
Open Wide: FOIA Reform Expands Public Access to U.S. Government Information

By Stephanie Amaru and Mark E. Elliott

On June 30, 2016, President Obama signed the bipartisan Freedom of Information Improvement Act of 2016 (S. 337). The bill most notably requires that the government operate under a “presumption of openness” in federal law and help protect the public from government secrecy. The main goal of the legislation is to make it more difficult for agency officials to withhold government records sought under the Freedom of Information Act (FOIA).

FOIA provides for the disclosure of previously unreleased records and information in the possession of the United States government. Section 522(a) requires agencies to publish their rules of procedure in the Federal Register and to make opinions, statements of policy, staff manuals, interpretations, and staff instructions readily available to the public. Section 522(a)(3) requires agencies, “upon any request for records which . . . reasonably describes such records” to make records “promptly available to any person.” Under the statute, district courts have jurisdiction over actions involving records improperly withheld by agencies. FOIA establishes which agency records must be disclosed to the public upon request, provides for mandatory disclosure procedure, and outlines nine exemptions.

These exemptions include information that is: (1) specifically subject to criteria established by Executive order to be kept secret in the interest of national defense or foreign policy; (2) related solely to internal personnel practices or rules of an agency; (3) specifically exempted by statute from disclosure; (4) privileged or confidential trade secret or commercial or financial information obtained from a person; (5) inter-agency or intra-agency memoranda or letters which would not be available by law to anyone but an agency in litigation with another agency (the “deliberative process” privilege); (6) personnel, medical, and other files which would constitute an unwarranted invasion of personal privacy; (7) law enforcement records, the disclosure of which could interfere with enforcement proceedings or impartial adjudication, result in an unwarranted invasion or personal privacy, disclose a confidential source, or disclose techniques and procedures for law enforcement investigations or prosecutions; (8) contained in or related to reports for an agency responsible for regulation or supervision of financial institutions; or (9) geological and geophysical information concerning wells.

Despite the pro-transparency purpose of FOIA, its shortcomings, especially in recent years, include a perceived lack of government transparency, excessive delays in processing FOIA requests for government records, redactions so excessive that they render disclosure of certain records useless to the public, and lack of responsiveness by agencies. The FOIA reform statute was developed in response to shortcomings of the original FOIA, which is intended to give citizens the legal right to access information from the federal government.

The new law's presumption of openness limits the government's ability to withhold information on the basis of certain exceptions and requires proactive disclosure of information likely to be of interest to the public, thus alleviating the public from some of the burden of the time-consuming FOIA request process. While none of the exemptions to FOIA will change with the new legislation, the statute will likely hold federal agencies more accountable to the public in adequately responding to FOIA requests and justifying when relevant exemptions are applicable.

In addition to the presumption of openness, the new FOIA law includes a 25-year sunset provision on documents withheld under the reportedly overused FOIA exception for information involved in the government's "deliberative process" in reaching decisions. While the 25-year sunset provision does not represent a dramatic victory in citizens' entitlement to government information, it marks an improvement to the original FOIA, which allowed an agency to withhold information indefinitely on the basis of deliberative process.

The statute also requires that a uniform online portal be created for the submission of FOIA requests, and that frequently requested records will be posted online. This sort of portal, which is already used effectively by many state agencies and some federal agencies such as the U.S. Environmental Protection Agency, is expected to streamline the processing of FOIA requests and improve public access to government records.

The statute prohibits federal agencies from charging record production fees for production costs for requested records when an agency has missed a FOIA deadline, and it requires that records requested three or more times be made available to the public in an electronic format. The law also provides for permissible disclosure of agency records created 25 or more years prior to a FOIA request date. It provides for use of Office of Government Information Services (OGIS) mediation services for resolution of any disputes between FOIA requesters and federal agencies over the sufficiency or validity of an agency's response to a FOIA request. Finally, the law creates new duties and authority for Chief FOIA Officers within each federal agency and creates a Chief FOIA Officers Counsel intended to increase compliance with FOIA and promote efficiency.

Accordingly, both those who make FOIA requests and those who respond to them should be aware of the changes in the Freedom of Information Improvement Act, which marks the most significant reform to FOIA since the law was originally enacted 50 years ago.

If you have any questions about the content of this Alert, please contact the Pillsbury attorney with whom you regularly work, or the attorneys below.

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