additional resources, including additional Congressional Research Service reports, on each of the laws.

Public Access Laws

In 1966, Congress enacted the first law requiring public access to executive branch information. Legislative records were not included in the bill because Congress believed it made its deliberations and proceedings adequately subject to public observation, largely published its records, and otherwise was constitutionally authorized to engage in information restriction in certain circumstances.⁴ For example, the Constitution explicitly permitted each house of Congress a discretion to keep portions of its journal of proceedings secret and disallowed the questioning of Members of Congress “in any other Place” regarding official speech or debate. Legislators also were satisfied with the openness of federal court files and hearing rooms. Thus, the departments and agencies were the principal object of government information access reform laws. Executive branch officials, however, were not supportive of these measures and, initially, did not always promote or pursue their faithful administration. The current major federal laws facilitating public access to government information are briefly described below; the full text of each statute may be consulted by using the *United States Code* references provided.

Freedom of Information Act (5 U.S.C. § 552)

Initially enacted in 1966 and subsequently amended, the Freedom of Information Act (FOIA) establishes for any person—corporate or individual, regardless of nationality—presumptive access to existing, unpublished agency records on any topic. The law specifies nine categories of information that may be permissibly exempted from the rule of disclosure. Agencies within the federal intelligence community are prohibited from making any record available to a foreign government or a representative of same pursuant to a FOIA request. Disputes over the accessibility of requested records may be settled, according to the provisions of the act, in federal court.⁵ Pursuant to the statute, FOIA does not apply to the legislative or executive branches of the federal government or to lower levels of government.

Fees for search, review, or copying of materials may be imposed, while certain types of requesters may be granted fee waivers or reductions.⁶ FOIA was amended in 1996 to provide for public access to information in an electronic form or format. These amendments are often referred to as e-FOIA.⁷ In 2007, FOIA was further amended to

⁴ By explicit exclusion, Congress and the courts are not subject to FOIA. The committees that developed FOIA—the House Committee on Government Operations and the Senate Committee on the Judiciary—were responding to perceived secrecy problems in the executive branch. Furthermore, these panels had no jurisdiction over legislation concerning congressional operations. Thus, FOIA was created, approved, and implemented with an executive branch focus. For more information on the limitations of FOIA applicability see Harold C. Relyea, “Congress and Freedom of Information: A Retrospective and a Look at the Current Issue,” *Government Information Quarterly*, vol. 26 (2009), pp. 437-440.

⁵ 5 U.S.C. § 552(4)(B). See U.S. Congress, House Committee on Government Reform, *A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, H.Rept. 109-226, 109th Cong., 1st sess. (Washington: GPO, 2005).

⁶ 5 U.S.C. § 552(h)(3).

⁷ 5 U.S.C. § 552 note.

- redefine qualifications for fee waivers for those seeking records,
- require the National Archives and Records Administration to create an Office of Government Information Services to act as a centralized FOIA oversight office, and
- require agencies to create tracking systems that allow requesters to determine the status of their information requests, among other modifications.⁸

Federal Advisory Committee Act (5 U.S.C. App.)

A 1972 statute, the Federal Advisory Committee Act (FACA), in part, requires that the meetings of all federal advisory committees serving executive branch entities be open to public observation and that all committee records be accessible to the public. The statute specifies certain categories of records and debate—identical to the record exemptions in FOIA—that could permit a committee to hold meetings that were not accessible to the public or could prohibit the release of certain committee records.⁹ Disputes over the proper public notice for a committee meeting or the closing of a session may be pursued in federal court.

Committees that fit certain FACA criteria are governed by FACA's guidelines.¹⁰ FACA was designed to eliminate duplication of committee expertise and make advisory bodies in the executive branch more transparent. Congress may decide, however, to place some or all FACA requirements on a body that it statutorily created.¹¹

Privacy Act (5 U.S.C. § 552a)

Legislated in 1974, the Privacy Act, in part, established for individuals who are United States citizens or permanent resident aliens, presumptive access to personally identifiable files on themselves held by most federal agencies—generally, however, not law enforcement and intelligence entities. The statute specifies seven types of information that may permissively be exempted from the rule of access.¹² Where a file subject contends that a record contains inaccurate information about that individual, the act allows correction through a request to the agency that possesses the record. Disputes over the accessibility or accuracy of personally identifiable files may be pursued in federal court.

Government in the Sunshine Act (5 U.S.C. § 552b)

Enacted in 1976, the Sunshine Act presumptively opens the policymaking deliberations of collegially headed federal agencies—such as boards, commissions, or councils—to public

⁸ P.L. 110-175. See also CRS Report R40766, *Freedom of Information Act (FOIA): Issues for the 111th Congress*, by Wendy R. Ginsberg.

⁹ FACA cites 5 U.S.C. § 552(b), which is the section of the U.S. Code that states which records are exempted from FOIA.

¹⁰ 41 C.F.R. Appendix to Subpart A of § 102-3.

¹¹ For more information on FACA, see CRS Report R40520, *Federal Advisory Committees: An Overview*, by Wendy R. Ginsberg.

¹² 5 U.S.C. § 552a(j) and 5 U.S.C. § 552a(k).

scrutiny. Pursuant to the statute, agencies are required to publish advance notice of impending meetings and make those meetings publicly accessible.¹³ The act includes ten conditions under which agency meetings would be exempted from the act.¹⁴ Disputes over proper public notice of such meetings or the propriety of closing a deliberation may be pursued in federal court.

Interbranch Access

Both Congress and the judiciary have subpoena powers that can be exercised to compel the production of materials by another branch, but even these demands have sometimes been resisted.¹⁵ In 1974, for example, a Special Prosecutor sought certain tape recordings that President Richard Nixon, on a claim of constitutional privilege, initially refused to provide. The Supreme Court, in *United States v. Nixon* (418 U.S. 683), disallowed the President's claim of privilege, finding it too general and overbroad and the needs of the Special Prosecutor to pursue criminal prosecutions more compelling. These tape recordings would become known as the Watergate Tapes.

Language within FOIA explicitly states that the statute does not permit agencies to withhold information from Congress. In general, interbranch disputes over access to information are often resolved through negotiation—reduction of the quantity of records initially sought, substitution of other information, alternative delivery mechanisms, or limitation of the number of individuals who will examine materials provided by another branch. Congress could use its “power of the purse” and the Senate could use its advice and consent power to leverage its information access demands. Federal courts rely upon a spirit of justice and fair play to sustain their orders for the production of information by another branch. In view of the American separation of powers model of government, such conflicts are neither unexpected nor necessarily destructive. Furthermore, they probably will continue to occur.

Using the Information Access Laws

Statistics on Usage

FOIA

The Freedom of Information Act requires each federal agency to submit a report on or before February 1 each year to the Attorney General describing the agency's freedom of information workload. Annual reports from all of the departments and agencies are posted on the Internet by

¹³ 5 U.S.C. § 552b(e)(3).

¹⁴ 5 U.S.C. § 552b(c).

¹⁵ For example, on March 31, 2004, Senator Jim Jeffords, the then-Senate Committee on Environment and Public Works minority ranking member, said at a hearing that he was having difficulty acquiring documents from the Environmental Protection Agency even though he and the committee chairman had drafted a letter to the agency requesting that it respond to requests from either member. U.S. Congress, Senate Committee on Environment and Public Works, *Nominations of the 108th Congress, 2nd Session*, 108th Cong., 2nd sess., March 31, 2004, S.Hrg. 108-500 (Washington: GPO, 2004), pp. 3-4.

the U.S. Department of Justice at http://www.usdoj.gov/04foia/04_6.html.¹⁶ In FY2008, The Department of Veterans Affairs reported that it received 99,333 new FOIA requests and processed 98,455 requests.¹⁷ The Department of Justice reported receiving 59,615 requests in FY2008 and processed 61,272 requests.¹⁸

FACA

According to the FACA Database, which is hosted by the General Services Administration, 914 federal advisory bodies have been active in FY2009,¹⁹ costing \$357,371,463.²⁰

Litigation

A certain number of requests for information under the access to information acts result in judicial action. The Administrative Office of the U.S. Courts provides statistical information on the number of FOIA cases filed in U.S. District Courts in its compendium, *Judicial Business of the United States Courts*, which is available on the Internet at <http://www.uscourts.gov/judbus2008/appendices/C02Sep08.pdf>. According to that report, 280 cases related to FOIA commenced in U.S. District Courts in 2008. According to the report on appellate courts,²¹ 60 cases related to FOIA commenced between January 1, 2008, and September 30, 2008.

The *Freedom of Information Case List*, produced by the Department of Justice Office of Information and Privacy, has compiled lists of cases decided pursuant to FOIA, FACA, the Privacy Act, and the Government in the Sunshine Act. Its principal section, an alphabetical list of judicial decisions addressing access issues under FOIA and the Privacy Act, numbers nearly 5,000 entries. It was last updated in May 2002 and is available on the Internet at <http://www.usdoj.gov/04foia/cl-tofc.html>. Judicial Watch, a public interest group that seeks to promote transparency in government, has posted information about its own lawsuits under “Our Litigation” at <http://www.judicialwatch.org/litigation.shtml>. Citizens for Responsibility and Ethics in Washington (CREW), a nonprofit organization that seeks to promote government accountability, has a webpage devoted to lawsuits in which it is involved at <http://www.citizensforethics.org/actions/lawsuits>. EPIC, a public interest nonprofit that focuses on civil liberties and privacy issues, also has a webpage devoted to FOIA-related litigation at <http://epic.org/privacy/litigation/>.

¹⁶ Data from the individual annual reports, which are posted on the Department of Justice website, are summarized in tables on the website of Public Citizen, a public interest group. Public Citizen’s tables for FY2000 through FY2005 can be found at http://www.citizen.org/litigation/free_info/foic_rep/statistics/index.cfm.

¹⁷ See <http://www.va.gov/foia/report/FY2006/InitialRequests.html>.

¹⁸ U.S. Department of Justice, U.S. Department of Justice, *Freedom of Information Act Annual Report*, Fiscal Year 2008, Washington, DC, February 6, 2009, p. 2, http://www.usdoj.gov/oip/annual_report/2008/foiapg5.pdf.

¹⁹ U.S. General Services Administration, Federal Advisory Committees Database, Government Statistics, FY2009, at <http://fido.gov/facadatabase/rptgovtstats.asp>.

²⁰ U.S. General Services Administration, Federal Advisory Committees Database, FY2009 Government Totals, at <http://fido.gov/facadatabase/rptgovttotals.asp>.

²¹ At <http://www.uscourts.gov/judbus2008/appendices/B01ASep08.pdf>.

Guides to Using the Information Acts

Individuals, groups, and organizations all possess a right to access some government information. Both government and private groups publish guides to the information acts in paper and on the Internet as well.

The U.S. House of Representatives Committee on Government Reform published several editions of its report, *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records* (H.Rept. 109-226). In addition to the text of the acts, the *Citizen's Guide* contains descriptions and explanations, sample document request forms, and bibliographies of related congressional and non-congressional material. The report is available at <http://www.access.gpo.gov/congress/house/house07cr109.html>. The General Services Administration's Federal Citizen Information Center publishes *Your Right To Federal Records: Questions and Answers on the Freedom of Information Act and Privacy Act*. Like the *Citizen's Guide*, this publication contains explanations, samples, and texts, although in less detail than found in the *Citizen's Guide*. *Your Right to Federal Records* is available on the Internet at http://www.pueblo.gsa.gov/cic_text/fed_prog/foia/foia.pdf.

The Justice Department is the agency responsible for overseeing and coordinating administration of the Freedom of Information Act. Its website at <http://www.usdoj.gov/04foia/index.html> includes extensive material about the act, statistics on its usage, guidelines for making requests, and freedom of information contacts at other federal agencies.

Among many non-governmental groups that publish information about freedom of information are Public Citizen and National Security Archive. Public Citizen maintains the "Freedom of Information Clearinghouse" on its website at http://www.citizen.org/litigation/free_info/. The National Security Archive website contains a number of FOIA guides, including, "Effective FOIA Requesting for Everyone: A National Security Archive Guide" published in January 2009 at http://www.gwu.edu/~nsarchiv/nsa/foia/foia_guide.html.

Records on each of the active federal advisory bodies is available on the General Services Administration's FACA Database at <http://fido.gov/facadatabase/>. The website includes each committee's charter, information on the members of each committee and their contact information, and cumulative data on the cost of federal advisory bodies.

Selected CRS Reports

CRS Report R40520, *Federal Advisory Committees: An Overview*, by Wendy R. Ginsberg

CRS Report R40238, *Presidential Records: Issues for the 111th Congress*, by Wendy R. Ginsberg, *Presidential Records: Issues for the 111th Congress*, by Wendy Ginsberg

CRS Report RL33502, *Protection of National Security Information*, by Jennifer K. Elsea

CRS Report R40766, *Freedom of Information Act (FOIA): Issues for the 111th Congress*, by Wendy R. Ginsberg

CRS Report RL33670, *Protection of Security-Related Information*, by Gina Stevens and Todd B. Tatelman

CRS Report RL30240, *Congressional Oversight Manual*, by Frederick M. Kaiser et al.

Selected Additional Resources

Sam Archibald. “The Early Years of the Freedom of Information Act—1955 to 1974.” *PS: Political Science and Politics*, Vol. 26, no. 4 (1993): 726-731.

Herbert N. Foerstel. *Freedom of Information and the Right To Know: The Origins and Applications of the Freedom of Information Act*. Westport, CT: Greenwood Press, 1999.

Harry A. Hammitt, Marc Rotenberg, and John A. Verdi, et al., *Litigation Under the Federal Open Government Laws 2008: Covering the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, and the Federal Advisory Committee Act*, 24th ed. (Washington, DC: EPIC Publications, 2008)

Harry A. Hammitt, Access Reports: Freedom of Information, at <http://www.accessreports.com/>.

Daniel N. Hoffman. *Governmental Secrecy and the Founding Fathers: A Study in Constitutional Controls*. Westport, CT: Greenwood Press, 1981.

Public Information Provision in the Digital Age: Implementation and Effects of the U.S. Freedom of Information Act. Santa Monica, CA: RAND, 2001.

U.S. Congress. House. Committee on Government Reform. *A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*. 109th Congress, first session. H.Rept. 109-226. Washington: GPO, 2005, at <http://fas.org/sgp/foia/citizen.pdf>.

U.S. Congress. Senate. Committee on Governmental Affairs. *Federal Advisory Committee Act (Public Law 92-463)—Source Book: Legislative History, Texts, and Other Documents*. Committee Print. 95th Congress, second session. Washington: GPO, 1978.

U.S. Congress. Senate. Committee on Governmental Affairs. *Government in the Sunshine Act: History and Recent Issues*. Committee Print. 101st Congress, first session. Washington: GPO, 1989.

U.S. Department of Justice, *Department of Justice Guide to the Freedom of Information Act* (2009 Edition), Washington, DC, 2009, http://www.usdoj.gov/oip/foia_guide07/introduction.pdf.

U.S. Department of Justice and U.S. General Services Administration. *Your Right to Federal Records: Questions and Answers on the Freedom of Information Act and Privacy Act, May 2006*. Washington: GSA Federal Citizen Information Center, 2006.

Author Contact Information

Wendy R. Ginsberg
Analyst in Government Organization and
Management
wginsberg@crs.loc.gov, 7-3933

Acknowledgments

Parts of this report were originally written by Harold C. Relyea, who has since retired from the Congressional Research Service.