

CRS Report for Congress

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Access to Government Information In the United States

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Summary

The Constitution of the United States makes no specific allowance for any one of the co-equal branches to have access to information held by the others and contains no provision expressly establishing a procedure for, or a right of, public access to government information. Nonetheless, Congress has legislated various public access laws. These include 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). Moreover, due to the American separation of powers model of government, interbranch conflicts over the accessibility of information are neither unexpected nor necessarily destructive. The federal courts, historically, have been reluctant to review and resolve “political questions” involving information disputes between Congress and the executive branch. Although there is considerable interbranch cooperation, such conflicts probably will continue to occur on occasion.

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 among the three branches or for the citizenry. 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. Furthermore, during this same era, an active federal public printing program was established and effectively developed.

Following World War II, however, information came to be of limited availability from federal departments and agencies. Conditioned by information restrictions prompted by recent global hostilities, fearful of Cold War spies, intimidated by zealous loyalty investigators within and outside of government, and anxious about various efforts at reducing the executive workforce during the postwar reconversion, the federal bureaucracy generally was not eager to have its activities and operations disclosed to the public, the press, or other governmental entities. Prevailing law tolerated this state of affairs, offering citizens no clear avenue of access to agency information. The public availability of records held by the executive branch was limited by artful interpretation of the housekeeping statute of 1789 (5 U.S.C. § 301) authorizing the heads of departments to prescribe regulations regarding the custody, use, and preservation of the records, papers, and property of their entity. 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.

Such conditions also contributed to the increasing difficulties of congressional committees and subcommittees in gaining access to both records and officials of federal departments and agencies during the 1950s. In response, some congressional panels began examining these information access issues and seeking responsive legislative solutions. Among the well known inquiries in this period was the work of the Special Subcommittee on Government Information of the House Committee on Government Operations. The subcommittee, established in 1955, was chaired by Representative John E. Moss and produced many volumes of hearings and reports.

Public Access Laws. Apart from interbranch information access dilemmas, Congress, in 1966, undertook fashioning various statutory arrangements for realizing public access to executive branch information. This focus resulted because legislators felt that Congress adequately made its deliberations and proceedings subject to public observation, largely published its records, and otherwise was constitutionally authorized to engage in information restriction in certain circumstances. 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 appropriate United States Code reference provided.

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

Initially enacted in 1966 and subsequently amended, the Freedom of Information (FOI) Act 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 FOI Act request. Disputes over the accessibility of requested records may be settled, according to the provisions of the act, in federal court. Fees for search, review, or copying of materials may be imposed; also, for some types of requesters, fees may be reduced or waived. The FOI Act 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 (5 U.S.C. § 552 note).

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

A 1972 statute, the Federal Advisory Committee Act (FACA), in part, presumptively requires that the meetings of all federal advisory committees serving executive branch entities be open to public observation. The statute specifies nine categories of information — similar to those of the FOI Act — that may be permissively relied upon to close advisory committee deliberations when such matters are under discussion. Disputes over the proper public notice for a committee meeting or the closing of a session may be pursued in federal court.

- Privacy Act (5 U.S.C. § 552a)

Legislated in 1974, the Privacy Act, in part, establishes 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. Where a file subject contends that a record contains inaccurate information about that individual, the act allows correction through emendation. Disputes over the accessibility 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 scrutiny unless closed in accordance with any of nine exemptions to the rule of openness. Disputes over proper public notice of such meetings or the propriety of closing a deliberation may be pursued in federal court.

Interbranch Access. No statutory arrangements have been created to facilitate access by one branch of the federal government to records and information holdings of the other two branches. Both Congress and the judiciary have subpoena powers which can be exercised to compel the production of materials by another branch, but even these demands have sometimes been resisted. Occasionally, but rarely, the courts have ruled on these disputes. 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.

In general, interbranch disputes over access to information are political conflicts of the highest order. The federal courts, historically, have been reluctant to review and resolve such “political questions.” Resolution is often reached 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. Sometimes appeals to public opinion will pressure an information access deadlock to settlement. Congress can use its “power of the purse” 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. How frequently are the provisions of the freedom of information acts invoked? 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 the U.S. Department of Justice at [http://www.usdoj.gov/04foia/04_6.html]. In FY2005, 30 selected federal departments and agencies with the largest volume of requests reported receiving over 788,000 new requests for government records under the FOI Act. In addition, the Department of Veterans Affairs, which includes first party requests for medical records in its tally, received 1,914,395 requests. Similarly, the Social Security Administration includes all requests for access to records in its report, regardless of which information access law is cited by the requester. Using these criteria, the Social Security Administration reported 17,257,886 requests in FY2005. Data from the individual annual reports, which are posted on the Department of Justice website, are summarized in tables on the Internet website of Public Citizen, a public interest group. Data from selected reports are provided above. Public Citizen’s tables can be found at [http://www.citizen.org/litigation/free_info/foic_rep/statistics/index.cfm].

Litigation. A certain number of requests for information under the FOI 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/judbus2005/appendices/c2a.pdf>]. According to that report, 404 cases were filed in U.S. District Courts in FY2005 compared to 315 cases in FY2004. *Judicial Business* tables also provide data about FOI Act cases at the appellate level.

The *Freedom of Information Case List* produced by the Department of Justice Office of Information and Privacy has compiled lists of cases decided under the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, and the Federal Advisory Committee Act. Its principal section, an alphabetical list of judicial decisions addressing access issues under the Freedom of Information Act and the Privacy Act, numbers nearly 5,000 entries. It was last updated in 2002 and is available on the Internet at [<http://www.usdoj.gov/04foia/cl-tofc.html>]. Judicial Watch, a public interest group, has posted information about its own activities under “Our Litigation” at [<http://www.judicialwatch.org/litigation.shtml>].

Guides to Using the Information Acts. Individuals, groups, and organizations all exercise the right to access 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 has 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 on the Internet at [http://www.frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:hr226.pdf]. 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 at [<http://www.nsarchive.org/>] includes among the many freedom of information documents and reports on its website, "40 Noteworthy Headlines Made Possible by FOIA, 2004-2006" at [<http://www.nsarchive.org/nsa/foia/stories.htm>].

Selected CRS Reports

CRS Report RL30966, *Congressional Access to Executive Branch Information: Legislative Tools*, by Louis Fisher.

CRS Report RL32780, *Freedom of Information Act (FOIA) Amendments: 109th Congress*, by Harold C. Relyea.

CRS Report RL30319, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments*, by Morton Rosenberg.

Selected Additional Resources

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

- Foerstel, Herbert N. *Freedom of Information and the Right To Know: The Origins and Applications of the Freedom of Information Act*. Westport, CT: Greenwood Press, 1999.
- Hoffman, Daniel N. *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.
- 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.
- . *Government in the Sunshine Act: History and Recent Issues*. Committee Print. 101st Congress, first session. Washington: GPO, 1989.
- 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.