Congressional Research Service

Freedom of Information Act (FOIA): Issues for the 111th Congress

Wendy R. Ginsberg
Analyst in Government Organization and Management

August 12, 2009

Congressional Research Service
7-5700
www.crs.gov
R40766

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

Enacted in 1966 after 11 years of investigation and legislative development in the House—and nearly 6 years of such consideration in the Senate—the Freedom of Information Act (FOIA; 5 U.S.C. §552) replaced the public information section of the Administrative Procedure Act. FOIA was designed to enable any person to request, without explanation or justification, access to existing, identifiable, unpublished, executive branch agency records. The statute specified nine categories of information that may be exempted from the rule of disclosure. Pursuant to FOIA, disputes over the accessibility of requested records could be settled ultimately in court.

The statute has become a widely used tool of inquiry and information gathering for various sectors of American society—particularly the press, businesses, scholars, attorneys, consumers, and activists—as well as some foreign interests. The response to a request may ultimately involve a few sheets of paper, several linear feet of records, or information in an electronic format. Assembling responses requires staff time, search and duplication efforts, and other resource commitments. Agency information management professionals are responsible for efficiently and economically responding to FOIA requests, doing so in the sensitized homeland security milieu. Agencies may negotiate with a requester to narrow a request's scope, or the agency may explain and justify why certain records cannot be supplied. Simultaneously, agency FOIA response costs need to be kept reasonable. The perception that FOIA standards are not properly met may result in proposed new corrective amendments to the statute.

FOIA has been refined with direct amendments in 1974, 1976, 1986, and 1996. In addition, the 110th Congress enacted the OPEN Government Act of 2007 (P.L. 110-175), which modified FOIA and prompted disagreements with the executive branch. Among the statute's modifications was the creation of both a more inclusive definition for a member of the news media and a more inclusive policy on waiving request processing fees. The legislation more clearly defined the time limits for agencies to respond to requests for information and required the creation of an Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA). After conflict in 2008 with the George W. Bush Administration over whether the OGIS should be placed in NARA or the Department of Justice, President Barack Obama's FY2010 budget requested $1.4 million and six full-time employees for OGIS implementation within NARA.

In his first full day in office, President Obama issued a memorandum to federal departments and agencies encouraging more collaboration, participation, and transparency in the federal government. As a follow-up to the January 21, 2009, memorandum, the Attorney General drafted new guidelines for agency and department heads on use and implementation of FOIA. The Obama Administration also conducted a three-phase online information-gathering effort linked to its OPEN Government Directive. The directive sought public input on ways to make FOIA and other policies and operations of federal government more effective and efficient.

In the 111th Congress, several bills that directly address FOIA have been introduced, including legislation that would exempt photographs of the treatment of detainees held by the Armed Forces from public disclosure pursuant to FOIA, and a bill that would require the archivist to issue more detailed regulations on the classification of government records.

This report will offer a history of FOIA, discuss current implementation of FOIA statutes, and outline pending FOIA legislation. The report will be updated as events warrant.

Contents

Introduction 1
FOIA History 3
FOIA Exemptions 4
Fees for Service 5
The George W. Bush Administration 5
Executive Order 13392, "Improving Agency Disclosure of Information" 5
110th Congress Legislative Reform Efforts 6
OPEN Government Act of 2007 6
Freedom of Information Act Amendments of 2007 8
FOIA Amendment Implementation 10
The Obama Administration 11
FOIA and the 111th Congress 13
Secret Service or Presidential Records 14
FOIA Legislation in the 111th Congress 15

Contacts

Author Contact Information 16
Acknowledgments 16

Introduction

The Freedom of Information Act (FOIA; 5 U.S.C. § 552), often referred to as the embodiment of "the people's right to know" about the activities and operations of government, statutorily established a presumption of public access to information held by federal departments and agencies. Enacted in 1966 to replace the public information section of the Administrative Procedure Act (APA; 5 U.S.C. Subchapter II), FOIA allows any person—individual or corporate, regardless of citizenship—to request, without explanation or justification, existing, identifiable, unpublished agency records on any topic.[1]

At the time of its enactment, FOIA was regarded as a somewhat revolutionary law. Only two other nations—Sweden and Finland—had comparable laws, and in neither case was the law as sweeping as the new American model. The law's premise reversed the burden of proof that had existed under the public information section of the APA. Under the APA, requesters had to establish a justification or a need for the information being sought. Under FOIA, in contrast, access was presumed. Instead, agencies had to justify denying a requester access to information. FOIA provided clear exceptions to access, protecting certain types of information from disclosure.

FOIA was also revolutionary in another regard. The product of 11 years of investigation, legislative development, and deliberation in the House and nearly 6 years of such consideration in the Senate, the statute was almost exclusively a congressional creation. No executive branch department or agency head had supported the legislation, and President Lyndon B. Johnson was reported to be reluctant to sign the measure.[2] Because the law was not enthusiastically received by the executive branch, supporters maintained that FOIA implementation and use sometimes required close attention from congressional overseers. The statute has been subsequently refined with direct amendments in 1974, 1976, 1986, and 1996. Other substantial modifications were enacted in 2007.

Congress, at times, has encountered executive-branch resistance to its FOIA designs. The George W. Bush Administration, for example, disregarded Congress's statutory provision creating an Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA). In his FY2009 budget request, former President Bush did not seek funding for the office and suggested it be moved from NARA to the Department of Justice.[3] The 111th Congress responded by including $1 million in the explanatory statement that accompanies the FY2009 Omnibus Appropriation Act (P.L. 111-8) for the OGIS to be established within

[1] See 5 U.S.C. § 552.

[2] See Samuel J. Archibald, "The Freedom of Information Act Revisited," *Public Administration Review*, vol. 39, July-August 1979, pp. 311-318. See also "NOW With Bill Moyers – Politics and Economy: Bill Moyers on the Freedom of Information Act," at http://www.pbs.org/now/commentary/moyers4.html. According to Moyers, Johnson "had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets; hated them challenging the official view of reality." See also Harold C. Relyea, "Federal Freedom of Information Policy: Highlights of Recent Developments," *Government Information Quarterly*, vol. 26 (January 12, 2009), p. 314.

[3] The proposal appears in a provision (Section 519) in the President's budget submission for the FY2009 appropriations for the Department of Commerce. U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2009, Appendix* (Washington: OMB, 2008), p. 239. See also Elizabeth Williamson, "Is Ombudsman Already in Jeopardy?" *Washington Post*, February 6, 2008, p. A17, at http://www.washingtonpost.com/wp-dyn/content/article/2008/02/05/AR2008020502840.html.

NARA.[4] The Barack Obama Administration's FY2010 budget request included $1.4 million and six full-time employees for OGIS implementation within NARA. Both House and Senate appropriators supported the President's request.[5]

The Government Accountability Office (GAO) found in March 2008, that the volume of FOIA requests in the federal government was increasing, but not as rapidly as it had been increasing in previous years.[6] Moreover, the report found that the backlog of FOIA requests continued to grow between 2005 and 2006. Among the agencies in which the FOIA backlog increased was the Department of Homeland Security's (DHS's) Citizenship and Immigration Services, which handled 89% of DHS's total FOIA requests.

Each new presidential administration has applied FOIA's statutes differently. As recent examples, the George W. Bush Administration, supported "full and deliberate consideration of the institutional, commercial, and personal privacy interests" that surround any requests,[7] while the current Administration of Barack Obama encouraged agencies "to adopt a presumption in favor of disclosure."[8]

Several bills have been introduced in the 111th Congress that directly address FOIA. On March 3, 2009, Representative Stephen Driehaus introduced the Reducing Information Control Designations Act (H.R. 1323). Although the bill concentrates its efforts on streamlining agency classification standards, it also requires agencies to ensure that their internal classification system does not hinder the disclosure of information. The act passed the House and was referred to the Senate Committee on Homeland Security and Governmental Affairs. On March 17, 2009, Senator Patrick Leahy introduced the OPEN FOIA Act of 2009 (S. 612), which would require agencies to explicitly state which exemption they are claiming when they deny a FOIA request. The bill was referred to the Senate Committee on the Judiciary. In addition, six bills—three in the House and three in the Senate (H.R. 2712; H.R. 2875; H.R. 3015; S. 1100; S. 1260; and S. 1285)—have been introduced that would exempt photographs of the treatment of detainees held by the Armed Forces from public disclosure pursuant to FOIA. Another bill (H.R. 2450) would require private, state, and local incarceration and detention facilities to comply with FOIA requirements. On May 15, 2009, Representative Sheila Jackson-Lee introduced a bill that would require all private, state, and locally run incarceration and detention facilities be subject to FOIA. The bill has been

---

[4] U.S. Congress, House Committee on Appropriations, *Explanatory Statement to Accompany Omnibus Appropriations Act, 2009*, committee print, 111th Cong., 1st sess., p. 988, at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_house_committee_prints&docid=f:47494d.pdf.

[5] U.S. Congress, House Committee on Appropriations, Subcommittee on Financial Services and General Government, *Financial Services and General Government Appropriation Bill, 2010*, report to accompany H.R. 3170, 111th Cong., 1st sess., July 10, 2009, H.Rept. 111-202 (Washington: GPO, 2009); and U.S. Congress, Senate Committee on Appropriations, Subcommittee on Financial Services and General Government, *Financial Services and General Government Appropriations Bill, 2010*, report to accompany S. 1432, 111th Cong., 1st sess., July 9, 2009, S.Rept. 111-43 (Washington: GPO, 2009), p. 102.

[6] U.S. Government Accountability Office, *Freedom Of information Act: Agencies are Making Progress in Reducing Backlog, but Additional Guidance is Needed*, GAO-08-344, March 2008, http://www.gao.gov/new.items/d08344.pdf. According to the report, from 2002 through 2006, FOIA requests increased 23%. From 2005 to 2006, requests increased between 1% and 2%, depending on the agency.

[7] Memorandum from John Ashcroft, Attorney General, to Heads of All Federal Departments and Agencies, October 12, 2001, http://www.doi.gov/foia/foia.pdf.

[8] Memorandum from President Barack Obama For Heads of Executive Departments and Agencies, January 21, 2009, http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

referred to the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security.

This report includes a brief history of FOIA, discusses subsequent modifications of FOIA, addresses statutory changes to FOIA that have not yet been implemented, examines Obama Administration efforts to modify the act, and outlines possible legislative issues related to the act.

FOIA History[9]

FOIA applies only to the departments and agencies of the federal executive branch. This scope has been shaped by both historical and constitutional factors. During the latter half of the 1950s, when congressional subcommittees began examining government information availability, the practices of the federal departments and agencies were a primary focus. The public, the press, and even some congressional committees and subcommittees were sometimes rebuffed when seeking information from executive branch entities.

Although presidential records might have been of interest to Congress and the public, the exercise of so-called "executive privilege"—the withholding of information based upon his authority as the head of the executive branch—was a matter of some constitutional complexity and uncertainty, and had not resulted in widespread public concern.[10] The President's records were, therefore, exempted from the forthcoming FOIA legislation.[11] The accessibility of federal court records was also not an issue. Access to congressional records were not closely scrutinized, since the subcommittees probing the executive branch in this regard lacked jurisdiction over the whole legislative branch. [12] In a 1955 hearing, Representative John E. Moss, chairman of the newly created Special Subcommittee on Government Information, delineated the scope of the investigation, saying,

> We are not studying the availability of information from Congress, although many comments have been made by the press in that field, but we are taking a long, hard look at the amount

[9] For a more in-depth legislative history of FOIA, see CRS Report RL32780, *Freedom of Information Act (FOIA) Amendments: 110th Congress*, by Harold C. Relyea.

[10] See U.S. Congress, Senate Committee on the Judiciary, *The Power of the President to Withhold Information from Congress*, committee print, 85th Cong., 2nd sess. (Washington: GPO, 1958-1959), 2 parts. Legislative-branch agencies, like the Government Accountability Office, the Congressional Research Service, and the Congressional Budget Office are not subject to FOIA.

[11] For more information on presidential records and vice presidential records see CRS Report R40238, *Presidential Records: Issues for the 111th Congress*, by Wendy R. Ginsberg.

[12] At present, the definition of agency for FOIA (found at 5 U.S.C. § 551) makes the requirements of the statute applicable only to an "agency," which "means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -

(A) the Congress; or
(B) the courts of the United States[.]"

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.

> of information available from the executive and independent agencies for both the public and its elected representatives.[13]

Eleven years after that hearing, FOIA was enacted, and was applicable only to federal, executive-branch departments and agencies. Some Members and academics have asserted that, in the case of Congress, the secret journal clause or the speech or debate clause of the Constitution[14] could be impediments to the effective application of FOIA to Congress.[15]

FOIA Exemptions

FOIA exempts nine categories of records from the statute's rule of disclosure. These exceptions detail certain restrictions. The exemptions are as follows:

1. Information properly classified for national defense or foreign policy purposes as secret under criteria established by an executive order
2. Information relating solely to agency internal personnel rules and practices
3. Data specifically excepted from disclosure by a statute which either requires that matters be withheld in a non-discretionary manner or which establishes particular criteria for withholding or refers to particular types of matters to be withheld
4. Trade secrets and commercial or financial information obtained from a person that is privileged or confidential
5. Inter- or intra-agency memoranda or letters that would not be available by law except to an agency in litigation
6. Personnel, medical, or similar files the disclosure of which would constitute an unwarranted invasion of personal privacy
7. Certain kinds of investigatory records compiled for law enforcement purposes
8. Certain information relating to the regulation of financial institutions
9. Geological and geophysical information and data. (5 U.S.C. § 552(b))

Some of these exemptions, such as the one concerning trade secrets and commercial or financial information, have been litigated and undergone considerable judicial interpretation.[16]

---

[13] U.S. Congress, House Committee on Government Operations, *Availability of Information from Federal Departments and Agencies*, hearing, 84th Cong., 1st sess., November 7, 1955 (Washington: GPO, 1956), p. 3.

[14] Art. I, Sec. 5, which directs each house of Congress to keep a journal of its proceedings and publish the same, except such parts as may be judged to require secrecy, has been interpreted to authorize the House and the Senate to keep other records secret. Art. 1, Sec. 6, which specifies that Members of Congress, "for any Speech or Debate in either House ... shall not be questioned in any other Place," might be regarded as a bar to requests to Members for records concerning their floor, committee, subcommittee, or legislative activity.

[15] See U.S. Congress, Senate Committee on Governmental Affairs, *To Eliminate Congressional and Federal Double Standards*, hearing, 96th Cong., 1st sess., September 20, 1979 (Washington: GPO, 1979); Harold C. Relyea, "Public Access to Congressional Records: Present Policy and Reform Considerations," *Government Information Quarterly*, vol. 2, 1985, pp. 235-256.

[16] For sources concerning judicial interpretation of FOIA, see Harry A. Hammitt, Marc Rotenberg, and John A. Verdi and Mark S. Zaid, eds., *Litigation Under the Federal Open Government Laws: 2008* (Washington: EPIC Publications and The James Madison Project, 2008); James T. O'Reilly, *Federal Information Disclosure*, third edition (Eagan, MN: West Group, first published in 2000, with supplements); U.S. Department of Justice, *Freedom of Information Act* (continued...)

A person denied access to requested information, in whole or in part, may make an administrative appeal to the head of the agency for reconsideration. After this step, an appeal for further consideration of access to denied information may be made in federal district court.[17] The newly created Office of Government Information Services (OGIS) may also provide "mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation."[18] The OGIS services are advisory only and are non-binding.

Fees for Service

Agencies responding to FOIA requests are permitted by statute to charge fees for certain administrative activities, such as records searching, reviewing, and duplicating. The amount of the fee will depend upon the type of requester, specifically whether the request is made by a commercial user, an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, a news media representative, or the general public. Moreover, certain requestors may be exempted from FOIA-related fees.[19] Requested records may be furnished by an agency without any charge or at a reduced cost, pursuant to FOIA, "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."[20] Requesters seeking a fee exemption must explicitly request it, and the agency then determines whether they qualify.

The George W. Bush Administration

Executive Order 13392, "Improving Agency Disclosure of Information"

On December 19, 2005, George W. Bush issued E.O. 13392 to ensure appropriate agency disclosure of information.[21] Executive Order 13392 directed all federal agencies subject to FOIA to, among other things,

> (1) Designate a senior agency official at each agency (at the Assistant Secretary or equivalent level), to serve as the Chief FOIA Officer of that agency.
>
> (2) Establish one or more FOIA Requester Service Centers (Center) to serve as the first place that FOIA requesters can contact to seek both information concerning the status of their FOIA requests and appropriate information about the agency's FOIA responses. The Center

(...continued)

Guide, March 2007 ed. (Washington, DC: GPO, 2007).

[17] 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).

[18] 5 U.S.C. § 552(h)(3).

[19] Ibid.

[20] 5 U.S.C. § 552(a)(4)(A)(iii). Additional information about the OGIS is provided later in this report.

[21] Executive Order 13392, 70 Fed. Reg. 75,373 (Dec. 14, 2005), http://edocket.access.gpo.gov/2005/pdf/05-24255.pdf.

was required to include appropriate staff to receive and respond to inquiries from FOIA requesters.

(3) Designate one or more agency officials as FOIA Public Liaisons. FOIA Public Liaisons were required to serve as supervisory officials to whom a FOIA requester could raise concerns about the service the FOIA requester received from the Center, following an initial response from the Center staff.

(4) Conduct a review of the agency's FOIA operations to determine whether agency practices are consistent with the policies set forth in the Executive Order.

(5) Develop, in consultation as appropriate with the staff of the agency (including FOIA Public Liaisons), the Attorney General, and the OMB Director, an agency-specific plan to ensure that the agency's administration of FOIA is in accordance with applicable law and the policies set forth in the Executive Order.

(6) Submit a report to the Attorney General and the OMB Director that summarized the results of the agency's review and included a copy of the agency's FOIA Improvement Plan under the Executive Order.

(7) Include in the agency's annual FOIA reports for fiscal years 2006 and 2007 a report on the agency's development and implementation of its FOIA Improvement Plan and on the agency's performance in meeting the milestones set forth in that plan, consistent with Department of Justice guidance.

110th Congress Legislative Reform Efforts

Building on legislation from previous Congresses, Members in the 110th Congress introduced several pieces of FOIA-related legislation. One bill, the Freedom of Information Act Amendments of 2007, was enacted .[22] Among other changes, the bill codified the requirement that all agencies have a chief FOIA officer. After the bill's enactment, however, controversy erupted between the legislative and executive branch over implementation of certain requirements in the bill. This section includes the bill's legislative history and describes the implementation controversy that ensued.

OPEN Government Act of 2007

On March 5, 2007, Representative Lamar Smith introduced the House version of the OPEN Government Act of 2007 (H.R. 1326).[23] The bill was referred to the House Committee on Oversight and Government Reform, Subcommittee on Information Policy, Census, and National Archives. No further action was taken on that version of the OPEN Government Act. Senator Patrick Leahy then introduced Senate version of the act (S. 849) on March 13. A hearing on the Senate bill was held by the Committee on the Judiciary on March 14. The committee ordered the bill to be reported favorably on April 12, and the report was printed on April 30.[24] The bill was

[22] P.L. 110-175

[23] For more information on the origins of the OPEN Government Act of 2007 and a legislative history of its origins, see CRS Report RL32780, *Freedom of Information Act (FOIA) Amendments: 110th Congress*, by Harold C. Relyea.

[24] Ibid., March 13, 2007, p. S3066; U.S. Congress, Senate Committee on the Judiciary, *Open Government Act of 2007*, (continued...)

not brought to the Senate floor for consideration or a final vote because of concerns arising from Department of Justice objections, which were resolved just before the Senate adjourned for the August recess. The bill came before the Senate by unanimous consent on August 3, was amended, and passed by unanimous consent. Among other changes, the bill sought to do the following:

- redefine "a representative of the news media";[25]
- modify the conditions for when a complainant has substantially prevailed relative to the recovery of attorney fees and litigation costs;[26]
- create new language concerning the time limits for agencies to act on requests;[27]
- modify the requirements for request tracking arrangements;[28]
- modify the provision amending the third exemption of the act concerning statutory protections of information;[29] and
- recharter of the proposed Office of Government Information Services as an entity within the National Archives and Records Administration.[30]

The bill was received in the House on September 4, 2007, but was held at the desk. No further action was taken on the bill.

(...continued)

report to accompany S. 849, 110th Cong., 1st sess., S.Rept. 110-59 (Washington: GPO, 2007).

[25] The bill stated that independent journalists are not barred from obtaining fee waivers solely because they lack an institutional affiliation with a recognized news media organization.

[26] This provision responded to the ruling in *Buckhannon Board and Care Home, Inc.* v. *West Virginia Dep't of Health and Human Services*, 532 U.S. 598 (2001), in which the Supreme Court eliminated the so-called "catalyst theory" of attorney fee recovery under certain federal civil rights laws, and which prompted concern that the holding could be extended to FOIA cases. The new definition required the government to pay the complainant's attorney fees if the records were required to be released by court or other administrative order as well as if the complainant's lawsuit prompted the agency to change its decision to release the records even without such an order.

[27] If an agency failed to comply with the new 20-day limit, which was defined as beginning when the agency first received the request, the agency would not be permitted to assert an exemption for the record sought (pursuant to 5 U.S.C. § 552(b)) unless such disclosure would endanger national security or disclose personal information protected by The Privacy Act (5 U.S.C. § 552a).

[28] Pursuant to the bill, agencies would have been required to establish tracking systems and assign requests tracking numbers within 10 days of the agency's receipt of the request. Requesters could then track the progress of their request via the number. Agencies would have also had to establish a telephone or Internet system to allow requesters to obtain information on the status of their individual requests, including an estimated date on which action on the request will be completed.

[29] The third exemption to the rule of disclosure exempts matters that are "specifically exempted from disclosure by statute [other than the Privacy Act], provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). The amendment would have affected any FOIA exemption that was adopted by Congress after enactment of S. 849. This provision was later offered in separate legislation as well as in future congressional sessions, including the 111th Congress.

[30] The OGIS would review agency policies and procedures, audit agency performance, recommend policy changes, and mediate disputes between FOIA requesters and agencies with a view to alleviate the need for litigation, while not limiting the ability of requester to litigate FOIA claims.

Freedom of Information Act Amendments of 2007

On March 5, 2007—four months prior to S. 849's receipt in the House—Representative William Clay introduced a modified House version of the OPEN Act (H.R. 1309), entitled the Freedom of Information Act Amendments of 2007. H.R. 1309 included explicit language stating the "policy of the Federal Government is to release information to the public in response to a request under" FOIA "if such release is required by law; or if such release is allowed by law and the agency concerned does not reasonably foresee that disclosure would be harmful to an interest protected by an applicable exemption."

When H.R. 1309 came under consideration by the Committee on Oversight and Government Reform during a March 8, 2007, markup, an amendment to the bill was approved. The added provision would require agencies to indicate, for each redaction made in a record, which specific FOIA exemption was involved. The amended legislation was then approved for House floor consideration.

Negotiations to resolve differences between H.R. 1309 and S. 849 continued through the fall. One of the more contentious issues concerned who would be entitled to payments if an agency changed its position concerning the release of records after a requester challenged an agency denial in court but prior to any court determination. While the House bill provided that such payments would come from annually appropriated agency funds, the lack of such specificity in the Senate bill posed the strong possibility that it would trigger "pay-as-you-go" objections in the House.[31] On December 6, Senator Leahy, with Senator Cornyn as a cosponsor, introduced S. 2427, a revised version of S. 849 that contained the language of the House bill concerning the source of attorney fees payments.[32] On December 14, a slightly revised version of this bill, addressing other House concerns, was introduced by Senator Leahy, with 17 bipartisan cosponsors, as S. 2488. That same day, the Senate considered the bill, and approved it without amendment by unanimous consent.[33] As adopted by the Senate, the bill amended FOIA as follows:

- redefined "representative of the news media" and "news" for purposes of request processing fees, and specified a freelance journalist as working for a news media entity if the journalist can demonstrate a solid basis for expecting publication through that entity;
- provided that, for purposes of awarding attorney fees and litigation costs, a FOIA complainant has substantially prevailed in a legal proceeding to compel disclosure if such complainant obtained relief through either (1) a judicial order or an enforceable written agreement or consent decree, or (2) a voluntary or unilateral change in position by the agency if the complainant's claim is not substantial;
- prohibited the Treasury Claims and Judgment Fund from being used to pay reasonable attorney fees in cases where the complainant has substantially prevailed, and required fees to be paid only from funds annually appropriated for

[31] For more information on Pay-As-You-Go procedures, see CRS Report RL32835, *PAYGO Rules for Budget Enforcement in the House and Senate*, by Robert Keith and Bill Heniff Jr.

[32] *Congressional Record*, daily edition, vol. 153, Dec. 6, 2007, pp. S14853-S14855.

[33] Ibid., Dec. 14, 2007, pp. S15701-S15704.

authorized purposes for the federal agency against which a claim or judgment has been rendered;

- directed the Attorney General to (1) notify the Special Counsel of civil actions taken for arbitrary and capricious rejections of requests for agency records, and (2) submit annual reports to Congress on such civil actions, while also directing the Special Counsel to submit an annual report on investigations of agency rejections of FOIA requests;
- required the 20-day period during which an agency must determine whether to comply with a FOIA request to begin on the date the request is received by the appropriate component of the agency, but no later than 10 days after the request is received by any component that is designated to receive FOIA requests in the agency's FOIA regulations; and prohibited the agency from halting the count of the 20-day period by the agency, except (1) that the agency may make one request to the requester for clarifying information and halt the 20-day period while awaiting such information, or (2) if necessary to clarify with the requester issues regarding fee assessment, the agency may halt the 20-day period while negotiating the fee.
- prohibited an agency from assessing search or duplication fees if it failed to comply with time limits, provided that no unusual or exceptional circumstances apply to the processing of the request, and requires each agency to make available its FOIA Public Liaison (see below), who shall assist in the resolution of any disputes between the agency and the requester;
- required agencies to establish (1) a system to assign an individualized tracking number for each FOIA request received that will take longer than 10 days to process, and (2) a telephone line or Internet service that provides information on the status of a request;
- revised annual reporting requirements on agency compliance with FOIA to require information on (1) FOIA denials based upon particular statutory provisions, (2) response times, and (3) compliance by the agency and by each principal component thereof; and requires agencies to make the raw statistical data used in reports electronically available to the public upon request;
- redefined "record" under FOIA to include any information maintained by an agency contractor;
- required establishment within the National Archives and Records Administration an Office of Government Information Services (OGIS) to (1) review compliance with FOIA policies, (2) recommend policy changes to Congress and the President, and (3) offer mediation services between FOIA requesters and agencies as a non-exclusive alternative to litigation; and authorizes the OGIS to issue advisory opinions if mediation fails to resolve a dispute;
- required each agency to designate a chief FOIA officer, who shall (1) have responsibility for FOIA compliance, (2) monitor FOIA implementation, (3) recommend to the agency head adjustments to agency practices, policies, personnel, and funding to improve implementation of FOIA, and (4) facilitate public understanding of the purposes of FOIA's statutory exemptions; and requires agencies to designate at least one FOIA public liaison, who shall be appointed by the chief FOIA officer to (1) serve as an official to whom a FOIA

requester can raise concerns about service from the FOIA Requester Center, and (2) be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes;

- required the Office of Personnel Management to report to Congress on personnel policies related to FOIA; and
- required the identification of the FOIA exemption(s) relied upon to redact information from records provided in response to a FOIA request.

The Senate-approved bill was received in the House on December 17, and it was referred to the Committee on Oversight and Government Reform. The following day, the measure was considered by the House under a suspension of the rules, agreed to by voice vote, and cleared for the President.[34] The legislation was signed into law by then-President George W. Bush on December 31, 2007.[35]

FOIA Amendment Implementation

Less than a month after passage of the Freedom of Information Act Amendments of 2007, Senator Patrick Leahy, the principal Senate proponent of the FOIA-reform legislation, noted to his colleagues that OMB officials had indicated that they intended to place in the Department of Justice budget for FY2009 all of the funding Congress had authorized by the new law for the OGIS within NARA. Some Members and open government organizations were concerned that OMB's desired arrangement could give DOJ control over the OGIS, perhaps to the point of eradicating it. DOJ, could, for example, allocate OGIS funds to its own Office of Information and Privacy, which oversees FOIA compliance by federal agencies.[36] In creating the OGIS, legislators had consciously placed it outside of the Department of Justice, which represents agencies sued by FOIA requesters.

Calling the OMB's attempt to place the OGIS within DOJ "not only contrary to the express intent of the Congress, but ... also contrary to the very purpose of this legislation," Senator Leahy expressed hope "that the administration will reconsider this unsound decision and enforce this law as the Congress intended."[37] OMB declined to comment on the matter prior to the formal presentation of the President's budget to Congress on February 4, 2008.

President George W. Bush requested the following as part of Title V, General Provisions, of the Commerce, Justice, Science, and Related Agencies Appropriations legislation for FY2009:

> Sec. 519. The Department of Justice shall carry out the responsibilities of the office established in 5 U.S.C. 552(h), from amounts made available in the Department of Justice

[34] Ibid., Dec. 18, 2007, pp. H16788-H16792.

[35] P.L. 110-175.

[36] See U.S. Senator Patrick Leahy, "Leahy: FOIA Ombudsman Belongs At Archives, Not DOJ," press release, February 14, 2008, http://leahy.senate.gov/press/200802/021408a.html; and Citizen Media Law Project, "Bush Refuses to Fund New FOIA Ombudsman, Takes the Heart Out of Open Government Reform Law," weblog, February 7, 2008, at http://www.citmedialaw.org/blog/2008/bush-refuses-fund-new-foia-ombudsman-takes-heart-out-open-government-reform-law.

[37] *Congressional Record*, daily edition, vol. 154, Jan. 23, 2008, pp. S201-S202; Dan Friedman, "Senators Say White House Plans to Eliminate Special FOIA Office," *CongressDaily*, Jan. 25, 2008, available at http://www.govexec.com/story_page_pf.cfm?articleid=39120&dcn=e_gvet.

> appropriation for "General Administration Salaries and Expenses." In addition, subsection (h) of section 552 of title 5, United States Code, is hereby repealed, and subsections (i) through (l) are redesignated as (h) through (k).[38]

The office established in 5 U.S.C. §552(h) is the OGIS. The Department of Justice, which would have been vested with carrying out the responsibilities of that office, would have been authorized to utilize funds from its general administration appropriation to do so. House appropriators subsequently rejected this language. Both House and Senate appropriators recommended $1 million go to OGIS. The Omnibus Appropriations Act, 2009 (P.L. 111-8) did not explicitly mention OGIS.[39] President Barack Obama's FY2010 budget requested $1.4 million and six full-time employees for OGIS implementation within NARA. In the report to accompany the FY2010 Financial Services and General Government appropriations bill, the Senate Committee on Appropriations recommended $1.4 million for OGIS.[40] The House report does not explicitly mention OGIS, but it does recommend funding NARA at the same levels requested by the President.

The Obama Administration

On January 21, 2009, President Barack Obama issued a "Memorandum for the Heads of Executive Departments and Agencies" on FOIA. In the memorandum, Obama stated that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails."[41] The memorandum stated that under the new administration:

> All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.[42]

The memorandum then directed the attorney general to "issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*."[43]

On March 19, 2009, Attorney General Eric Holder issued the memorandum in which he required "A Presumption of Openness." The memorandum explicitly rescinded former Attorney General John Ashcroft's October 12, 2001, memorandum.[44] Holder's memorandum read as follows:

---

[38] U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2009—Appendix* (Washington: GPO, 2008), p. 239.

[39] U.S. Congress, House Committee on Appropriations, *Financial Services and General Government Appropriations Bill, 2009*, committee print, 110th Cong., 2nd sess. (Washington: GPO, 2008), pp. 80-81.

[40] U.S. Congress, Senate Committee on Appropriations, Subcommittee on Financial Services and General Government, *Financial Services and General Government Appropriations Bill, 2010*, report to accompany S. 1432, 111th Cong., 1st sess., July 9, 2009, S.Rept. 111-43 (Washington: GPO, 2009), p. 102.

[41] Barack Obama, U.S. President, Memorandum for the Heads of Executive Departments and Agencies, January 21, 2009, at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

[42] Ibid.

[43] Ibid. The memorandum does not include a deadline by which such guidelines must be published.

[44] This memorandum is described in more detail below.

> First, an agency should not withhold information simply because it may do so legally.… An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.
>
> Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.
>
> At the same time, the disclosure obligation under the FOIA is not absolute.…
>
> [T]he Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.[45]

Some newspapers and open government advocates argued that the Obama and Holder memorandums on FOIA marked a significant break with the policies of the previous administration.[46] In a memorandum written by former Attorney General John Ashcroft shortly after the 9/11 terrorist attacks, the Bush Administration required agency and department heads to release documents "only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information."[47] The memorandum continued:

> When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.[48]

The Obama Administration also sought to solicit information and ideas from the public on how to make FOIA a more useful tool. In May, the administration announced a three-phase Open Government Initiative aimed at collecting ideas from the public on how to make government more collaborative, transparent, and participatory. From May 21 through June 3, 2009, the Obama Administration's Office of Science & Technology Policy (OSTP) entered the first phase of the directive by tapping the National Academy of Public Administration (NAPA) to host an online "brainstorming session,"[49] seeking public comment on "innovative approaches to policy, specific

---

[45] Attorney General Eric Holder, *Memorandum For the Heads of Executive Departments and Agencies*, U.S. Department of Justice, Washington, DC, March 19, 2009, pp. 1-2, http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

[46] In an editorial, the Los Angeles Times called President Obama's new policy "a transformation of incalculable significance." "Obama Gives New Life to the FOIA," *The Los Angeles Times*, January 23, 2009, at http://www.latimes.com/news/printedition/opinion/la-ed-foia23-2009jan23,0,4722159.story. The Sunshine in Government Initiative said the memorandum demonstrated that transparency was a "wonderful" priority for the Obama Administration. The Sunshine in Government Initiative," January 21, 2009, press release, at http://www.sunshineingovernment.org/index.php?cat=31.

[47] John Ashcroft, U.S. Attorney General, Memorandum for the Heads of all Federal Departments and Agencies, October 12, 2001, http://www.doi.gov/foia/foia.pdf.

[48] Ibid.

[49] National Academy of Public Administration (NAPA), *Open Government Dialogue*, May 21, 2009, http://opengov.ideascale.com/akira/panel.do?id=4049. When the dialogue began, users could offer ideas without signing up for a log-on identity. On May 23, NAPA changed that policy and required all participants to log into the website before their comments could be posted.

project suggestions, government-wide or agency-specific instructions, and any relevant examples and stories relating to law, policy, technology, culture, or practice."[50] The brainstorming session garnered 4,205 suggestions and comments, some of which addressed FOIA. One suggestion, for example, said that agencies should be required to post documents online that are released in relation to a FOIA request. The suggestion stated that such action could reduce the number of duplicative requests to which agencies and departments must respond.

From June 3 through June 26, 2009, OSTP began the second phase of its Open Government Initiative, which focused in greater depth on some of the ideas that emerged in the brainstorming session forums. On June 10, 2009, Michael Fitzpatrick, associate administrator for the Office of Information and Regulatory Affairs, posted a question on OSTP's blog asking for "recommendations … for agencies to pro-actively post information on their websites to avoid a FOIA request from even occurring" and "recommendations to make FOIA reading rooms more useful and information more easily searchable, as they are meant to be a mechanism for information dissemination to the public."[51] The request prompted 58 responses, including one response that suggested documents released as part of a FOIA request not only be published online, but also be text searchable.[52]

From June 22 through July 6, 2009, OSTP conducted the third phase of the initiative: drafting. Using an online program, members of the public created online documents that included policy recommendations. Participants critiqued, endorsed, and rated the policy recommendations.[53] OSTP said that the "recommendations will inform the drafting of an 'Open Government Directive' to Executive branch agencies."[54] Among the policy recommendations posted was a suggestion to "rebuild technical capacity for information dissemination in the agencies (and government-wide)" so historical agency information can be stored electronically and accessed more efficiently when it is requested by the public.[55]

FOIA and the 111th Congress

The administration's new guidelines on how agencies are to apply FOIA could prompt Congress to reevaluate certain FOIA practices and policies. An issue potentially subject to reevaluation is whether Secret Service records should be considered "presidential records," administered according to the Presidential Records Act of 1978 (PRA). Making Secret Service records subject to PRA could protect certain records from disclosure for up to 20 years more than protections afforded under FOIA. In addition, several pieces of legislation have been introduced in the 111th Congress that directly or tangentially address FOIA.

---

[50] Ibid.

[51] Michael Fitzpatrick, associate administrator for OIRA, *Transparency: Access to Information*, Executive Office of the President, Office of Science & Technology Policy, June 10, 2009, http://blog.ostp.gov/2009/06/10/transparency-access-to-information/.

[52] *Transparency: Access to Information*, Executive Office of the President, Office of Science & Technology Policy, June 10, 2009, http://blog.ostp.gov/2009/06/10/transparency-access-to-information/.

[53] For more information on MixedInk, see http://www.vimeo.com/2674991.

[54] U.S. Office of Science and Technology Policy, Executive Office of the President, *Open Government Directive, Phase 3: Drafting*, 2009.

[55] MixedInk, Institutionalizing Transparency in Government, at http://mixedink.com/OpenGov/InstitutionalizingTransparency.

Secret Service or Presidential Records

Debate and litigation surrounding the Secret Service records began in 2006, when Citizens for Responsibility and Ethics in Washington (CREW) filed a FOIA request with the Secret Service seeking access to sign-in logs maintained at the White House and the Vice Presidential Residence. The logs track who attends meetings at the two locations. CREW filed suit in federal district court in 2007, after the Secret Service failed to respond to the FOIA request. The suit also challenged the service's policy of deleting certain White House visitor records, claiming such action violated the Federal Records Act[56] and the Administrative Procedure Act.[57]

The district court found that the sign-in logs at the White House and the Vice Presidential Residence are created and controlled by the Secret Service, and, therefore, are "agency records."[58] The court also rejected the Secret Service's claim that disclosure of the records would prompt separation of powers concerns because they could "impede the ability of the President and Vice President to receive full and frank submissions of facts and opinions and to seek confidential information from many sources, both inside and outside the government."[59] The opinion of the district court is currently on appeal to the D.C. Circuit.

Congress may opt to enact legislation that would explicitly state whether the Secret Service logs should be treated as "presidential records."[60] If the records were designated as "presidential records" the logs would be afforded additional protections that could delay their release by up to 20 years.[61] If the records were determined not to be "presidential records," they would be subject to public release unless a FOIA exemption applied. Congress may also consider whether the legislation should be applied retroactively to the records of the Bush Administration or if the policy should apply only to current and future Secret Service logs. Congress could opt to take no action and wait for a determination of the records' status by the D.C. Circuit Court of Appeals. If the court does not overturn the district court's findings, the logs would be subject to FOIA, and would not receive any additional protections.

On May 19, 2009, the U.S. Court of Appeals decided that the Office of Administration (OA) within the Executive Office of the President (EOP) was not subject to FOIA.[62] CREW was again the appellant in the case, and sought information related to e-mails that went missing from the OA. The court stated the test to determine if an EOP entity was subject to FOIA was to ask whether the entity "wielded substantial authority independently of the President."[63] Finding that

---

[56] 44 U.S. C. § 3101 *et seq.* (2006).

[57] 5 U.S.C. § 551 *et seq.* (2006).

[58] CREW, 527 F.Supp.2d at 98 (*citing Tax Analysts*, 492 U.S. at 147).

[59] Ibid. at 98 (citing Def. Mot. S.J. at 30). The court's opinion questioned whether releasing the log books would "impede the President's ability to perform his constitutional duty," saying the threat is not "great enough to justify curtailing the public disclosure aims of FOIA."

[60] If Congress opted to create such legislation, it could do so by amending FOIA (5 U.S.C. § 552), PRA (44 U.S.C. § 2201), or the Secret Service Statute (18 U.S.C. § 3056) to explicitly state the status of the Secret Service logs.

[61] Pursuant to the PRA, an outgoing President can restrict access to certain records for up to 12 years (44 U.S.C. § 2204(a). After 12 years, the President's records are then subject to release pursuant to FOIA's provisions. The 20-year protection assumes a record was created in January of a two-term (8-year) President's first term. The 12-year restriction to record access begins at the end of a President's tenure. For more information on the PRA see CRS Report R40238, *Presidential Records: Issues for the 111th Congress*, by Wendy R. Ginsberg.

[62] Citizens for Responsibility and Ethics in Washington v. Office of Administration, 566 F.3d 219 (D.C. Cir. 2009).

[63] *Id.*, at 222.

the OA was "directly related to the operational and administrative support of the work of the President and his EOP staff,"[64] the court decided that OA did not qualify as an executive branch agency.

FOIA Legislation in the 111th Congress

H.R. 1323. Introduced by Representative Steve Driehaus on March 5, 2009, the Reducing Information Control Designs Act would require federal agencies to streamline their internal classification designations. The bill would not affect classification standards that are codified or established by executive order. Pursuant to the legislation, the archivist of the United States would promulgate regulations aiming to standardize agencies' classification designations to "maximize public access to information," among making other reforms. Any modifications of classification designations "should have no relationship to determinations of public disclosure pursuant to the Freedom of Information Act (FOIA)."[65] The House agreed to the bill by voice vote on March 17, 2009. The next day, the Senate received the bill and referred it to the Senate Committee on Homeland Security and Governmental Affairs.

H.R. 2450. Introduced by Representative Sheila Jackson-Lee on May 15, 2009, the Private Prison Information Act of 2009 would require all private, state, and locally run incarceration and detention facilities to comply with FOIA. Pursuant to the act, non-federal prisons and correctional facilities would be required "to release information about the operation of the non-Federal prison or correctional facility" unless the information was exempted from release by one of FOIA's nine exemptions.

H.R. 2712 (Representative Conaway); H.R. 2875 (Representative Conaway); H.R. 3015 (Representative Conaway); S. 1100 (Senator Joseph Lieberman); S. 1260 (Senator Joseph Lieberman); and S. 1285 (Senator Joseph Lieberman). These six bills address the public release of photographs of the treatment of individuals engaged, captured, or detained by the U.S. Armed Forces from September 11, 2001 through January 22, 2009. Pursuant to the bills, these photographs would exempted from disclosure under FOIA. S. 1285 was introduced on March 17, 2009 and passed by unanimous consent that same day. On March 18, the bill was sent to the House, where it was referred both the House Committee on Oversight and Government Reform and the House Committee on Armed Services. The House bills have all been concurrently reported to the House Committee on Oversight and Government Reform and the House Committee on Armed Services. The Senate bills (other than S. 1285) have been referred to the Senate Committee on the Judiciary.

S. 612. Introduced by Senator Patrick J. Leahy on March 17, 2009, the OPEN FOIA Act of 2009 would require Congress to be detailed and explicit when creating any future statutory exemptions to the public release of records within FOIA. Any exemptions made subsequent to the enactment of S. 612 pursuant to the third exemption of FOIA, must cite directly to the third exemption. This bill is similar to legislation introduced in both the 109th and 110th Congresses. On March 17, the bill was referred to the Senate Committee on the Judiciary. The language of this bill was placed in

[64] *Id.*, at 224.

[65] U.S. Congress, House Committee on Oversight and Government Reform, *Reducing Information Control Designations Act*, report to accompany H.R. 1323, 111th Cong., 1st sess., March 16, 2009, H.Rept. 111-38 (Washington: GPO, 2009), pp. 3-4.

S. 1285, which—as noted earlier—has passed the Senate and has been referred to two committees in the House.

Author Contact Information

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

Acknowledgments

Parts of this report are adapted from CRS Report RL32780, *Freedom of Information Act (FOIA) Amendments: 110th Congress*, by Harold C. Relyea.