

**Society of American Archivists
Council Meeting
November 14–16, 2016
Chicago, Illinois**

**Issue Brief: Freedom of Information Act (Revised)
(Prepared by SAA Committee on Public Policy)**

BACKGROUND / DISCUSSION

This updates the existing brief on the Freedom of Information Act, which was originally adopted by Council in 2014 and updated by the Executive Committee in 2015.

On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016. The Act addresses a range of procedural issues, including requirements that agencies establish a minimum of 90 days for requesters to file an administrative appeal and that they provide dispute resolution services at various times throughout the FOIA process. The Act also codifies the Department of Justice’s “foreseeable harm” standard, amends Exemption 5, creates a new “FOIA Council,” and adds two new elements to agency Annual FOIA Reports.

Although the impact of the most recent amendments on FOIA implementation remains to be seen and thus the majority of the 2015 version of the brief continues to be valid, some provisions in the brief require updating to reflect the current law. We have opted to remove the “detailed legislative agenda” that originally accompanied this brief until the Committee on Public Policy and other interested parties have the opportunity to evaluate the impact of the latest changes in the law. We plan to revise the agenda in 2017.

RECOMMENDATION

THAT the following revised issue brief on “Freedom of Information Act” be adopted (~~strikethrough~~ = deletion, underline = addition).

Issue Brief: Freedom of Information Act

To ensure the public's right to equal and equitable access to government information found in archives, SAA supports all efforts to strengthen the federal Freedom of Information Act (FOIA) so that:

- Agencies follow both the letter and the spirit of the law.
- Delays and backlogs in the FOIA request process are reduced to a minimum.

- Communication between agencies and FOIA requesters and between the government and the public regarding FOIA matters is improved.
- Individuals whose records fall under FOIA are made aware of their responsibilities to make available all eligible records.

Detailed legislative agenda: <http://www2.archivists.org/statements/detailed-legislative-agenda-related-to-the-freedom-of-information-act>

SAA also encourages state and local governments to acknowledge the right of citizens to access public records. SAA encourages state and local governments to:

- Adopt and enforce laws and policies that are based on the belief in the public's right to these records.
- Assume that all public records are open for use unless specific and generally agreed upon reasons can be stated as to why access to a particular record must be denied.

~~SAA will consider joining legal actions to ensure proper and thorough application of FOIA, advocate for pertinent legislation and agency regulations, and suggest alterations to both court filings and proposed legislation in pursuit of these goals.~~

THE ISSUES

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

- A number of federal agencies are resistant to fully implementing FOIA.
- Exemptions granted under federal law for certain types of information are often too broadly applied. This is especially true for Exemption 1 (national security information), and Exemption 3 (exempted by statute), and Exemption 5 (the “deliberative process” privilege, in which the internal processes of the executive branch are immune from disclosure).
- Most federal exemptions have no mechanism that allows the public interest in seeing information released to be balanced against the potential harm of releasing the information.
- ~~There is no single federal standard for ensuring the public's “right to know,” resulting in varying interpretations of the law by the President and individual agencies. For example, various Executive Orders have significantly affected the ways in which the Act has been administered. Although recent amendments to the law attempt to address issues related to the consistent application of its provisions, it remains to be seen whether the public's “right to know” will be subject to varying interpretations of the law by the President and individual agencies.~~
- The federal FOIA process itself suffers from persistent delays and backlogs due to the interagency referrals process, the policy of the Department of Justice to defend all actions undertaken by federal agencies under FOIA, the tendency of agencies to litigate FOIA requests due to this policy, out-of-date regulations, and a lack of incentives for agencies to follow the law.

- Communication between federal agencies and FOIA requesters and between the government and the public can be problematic. ~~Requesters currently have to visit one of more than 100 sites to track FOIA requests.~~ In the case of interagency referrals, it can be difficult to find out to whom the request has been referred and its status.
- Legislation affecting FOIA can be difficult to ascertain because provisions that affect FOIA may not be clearly stated. This can lead to inadvertent loopholes or to deliberate loopholes that are enacted without the chance for public input.
- ~~There is no federal advisory committee regarding FOIA that would allow non-government FOIA experts to help shape FOIA policy.~~
- Individuals who are responsible for records that are eligible for FOIA requests often are unaware of 1) the eligibility of their records, 2) the policies that apply to the records, and/or 3) the record-keeping responsibilities that accrue to their position.

BACKGROUND

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

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

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

1996 and 2002: The Electronic Freedom of Information Act Amendments of 1996 addressed electronic access to records. These amendments also doubled an agency's required response time to 20 days. In response to the 2001 terror attacks, Congress in 2002 precluded disclosure of records by U.S. intelligence agencies in response to FOIA requests by foreign governments or international governmental agencies, whether directly or through a representative.

2007: The Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007 defined who constituted a "representative of the media;" extended the 20-day deadline by up to 10 days between the FOIA office of an agency and the part of the agency that actually holds the records; required agencies to assign a tracking number to FOIA requests that take longer than 10 days and create a system for determining their status; and directed that attorney's fees be paid from the agency's own appropriations. The Act also codified agency annual reporting requirements; directed that data used to create reports be available electronically; required that agencies specify the exemption used for each deletion or redaction; and defined an agency record to include those held for an agency by a government contractor. Finally, the Act required agencies to designate a FOIA Public Liaison to assist in dispute resolution and established the Office of Government Information Services within the National Archives and Records Administration to review agency FOIA compliance.

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

2014: The FOIA Federal Advisory Committee was established pursuant to the United States second Open Government National Action Plan (NAP) issued on December 5, 2013. Comprising government and non-governmental members of the FOIA community, the Advisory Committee fosters dialogue between the government and the requester community, solicits public comments, and develops recommendations for improving FOIA administration and proactive disclosures.

2016: The FOIA Improvement Act of 2016 (P.L. 114-185) amended the law in several key aspects, most importantly in codifying the legal standard that agencies should adopt a presumption of openness when responding to requests. This includes allowing partial disclosure of information as well as segregating nonexempt information. The law also amended the Federal Records Act (44 U.S.C. § 3102) by requiring that agencies establish proactive disclosure procedures. The new law intended to streamline the overall FOIA process by requiring the creation of a consolidated online request portal allowing the public to submit requests to any agency. The law further established a sunset provision for the deliberative process privilege, stating such exemption shall not apply to records more than 25 years old. Agencies are also required to make publicly available in electronic format any records that have been requested at least three times. The amendment aimed to improve communication methods and standards between agencies and requesters, including in terms of dispute resolution and response letters, as well as various annual reports, agency regulations, and FOIA reference guides. Finally, the law revised the duties of agency Chief FOIA Officers, creating a Chief FOIA Officer Council, and revising the duties of NARA's Office of Government Information Services.

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

- President Ronald Reagan’s Executive Order 12356 allowing agencies to withhold a wider variety of information under Exemption 1 (national security information),
- President William Clinton’s Executive Order 12958 releasing previously classified material more than 25 years old and of historical interest,
- President George W. Bush’s Executive Order 13233 restricting access to Presidential records, and
- President Barack Obama’s Executive Order 13489 rescinding EO 13233, and Executive Order 13526 allowing retroactive classification of material after it has been requested.

ADDITIONAL RESOURCES

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

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

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

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

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

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

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

- Center for Effective Government [formerly OMB Watch] Freedom of Information page: <http://www.foreffectivegov.org/category/categories/open-accountable-government/freedom-information>
- CREW: Citizens for Responsibility and Ethics in Washington Open Government page: <http://www.citizensforethics.org/policy/>
- Judicial Watch page: <http://www.judicialwatch.org/>

- Public Citizen Freedom of Information and Government Transparency page: <http://www.citizen.org/Page.aspx?pid=3194>

All sites were accessed on ~~October 15, 2013~~ September 5, 2016.

Originally Aadopted by the SAA Council in May 2014. Revisions adopted by the SAA Executive Committee in September 2015 and by the Council in November 2016.

Support Statement: This issue brief supports SAA's Public Policy Agenda by providing members and other prospective audiences with SAA's considered opinion on the topic of access to federal records, as well as transparency and accountability of government agencies.

Impact on Strategic Priorities: Addresses Goal 1: Advocating for Archives and Archivists, Strategy 1.2. Educate and influence decision makers about the importance of archives and archivists, and 1.3. Provide leadership in ensuring the completeness, diversity, and accessibility of the historical record.

Fiscal Impact: Approval of the issue brief does not commit SAA to expend funds on any particular advocacy effort at this time.