



# **Fannie Mae, Freddie Mac, and FOIA: Information Access Policy for the Government-Sponsored Enterprises**

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## Summary

The Freedom of Information Act (FOIA; 5 U.S.C. §552) grants the public presumptive access—without explanation or justification—to certain existing, identifiable, unpublished, executive branch agency records. FOIA includes nine categories of exemption from disclosure, including information that could prompt national security concerns, invade privacy, or damage financial markets, among other concerns. Disputes over the accessibility of requested records can be appealed administratively or ultimately settled in court.

Fannie Mae and Freddie Mac are congressionally chartered, stockholder-owned companies known as government-sponsored enterprises (GSEs). Their charters grant them special favorable treatment in return for supporting the nation’s housing by limiting their businesses to purchasing existing mortgages and either holding them as investments or pooling them into mortgage-backed securities, which are sold to institutional investors. In addition, Fannie and Freddie are charged with meeting certain affordable housing goals.

In September 2008, as a result of losses and inadequate capital reserves, Fannie Mae and Freddie Mac agreed with the federal government to go into conservatorship. In conservatorship, the government takes control of a failing financial institution with the goal of returning it to financial health and stockholder control. Since Fannie Mae and Freddie Mac went into conservatorship, the government has purchased more than \$150 billion in special stock issued by the two organizations. Since the financial crisis in 2008, the two GSEs have helped to finance more than half of all new mortgages in the country.

As stockholder-owned and -controlled companies, Fannie Mae and Freddie Mac would not normally be considered government agencies and would not appear to be covered by FOIA. On January 26, 2011, Representative Jason Chaffetz introduced the Fannie Mae and Freddie Mac Transparency Act of 2011 (H.R. 463) that would make Fannie Mae and Freddie Mac subject to FOIA by requiring them to be considered federal “agencies” for the purposes of FOIA. H.R. 463 was referred to the House Committee on Financial Services on March 23, 2011.

On May 25, 2011, Edward J. DeMarco, acting director of the Federal Housing Finance Agency, testified that making Fannie and Freddie subject to FOIA could generate operational, compliance, and legal costs.

On July 12, 2011, the House Committee on Financial Services’ Subcommittee on Capital Markets and Government Sponsored Enterprises voted to approve the bill at markup, and it was then forwarded to the full committee. No further action has been taken on the bill.

This report examines some possible effects of applying FOIA to Fannie Mae and Freddie Mac and identifies some open questions that Congress may address in this context. The report analyzes how certain FOIA requirements and guidelines may pose concerns if they are applied to private institutions. The report explores cases in which members of the public sought information from an entity in federal conservatorship, as well as how Amtrak, a shareholder-owned company that is financially dependent on the federal government through grants and entitlements, administers FOIA.

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## Introduction

The Freedom of Information Act (FOIA; 5 U.S.C. §552) is often referred to as the embodiment of “the people’s right to know” about the activities and operations of government. The act statutorily established a presumption of public access to information held by federal executive branch departments and agencies. Enacted in 1966, FOIA was designed to provide individuals the right to know how their government was operating.<sup>1</sup> In addition to processing records requests and appropriately releasing requested records, FOIA requires additional agency actions, including the following:

- Promulgation of regulations on fees that may be charged to process FOIA requests;
- Appointment of a FOIA liaison to help requesters with questions about their requests;
- Appointment of a chief FOIA officer to oversee the entity’s FOIA administration;
- Design and implementation of a FOIA request tracking system to allow requesters to check on the status of their request;
- Creation of an annual report that includes a variety of statutorily required data on the entity’s FOIA processing, including the number of requests received, processed, and pending for each fiscal year, and the number of exemptions applied each fiscal year; and
- Creation of a website or other telecommunications mechanism by which the public can access the annual report.

Fannie Mae and Freddie Mac<sup>2</sup> are congressionally chartered, stockholder-owned companies known as government-sponsored enterprises (GSEs or the enterprises<sup>3</sup>) that receive special favorable treatment in return for limiting their businesses to purchasing existing mortgages and either holding them as investments or pooling them into mortgage-backed securities, which are sold to institutional investors. Some of the mortgages that Fannie and Freddie purchase must meet certain affordable housing goals. Despite the explicit denial in their charters of any federal backing, for many years, it has widely been believed that there is an implicit federal guarantee backing the GSEs.<sup>4</sup> Because the guarantee is not explicit, it has been unclear exactly what actions

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<sup>1</sup> U.S. Congress, House Committee of the Whole House on the State of the Union, *Clarifying and Protecting the Right of the Public to Information*, 89<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 9, 1966, H.Rept. 1497 (Washington: GPO, 1966), p. 6.

<sup>2</sup> Officially, Fannie Mae is the Federal National Mortgage Association and Freddie Mac is the Federal Home Loan Mortgage Association.

<sup>3</sup> Unless otherwise noted, the Congressional Research Service (CRS) uses the term “GSEs” in this report to refer specifically to Fannie Mae and Freddie Mac. Other GSEs not addressed in this report include the twelve Federal Home Loan Banks and the Federal Farm Credit Banks.

<sup>4</sup> See for example, Dan L. Crippen, then-Director of the Congressional Budget Office, “Federal Subsidies for the Housing GSEs,” testimony before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the Committee on Financial Services, U.S. House of Representatives, May 23, 2001, available at <http://www.cbo.gov/doc.cfm?index=2839&type=0>, and Alan Greenspan, then Chairman of the Board of Governors of the Federal Reserve, “Government-Sponsored Enterprises,” testimony before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, February 24, 2004, available at <http://www.federalreserve.gov/boarddocs/testimony/2004/20040224/>.

the government might take to relieve financial stress on the GSEs and in many ways it is similar to the implicit guarantee behind financial entities that are “too big to fail.” Nevertheless, the Housing and Economic Recovery Act of 2008 (HERA; P.L. 110-289 §1117) temporarily authorized the Secretary of the Treasury to purchase securities from the GSEs “in such amounts as the Secretary may determine.”<sup>5</sup> This implicit guarantee has allowed the two GSEs to borrow money from institutional investors at interest rates lower than other companies may pay; these rates are slightly higher than the Treasury pays.

In September 2008, as a result of losses and insufficient capital reserves, Fannie Mae and Freddie Mac agreed with their regulator, the Federal Housing Finance Agency (FHFA), to go into conservatorship with the goal of returning the GSEs to financial health. As conservator, FHFA assumes all powers of stockholders and the board of directors. At the time that the GSEs agreed to their voluntary conservatorship, each signed separate contracts with the Treasury that the government would provide financial support necessary to maintain a positive value to the GSEs.<sup>6</sup>

Since the start of conservatorship, the government has purchased more than \$150 billion in special preferred stock issued by the two GSEs.<sup>7</sup> Since the financial crisis, the two GSEs have accounted for more than half of all new mortgages in the country.<sup>8</sup>

On January 26, 2011, Representative Jason Chaffetz introduced the Fannie Mae and Freddie Mac Transparency Act of 2011 (H.R. 463), which would make Fannie Mae and Freddie Mac subject to FOIA.<sup>9</sup> H.R. 463 would, therefore, hold Fannie Mae and Freddie Mac accountable for all of FOIA’s statutory requirements, including recordkeeping, records access, tracking requests, and promulgation of regulations in the *Federal Register*—“the official gazette of the United States government.”<sup>10</sup> For example, pursuant to FOIA, Fannie Mae and Freddie Mac would have to promulgate regulations in the *Federal Register* that clarify what fees a requester may be charged to process their records request. Also, Fannie Mae and Freddie Mac would have to train a FOIA-processing staff. The staff, pursuant to FOIA, would have 20 days upon receipt of a records request to notify requesters whether they will receive requested materials or whether the requested materials are protected from public release by one or more of FOIA’s nine exemptions.<sup>11</sup> If a requester believed the records he or she requested were improperly withheld, he or she could challenge the agency’s response administratively, or, ultimately, in court. Fannie

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<sup>5</sup> This authority expired Dec. 31, 2009. For more information about the implicit guarantee see CRS Report RL34661, *Fannie Mae’s and Freddie Mac’s Financial Problems*, by N. Eric Weiss.

<sup>6</sup> CRS Report RL34661, *Fannie Mae’s and Freddie Mac’s Financial Problems*, by N. Eric Weiss.

<sup>7</sup> Federal Housing Finance Agency, Current Data on Treasury and Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities as of September 30, 2011, available at <http://www.fhfa.gov/webfiles/22692/TSYSupport09302011.pdf>.

<sup>8</sup> Inside Mortgage Finance Publications, *2011 Mortgage Market Statistical Annual: Volume II*, p. 9.

<sup>9</sup> Representative Jason Chaffetz, “Public Bills and Resolutions,” House bill introductions, *Congressional Record*, January 26, 2011, p. H506.

<sup>10</sup> The National Archives and Records Administration, “The *Federal Register*,” at <http://www.archives.gov/federal-register/the-federal-register/>. According to the National Archives and Records Administration, the *Federal Register* “provides legal notice of administrative rules and notices and Presidential documents in a comprehensive, uniform manner. The *Federal Register* contains (1) Federal Agency Regulations, (2) Proposed Rules and Public Notices, (3) Executive Orders, (4) Proclamations, and (5) Other Presidential Documents.

<sup>11</sup> Pursuant to FOIA, if an agency claims that a record falls within the parameters of an exemption, the agency can withhold the record from release. Agencies may also deny a request if the record requested does not exist or if the agency does not own the record. See the **Appendix** for a summary of the nine exemptions.

Mae and Freddie Mac would have to process administrative appeals and prepare for possible FOIA-related litigation.

On March 19, 2009, Attorney General Eric J. Holder wrote in a memorandum that the Department of Justice (DOJ) would “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.”<sup>12</sup> If H.R. 463 were enacted, it would appear that this memorandum would require modification to account for the special status of the GSEs and whether DOJ would specify different conditions for defending Fannie Mae’s and Freddie Mac’s decisions to withhold records requested pursuant to FOIA.

There are precedents for applying FOIA to an entity that is not a federal agency. In 1972, Congress enacted a law (P.L. 91-518) that explicitly applied FOIA’s requirements to Amtrak, the National Railroad Passenger Corporation. In the congressional reports that accompanied the legislation that became P.L. 91-518, the Senate Committee on Commerce stated that the government’s financial support of Amtrak warranted giving “the taxpaying public” access to “information about the conduct of Amtrak affairs.” More information about Amtrak’s history with FOIA is provided later in this report.

On July 12, 2011, the House Committee on Financial Services, Subcommittee on Capital Markets and Government Sponsored Enterprises forwarded H.R. 463 to the full committee by a voice vote.<sup>13</sup> No further action has been taken on the bill.

Making Fannie and Freddie subject to FOIA raises a series of issues:

- What kinds of records that are not now available from Fannie Mae, Freddie Mac, or other sources would be made public?
- When should private entities in federal conservatorship be considered federal agencies for the purposes of certain recordkeeping and records accessibility laws?
- Would making Fannie and Freddie subject to FOIA prompt serious concerns for private institutions that in the future are found in federal conservatorship?
- Would additional legislative action be required to allow Fannie Mae and Freddie Mac fully to comply with FOIA’s requirements, including promulgation of regulations in the *Federal Register*?
- Would the Department of Justice defend Fannie Mae and Freddie Mac if the denial of a records request is challenged in court?
- Would the application of FOIA to Fannie Mae and Freddie Mac apply to all records, or only those created during conservatorship?

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<sup>12</sup> Attorney General Eric Holder, *The Freedom of Information Act*, U.S. Department of Justice, Memorandum for Heads of Executive Departments and Agencies, Washington, DC, March 19, 2009, p. 2, at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

<sup>13</sup> For information about the bill markup and vote, see Charlene Carter, “House Panel Backs More Bills to Limit Fannie, Freddie,” *Congressional Quarterly*, July 12, 2011, at <http://www.cq.com/doc/committees-2011071200288907?w=bzR2QWhQbmtjMGx6TTJzLUVUtdjU5QQ>.

- Would Fannie Mae’s and Freddie Mac’s confidential records be appropriately protected by FOIA’s existing exemptions?
- What would be the cost for Fannie Mae and Freddie Mac to train and support FOIA staff? Could that staff be operational prior to an end to the conservatorship?
- Are there alternatives to FOIA to ensure appropriate oversight of Fannie Mae’s and Freddie Mac’s conservatorship?

Not all of these questions can be answered in this report. This report examines the policy option of subjecting Fannie Mae and Freddie Mac to FOIA. It analyzes the costs and benefits of FOIA’s administration and application. It then identifies additional policy options for Congress.

## **FOIA’s Purpose**

When Congress enacted FOIA in 1966, its primary purpose was to give the general public presumed access to certain federal records, as well as to provide citizens who are denied such access a formal procedure for legally challenging agencies that denied records requests. FOIA was amended in 1974, 1976, 1986, 1996, 2007, and 2010.

Making Fannie Mae and Freddie Mac subject to FOIA would give the public presumed access to the companies’ records, and the companies would have to demonstrate why certain records should be withheld from release. As noted earlier in this report, Attorney General Eric J. Holder stated that DOJ would “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.”<sup>14</sup> As noted earlier, it is unclear whether DOJ would specify different conditions for defending Fannie Mae’s and Freddie Mac’s decisions to withhold records requested pursuant to FOIA.

Some Fannie Mae and Freddie Mac records may be available through other channels, including the Federal Elections Commission, FHFA, or by their own release. The next section considers some of the types of records that the public may request from Fannie Mae and Freddie Mac if H.R. 463 were adopted.

## **Possible FOIA Requests**

As stockholder-owned and -controlled companies, Fannie Mae and Freddie Mac are not usually considered government agencies and would not appear to be covered by FOIA. However, while under conservatorship, the enterprises are controlled by FHFA. This conservatorship and the federal government’s financial support have led to attempts to use FOIA to obtain information about the enterprises. This section analyzes these attempts and other instances where FOIA might be used.

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<sup>14</sup> Attorney General Eric Holder, *The Freedom of Information Act*, U.S. Department of Justice, Memorandum for Heads of Executive Departments and Agencies, Washington, DC, March 19, 2009, p. 2, at <http://www.justice.gov/ag/foia-memo-march2009.pdf>.

FOIA requests for records related to Fannie Mae and Freddie Mac that are submitted to FHFA may raise questions over ownership and control of the records. It is unclear whether conservatorship affects whether certain records are considered federal government property or remain the property of Fannie Mae and Freddie Mac. A requested record must be “used, distributed, or incorporated” by the agency responding to the FOIA request in order for the agency to release it.<sup>15</sup>

FOIA does not limit what records a requester can seek. FOIA requests, however, have certain limitations. As noted earlier, FOIA limits requests to existing records and delineates nine categories of exemption from public release that agencies may apply when processing requests. Thus while almost any record could be requested under FOIA, not all requested records might exist, and not all existing records are subject to release pursuant to FOIA. It is not possible to anticipate the universe of FOIA requests that could be made of Fannie Mae or Freddie Mac if they were to be subject to the act’s requirements. Key areas of public interest, however, could include contract information, financial agreements, or detailed financial product information.

## **Amtrak and FOIA**

Although FOIA was enacted to give the public access to information about the operations of federal government, Congress has, in at least one case, applied FOIA to a nongovernmental entity. In 1970, Congress enacted the Rail Passenger Service Act of 1970, which called for the creation of the National Railroad Passenger Corporation (now called Amtrak).<sup>16</sup> The law required the corporation to operate as a “for profit corporation,” and added that “the Corporation will not be an agency or establishment of the U.S. government.”<sup>17</sup> The law, however, explicitly granted any person access to “inspection and copying” of the corporation’s records of shareholders and assets, regardless of how much or whether he or she owned its stock.<sup>18</sup> The Corporation began operations in 1971.

In April 1972, the Senate Committee on Commerce reported H.R. 11417, a bill to amend the Rail Passenger Service Act. Included in the bill was a provision that would explicitly place Amtrak under FOIA’s provisions.<sup>19</sup> In the report, the committee wrote that it “believes that in view of the substantial Federal funds which are going to Amtrak, the taxpaying public is entitled to access the information about the conduct of Amtrak affairs.” On June 22, 1972, Congress enacted P.L. 92-316, which included the Senate’s FOIA provision.<sup>20</sup>

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<sup>15</sup> *Judicial Watch, Inc., v. Federal Housing Finance Agency*, 744 F. Supp. 2d 228, 231 (D. D.C. 2010), *aff’d*, \_\_\_ F. 3d \_\_\_, 2011 WL 3375576 (D.C. Cir. 2011).

<sup>16</sup> P.L. 91-518, Sec. 301.

<sup>17</sup> *Ibid.*

<sup>18</sup> P.L. 91-518, Sec. 304(f). Prior to enactment of P.L. 91-518, federal law (P.L. 83-389) provided access to similar records only for individuals (or their legal representatives) who held at least five percent of shares in the corporation from which the records were sought (68 Stat. 197).

<sup>19</sup> U.S. Congress, Senate Committee on Commerce, *To Amend the Rail Passenger Service Act of 1970 to Provide Financial Assistance to the National Railroad Passenger Corporation for the Purpose of Purchasing Railroad Equipment, and for Other Purposes*, report to accompany 11417, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., April 20, 1972, S.Rept. 92-756 (Washington: GPO, 1972), p. 9.

<sup>20</sup> P.L. 92-316, Sec. 3(g).



In 1997, the Senate considered Amtrak's FOIA administration. Section 110(a) of the Amtrak Reform and Accountability Act of 1997<sup>21</sup> amended FOIA's application to Amtrak by limiting it to "any fiscal year in which Amtrak receives a subsidy."<sup>22</sup> Amtrak has received a federal subsidy every year since its inception.

## **Promulgation of Regulations**

As noted earlier in this report, FOIA includes requirements that aim to make FOIA administration more transparent and effective. Among those requirements is the promulgation of regulations to clarify how an agency plans to apply and administer FOIA.<sup>23</sup> For example, 5 U.S.C.

§552(4)(A)(i) requires agencies to promulgate regulations specifying the fees requesters may anticipate if they request records from the agency. Amtrak promulgated its FOIA regulations in the *Federal Register*.<sup>24</sup> The regulations are now included in the *Code of Federal Regulations* at 49 C.F.R. §§701.1-701.12.

Included in Amtrak's regulations was a clarification of the corporation's policy related to "business information."<sup>25</sup> The regulation permits a submitter of business information to "use good faith efforts to designate" any portion of the information it provides as subject to protection from release pursuant to exemption b(4) of FOIA, which protects trade secrets and other business information. If a FOIA requester seeks the business information, Amtrak is required to notify the entity that provided the record and designated it as potentially eligible for protection under b(4). If the submitter objects to the release of the provided record, he or she is to be afforded the opportunity to submit a written statement to Amtrak detailing why he or she believes the record should be withheld. The record requester is also to be notified that Amtrak has contacted the submitter. Amtrak may consider the submitter's statement when it makes a final determination on the record's release. Amtrak must then notify the submitter if it chooses to release the record in spite of his or her objections.

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<sup>21</sup> S. 738 (105<sup>th</sup> Congress).

<sup>22</sup> P.L. 105-134, Sec. 110(a). The information which Amtrak must provide under FOIA can give parties a competitive edge over other entities vying for the same contract award. Legislation enacted during the 104<sup>th</sup> Congress protects Federal agencies from FOIA concerning procurement-related disclosure requirements.

<sup>23</sup> Regulations generally start with an act of Congress, and are the means by which statutes are implemented and specific requirements are established. The terms "rule" or "regulation" are often used interchangeably in discussions of the federal regulatory process. The Administrative Procedure Act of 1946 (5 U.S.C. 551 et seq.) generally requires agencies to publish a notice of proposed rulemaking in the *Federal Register*, permit the public to comment on the proposed rule, and then publish a final rule addressing the comments provided. For an overview of many of the statutes and executive orders governing federal rulemaking, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Maeve P. Carey.

<sup>24</sup> On November 14, 1997, Amtrak published its Notice of Proposed Rulemaking related to FOIA. See National Railroad Passenger Corporation, "Revision of the Freedom of Information Act Regulations of the National Railroad Passenger Corporation and Implementation of the Electronic Freedom of Information Act Amendments of 1996 (P.L. 104-231)," 62 *Federal Register* 61070, November 14, 1997. In its Final Rule on February 13, 1998, Amtrak reported that it received no public comments related to its promulgation of FOIA rules. See National Railroad Passenger Corporation, "Revision of the Freedom of Information Act Regulations and Implementation of the Electronic Freedom of Information Act Amendments of 1996," 63 *Federal Register* 7311-7318, February 13, 1998.

<sup>25</sup> 49 C.F.R. §701.9. The regulation defines business information as "commercial or financial information held by Amtrak that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4)."

## Judicial Decisions<sup>26</sup>

As noted earlier, the expenditure of substantial taxpayer funds in connection with a private company has prompted Congress to subject this private company to FOIA.<sup>27</sup> To date, however, Congress has not explicitly made the FOIA applicable to Fannie Mae or Freddie Mac, as private companies, nor has there been a judicial decision applying FOIA to either of these publicly traded, shareholder-owned companies.<sup>28</sup> FOIA applies only to agencies in the executive branch of the federal government.<sup>29</sup> FOIA defines “agency” to include “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.”<sup>30</sup>

Determining whether an entity is an “agency” for purposes of FOIA has involved the courts in “comparing the powers and characteristics of the disputed entity with the statute and other agencies in lieu of adopting a standard test.”<sup>31</sup> Under the case law applicable in the District of Columbia federal circuit, an array of factors are considered including “[t]he performance of governmental functions by the entity, the presence of substantial government control over the entity’s day-to-day operations, [the] authority of the entity to make and implement decisions, the nature of the government’s financial involvement with the entity, the existence of a federal charter, and the status of the entity’s employees.”<sup>32</sup> As an “independent regulatory agency,”<sup>33</sup>

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<sup>26</sup> This section was written by M. Maureen Murphy, a legislative attorney, in CRS’ American Law Division.

<sup>27</sup> Amtrak, the National Railroad Passenger Corporation, has been subjected to the FOIA since 1972. 49 U.S.C. §24301(c). According to the Report of the Senate Committee on Commerce, which recommended this provision, “in view of the substantial Federal funds which are going to Amtrak, the taxpaying public is entitled to access to information about the conduct of Amtrak affairs.” S. Rep. 92-756, at 9, (1972).

<sup>28</sup> On June 16, 2010, FHFA ordered Fannie Mae and Freddie Mac to delist from the New York Stock Exchange. Their stock is now traded over the counter. FHFA, *FHFA Directs Delisting of Fannie Mae and Freddie Mac Stock from New York Stock Exchange*, press release, June 16, 2010, available at [http://www.fhfa.gov/webfiles/15854/Delisting\\_6\\_16\\_10.pdf](http://www.fhfa.gov/webfiles/15854/Delisting_6_16_10.pdf).

<sup>29</sup> 5 U.S.C. §552(a). The statutory language refers to the definition of “agency” in 5 U.S.C. §551(1), which reads:

- (1) ‘agency’ 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;
  - (B) the courts of the United States;
  - (C) the governments of the territories or possessions of the United States;
  - (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title;
  - (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
  - (F) courts martial and military commissions;
  - (G) military authority exercised in the field in time of war or in occupied territory; or
  - (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12 [referring to the Department of Housing and Urban Affairs’ housing insurance programs]....

<sup>30</sup> 5 U.S.C. §552(f).

<sup>31</sup> Kara Karlson, “Checks and Balances: Using the Freedom of Information Act to Evaluate the Federal Reserve Banks, 60 American University Law Review 213, 224 (2010).

<sup>32</sup> *Railway Labor Executives’ Association v. Consolidated Rail Corporation*, 580 F. Supp. 777 (D. D.C. 1984).

<sup>33</sup> The Housing and Economic Recovery Act of 2008, P.L. 110-289, tit. XIII, §1311, 12 U.S.C. §4511, established FHFA as “an independent agency of the Federal Government.”

FHFA must comply with FOIA.<sup>34</sup> Although Fannie Mae and Freddie Mac are regulated by FHFA and, since September 2008, have been under an FHFA conservatorship,<sup>35</sup> it appears that they are not directly subject to FOIA.<sup>36</sup>

Since the two housing GSEs were placed in conservatorship in 2008, there has been one federal court case involving a FOIA request for their records. In it, the plaintiff, Judicial Watch, Inc.,<sup>37</sup> sought access to campaign contribution records which Fannie Mae and Freddie Mac had created prior to the conservatorship.<sup>38</sup> On May 29, 2009, Judicial Watch filed the FOIA request with FHFA, which, on July 1, 2009, declined to provide the requested documents on the grounds that the two housing GSEs were private companies and that their records were not FHFA records because the FHFA had never looked at them. The court upheld the FHFA's argument, viewing the case to involve "the central issue ... [of] whether the requested documents are 'agency records' within the meaning of the FOIA."<sup>39</sup> It found that they were not "agency records" by relying on a test derived from a Supreme Court case<sup>40</sup> as interpreted by the U.S. Court of Appeals for the District of Columbia.<sup>41</sup>

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<sup>34</sup> FHFA has established a webpage providing public access to information and a means of making FOIA requests: <http://www.fhfa.gov/Default.aspx?Page=12>.

<sup>35</sup> As conservator of Fannie Mae and Freddie Mac, the FHFA is their successor and has authority to operate and bring them into solvency, carrying on their business and preserving their assets. 12 U.S.C. §§4617(b)(2)(A)–(D).

<sup>36</sup> According to the description on its website,

Fannie Mae and Freddie Mac are privately held. Fannie Mae, since 1968; Freddie Mac, since 1979. Fannie Mae has been privately held since 1968, when the Federal National Mortgage Association was partitioned into two corporations, one to be privately-owned and known as the Federal National Mortgage Association, now referred to as Fannie Mae; the other to be a government-sponsored corporation, the Government National Mortgage Corporation, now referred to as Ginnie Mae. P.L. 90-448, §808, 82 Stat. 536, 12 U.S.C. §1716b. Freddie Mac has been privately held since 1989 when Congress, in P.L. 101-73, §731(b)(1) and (c), 103 Stat. 183, 430-431, provided it with "a market oriented corporate structure" similar to that of Fannie Mae. S. Rept. 101-19, 37 (1989). Unlike most corporations, but like national banks, Fannie Mae and Freddie Mac are federally chartered, rather than state chartered, and subjected to federal prudential regulation and supervision, including capital requirements and limitations on investments. Unlike national banks, they must have the securities which they wish to issue approved by the Secretary of the Treasury; are not required to register their securities with the Securities and Exchange Commission; are subject to Government Accounting Office audits; and are required to make periodic reports to Congress. 12 U.S.C. §§1452-1455; 1717–1723a and 1723c. Before 1989, however, Freddie Mac was held to be a government controlled corporation and subject to FOIA on the basis of a number of factors evidencing federal control. *Rocap v. Indiek*, 539 F. 2d 174 (D.C. Cir. 1976). At that time, its Board of Directors was comprised solely of federal officials; now all directors are elected by shareholders. 12 U.S.C. §1452(a). Previously all of Freddie Mac shares were held by the Federal Home Loan Banks; now, Freddie Mac shares are publicly held.

<sup>37</sup> Judicial Watch, Inc., a conservative, non-partisan educational foundation, promotes transparency, accountability and integrity in government, politics and the law. Through its educational endeavors, Judicial Watch advocates high standards of ethics and morality in our nation's public life and seeks to ensure that political and judicial officials do not abuse the powers entrusted to them by the American people. Judicial Watch fulfills its educational mission through litigation, investigations, and public outreach. <http://www.judicialwatch.org/about-us>

<sup>38</sup> *Judicial Watch, Inc., v. Federal Housing Finance Agency*, 744 F. Supp. 2d 228, 231 (D. D.C. 2010), *aff'd*, \_\_\_ F. 3d \_\_\_, 2011 WL 3375576 (D.C. Cir. 2011). Under federal election law, corporations "organized by authority of any law of Congress" are prohibited from making contributions in connection with federal elections (2 U.S.C. §441b(a)). In addition, each state has its own laws that govern corporate contributions in state elections. For more information see CRS Report R41542, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress*, by R. Sam Garrett.

<sup>39</sup> 744 F. Supp. 2d 228, at 232.

<sup>40</sup> *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989). The case involved a denial by the Department of (continued...)

Under the Supreme Court test, two factors are relevant: whether the agency has obtained the records in question and whether that agency has control of the records. The district court found that although the FHFA had obtained<sup>42</sup> the records of Fannie Mae and Freddie Mac as their conservator and, thus, succeeding to title to the records, it did not have control of the records as required by FOIA. The appellate court upheld the district court on this issue. To determine whether FHFA had control of the documents, both courts applied a four-part test derived from an earlier case in which the U.S. Court of Appeals for the District of Columbia found that records held by researchers commissioned by the National Cancer Institute (NCI) to do research were “agency” records because the “NCI ordered creation of the materials, ... [planned] to take physical possession of [them] ..., indicated it will disclose the information ...[,] prohibited ... independent disclosures, and ... read and relied significantly on the information in writing articles and developing agency policies.”<sup>43</sup> The crucial requirement was that “[a]gencies must use or rely on the document[s] to perform agency business, and integrate it into their files, before it may be deemed an ‘agency record.’”<sup>44</sup> Applying this test to the Fannie Mae and Freddie Mac campaign contribution records, the district court found that although Fannie Mae and Freddie Mac voluntarily agreed to the conservatorship and, thus, to FHFA’s taking control of their records, and although FHFA has “virtually unrestricted ... use of the records,”<sup>45</sup> “the records ... are not relevant to the supervisory mission of the FHFA and ..., for that reason, no agency employees have read or relied on the requested records”<sup>46</sup> and “the FHFA ... plans to return the records to the Enterprises

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(...continued)

Justice (DOJ) of a FOIA request by a publishing firm for copies of federal district court tax decisions in cases which the DOJ had litigated. DOJ withheld the material on grounds that it had not created the documents, and that the documents had been created by the judicial branch of government, which was not covered by the FOIA. The Court found that the documents had been impermissibly withheld on the grounds that DOJ had obtained copies of the decision and “at the time of the FOIA request ... the materials [had] ... come into the agency’s possession in the legitimate conduct of its duties.” *Id.*, at 145.

<sup>41</sup> *Burka v. U.S. Department of Health and Human Services*, 87 F. 3d 508 (D.C. Cir. 1996).

<sup>42</sup> The district court noted that the FHFA had obtained the records both because the Enterprises had acquiesced to the conservatorship, 744 F. Supp. 2d 228, at 230-231, and by operation of law because “[i]n its capacity as conservator, the FHFA has ‘all rights, titles, powers, and privileges of [the Enterprises] with respect to [the Enterprises] and [their] assets....’ In addition, the FHFA has ‘title to the books, records, assets of any other legal custodian of’ the Enterprises.” 744 F. Supp. 2d 228, 230-231, citing 12 U.S.C. §§4617(b)(2)(A)(i) and (ii). The appellate court, having found that the FHFA did not have control of the records, did not reach the question of whether the FHFA had obtained them.

<sup>43</sup> *Burka v. U.S. Department of Health and Human Services*, 87 F. 3d 508, 515 (D.C. Cir. 1996). This set of factors convinced the court that the records being requested satisfied the four-part test used by the D.C. circuit to determine “whether an agency exercises sufficient control over a document to render it an ‘agency record’: ‘(1) the intent of the document’s creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency’s record system or files,’” citing *Tax Analysts v. Department of Justice*, 845 F. 2d 1060, 1069 (D.C. Cir. 1988), *aff’d on other grounds*, 492 U.S. 136 (1989).

<sup>44</sup> *Tax Analysts v. U. S. Department of Justice*, 845 F. 2d 1060, 1068 (D.C. Cir. 1988), *aff’d on other grounds*, 492 U.S. 136 (1989). Currently, the test used in the D.C. circuit to determine whether records held outside a federal agency are “agency records” for purposes of the FOIA involves four factors: “[1] the intent of the document’s creator to retain or relinquish control over the records; [2] the ability of the agency to use and dispose of the record as it sees fit; [3] the extent to which agency personnel have read or relied upon the document; and [4] the degree to which the document was integrated into the agency’s record system or files.” *Id.*, 1069, quoting *Lindsey v. Bureau of Prisons*, 736 F. 2d 1462, 1465 (11<sup>th</sup> Cir.), *vacated*, 469 U.S. 1082 (1984). The same four factors are used in *Judicial Watch, Inc., v. Federal Housing Finance Agency*, \_\_\_ F. 3d \_\_\_, 2011 WL 3375576, at \*2.

<sup>45</sup> 744 F. Supp. 2d 228, at 234.

<sup>46</sup> 744 F. Supp. 2d 228, 234.

once the conservatorship ends....<sup>47</sup> For the appellate court, because the FHFA did not use the records, access to them would in no way further the objectives of the FOIA:

[t]he public cannot learn anything about an agency decisionmaking from a document the agency neither created nor consulted, and requiring disclosure under these circumstances would do nothing to further the FOIA's purpose of 'open[ing] agency action to the light of public scrutiny.... Satisfying curiosity about the internal decisions of private companies is not the aim of FOIA, and there is no question that disclosure of the requested records would reveal nothing about decisionmaking at the FHFA.'<sup>48</sup>

There appears to be an analogy between the facts of this case and cases involving FOIA requests for documents held by failed banks under Federal Deposit Insurance Corporation (FDIC) receivership.<sup>49</sup> The language concerning the FHFA's acquisition of rights to Fannie Mae and Freddie Mac by virtue of being appointed conservator parallels that respecting FDIC's appointment as receiver or conservator of a failed insured depository institution.<sup>50</sup> Just as the FHFA, as conservator, succeeded to the title of the records of the two housing GSEs, the FDIC, as conservator or receiver of a failed bank, succeeds to the title of its records. Examination of FOIA cases with respect to a FDIC receivership or conservatorship, however, reveals no case in which the FDIC claimed that the requested records were not "agency" records. Because the FDIC generally uses conservatorship infrequently and then only on a temporary basis before determining how to resolve a failed institution, no FOIA case involving a FDIC conservatorship was discovered. Most of the receivership cases, moreover, involved records prepared by the failed institution for the FDIC<sup>51</sup> or records which the FDIC, itself, had created in its handling of claims against the failed institution.<sup>52</sup> The one case that was slightly different involved a request for information relating to a real estate development project of a subsidiary of a bank being operated by the FDIC as its receiver. Rather than claiming that the documents did not qualify as "agency records," the FDIC chose to defend its refusal to release the documents by claiming that the FDIC was under no obligation to disclose them because they were exempt from disclosure as "trade secrets and commercial or financial information obtained from a person and privileged or confidential" under FOIA's Exemption 4.<sup>53</sup>

## Policy Options and Other Considerations

FHFA's conservatorship of Fannie Mae and Freddie Mac prompts questions about the recordkeeping and records access requirements that are or should be placed on these entities. This

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<sup>47</sup> 744 F. Supp. 2d 228, 234-235.

<sup>48</sup> \_\_\_ F. 3d. \_\_\_, 2011 WL3375576 , at \*3, citing *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

<sup>49</sup> The goal of a receivership is generally to liquidate or wind up the affairs of an institution. See, e.g., 12 U.S.C. §§1821(c)(2) and (13)(B) (FDIC ) and 12 U.S.C. §4617(b)(2)(E) (as receiver of a failed GSE, the FHFA must "place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity....").

<sup>50</sup> Compare 12 U.S.C. §4617(b)(2)(A) with 12 U.S.C. §1821(d)(2).

<sup>51</sup> See, e.g., *Gregory v. Federal Deposit Insurance Corporation*, 631 F. 2d 896 (D.C. Cir. 1980) (financial reports prepared by two banks for the Federal Deposit Insurance Corporation, prior to their being placed in receivership).

<sup>52</sup> See, e.g., *Lepelletier v. Federal Deposit Insurance Corporation*, 164 F. 3d 37 (D.C. Cir. 1999) (request for names of depositors with unclaimed funds in accounts in a failed bank) and *Nikelsberg v. Federal Deposit Insurance Corporation*, 640 F. Supp. 2d 55 (D.D.C. 2009) (request for names of account holders with underinsured funds at two failed banks).

<sup>53</sup> 5 U.S.C. §552(b)(4).

section will introduce some of these concerns and controversies and analyze potential resolutions and policy options for Congress.

One basic consideration is that FOIA currently applies only to executive branch government agencies and certain other government entities, including the U.S. Postal Service. Only one private company, Amtrak, has been required to implement FOIA. As part of the government, agencies are subject to many other laws, regulations, policies, and executive orders that require formalized methods of recordkeeping and public access. These requirements—which include the rulemaking process, open meetings requirements, and records maintenance—would add time and costs to GSE operations and have not historically been required of Fannie Mae and Freddie Mac.<sup>54</sup> It is not clear how an entity that is an agency for FOIA purposes, but not an agency for other purposes, would balance these constraints or incorporate new requirements.

## FOIA Costs

If H.R. 463 were enacted, Fannie Mae and Freddie Mac would incur start-up costs such as staff training and indexing existing records, and continuing operational costs such as staff, recordkeeping, record processing and litigation.

One method of estimating what FOIA-related costs Fannie Mae and Freddie Mac could face is to examine the FOIA costs incurred by FHFA, the agency currently serving as the GSEs' conservator. For FY2010, FHFA reported receiving 116 FOIA requests, and reported processing 109 requests.<sup>55</sup> FHFA reported that it employed the equivalent of 1.6 “full-time FOIA staff,” and incurred \$200,000 in FOIA processing costs and \$20,000 in litigation costs in FY2010.<sup>56</sup> For FY2009, FHFA reported receiving 118 requests, and processing 116.<sup>57</sup> For FY2009, FHFA reported that it had one full-time FOIA staff, and that FOIA processing cost \$150,000 and there were no litigation-related costs.

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<sup>54</sup> Analysis of the rulemaking process and open government requirements are beyond the scope of this report. For additional information about the regulatory process, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, by Maeve P. Carey, The Federal Rulemaking Process: An Overview, Maeve P. Carey. For information about open government requirements, see CRS Report 97-71, *Access to Government Information In the United States*, by Wendy Ginsberg.

<sup>55</sup> Federal Housing Finance Agency, *FY10 Freedom of Information Act Report*, Washington, DC, pp. 6, at [http://www.fhfa.gov/webfiles/19637/FHFA\\_FY10\\_Annual\\_FOIA\\_Report.pdf](http://www.fhfa.gov/webfiles/19637/FHFA_FY10_Annual_FOIA_Report.pdf). According to the report, FHFA began FY2010 with nine requests still pending from FY2009, and had 16 requests pending at the end of FY2010.

<sup>56</sup> *Ibid.*, p. 13. Reports on the number of employees does not need to be in whole numbers because, in some cases, an employee may spend a portion of his or her time working on FOIA-related administration and another portion of his or her time on other activities. In 2008, OIP issued guidance clarifying how agencies should report FOIA staff counts. See U.S. Department of Justice, Office of Information and Privacy, *2008 Guidelines for Agency Preparation of Annual FOIA Reports*, May 2008, p. 26, at <http://www.justice.gov/oip/foiapost/guidance-annualreport-052008.pdf>.

<sup>57</sup> Federal Housing Finance Agency, *FY09 Freedom of Information Act Report*, January 4, 2010, p. 6, at [http://www.fhfa.gov/webfiles/15355/FHFA\\_FY09\\_FOIA\\_Report.pdf](http://www.fhfa.gov/webfiles/15355/FHFA_FY09_FOIA_Report.pdf). FHFA reported that it began FY2009 with 7 pending requests, although FHFA did not exist prior to FY2009. The Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB) merged to become FHFA in July 2008, when FHFA began conservatorship of Fannie Mae and Freddie Mac. In FY2008, OFHEO reported receiving 38 FOIA requests and processed 31. It reported no requests pending from FY2007. OFHEO reported it had one full-time FOIA staff, and that FOIA processing cost \$132,000 in FY2008. OFHEO reported it had no FOIA-related litigation costs in FY2008. For FY2008, the FHFB reported it received 36 and processed 36 FOIA requests. It reported no pending requests. For FY2008, FHFA reported .25 full-time FOIA staff and FOIA-related costs of \$27,575—with no FOIA-related litigation costs. See Federal Housing Finance Board, *Freedom of Information Act Annual Report*, p. 5; 11, at [http://www.fhfa.gov/webfiles/2731/FHFB\\_annual\\_report\\_FY2008%5B1%5D.pdf](http://www.fhfa.gov/webfiles/2731/FHFB_annual_report_FY2008%5B1%5D.pdf).

## FOIA Exemptions

It is not clear what information would be affected if this bill were to become law. While FOIA, other laws, and executive branch policies like the Open Government Initiative<sup>58</sup> require the federal government to operate in an open manner, companies usually consider certain business information to be information whose disclosure must be controlled for competitive advantage.<sup>59</sup> Some FOIA exemptions, notably Exemption 4 for “trade secrets and commercial or financial information,” likely would apply to possible records requests to Fannie Mae or Freddie Mac.<sup>60</sup> As in the case of costs, examining FHFA’s annual FOIA reports may provide some insight into what exemptions may apply to FOIA requests filed with Fannie Mae or Freddie Mac if H.R. 463 were enacted. In FY2010, for example, out of the 109 total requests processed by FHFA, the agency applied 36 exemptions to withhold certain information or records from release.<sup>61</sup> The 36 exemptions fell within four of FOIA’s exemption categories:

- Nine claims under exemption four, which protects trade secrets and other business information;
- Fourteen claims under exemption five, which protects inter- or intra-agency memoranda or letters that would not be available by law except to an agency in litigation communications;
- Five claims under exemption six, which protects information that would infringe upon personal privacy; and
- Eight claims under exemption eight, which protects certain information relating to the regulation of financial institutions.

In FY2009, FHFA processed 116 requests and applied 80 exemptions, including three exemption two claims, which protect from disclosure records that are solely internal personnel rules and practices.<sup>62</sup>

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<sup>58</sup> OMB’s Open Government Directive acknowledges, with the following statement, that valid reasons for placing limits on transparency exist: “With respect to information, the presumption shall be in favor of openness (to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions).” See Peter R. Orszag, then Director, U.S. Office of Management and Budget, “Open Government Directive,” memorandum M-10-06, December 8, 2009, at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf), p. 2.

<sup>59</sup> For more information on legal interpretations of FOIA and its exemptions, see the *U.S. Department of Justice, Guide to the Freedom of Information Act*, 2009, at [http://www.justice.gov/oip/foia\\_guide09.htm](http://www.justice.gov/oip/foia_guide09.htm).

<sup>60</sup> 5 USC §552(b)(4). For a full list of FOIA’s nine exemptions, see the **Appendix** to this report.

<sup>61</sup> Federal Housing Finance Agency, *FY10 Freedom of Information Act Report*, Washington, DC, pp. 6-7, [http://www.fhfa.gov/webfiles/19637/FHFA\\_FY10\\_Annual\\_FOIA\\_Report.pdf](http://www.fhfa.gov/webfiles/19637/FHFA_FY10_Annual_FOIA_Report.pdf). Agencies are required by FOIA to make their annual reports publicly available by February 1 of each year. Agencies can apply more than one exemption to a single FOIA request.

<sup>62</sup> Federal Housing and Finance Agency, *FY09 Freedom of Information Act Report*, Washington, DC, January 4, 2010, pp. 6-7, [http://www.fhfa.gov/webfiles/15355/FHFA\\_FY09\\_FOIA\\_Report.pdf](http://www.fhfa.gov/webfiles/15355/FHFA_FY09_FOIA_Report.pdf). The remaining 77 exemptions included 32 exemption four claims, 18 exemption five claims, 9 exemption six claims, and 28 exemption eight claims. Prior to FY2009, the FHFA did not exist. FHFA was created when Fannie Mae and Freddie Mac went into conservatorship. The FHFA was created by merging the Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB). In FY2008, OFHEO received 38 FOIA requests, processed 31 requests, and applied four exemptions: two claimed exemption four and two claimed exemption eight.

## Considerations in Complying with FOIA

Under FOIA, an agency is required to establish procedures and policies for receiving and processing FOIA requests. This includes hiring staff to review FOIA requests, locate the appropriate records, and make copies. In other federal agencies, staff are hired under civil service laws and regulations, giving employees certain protections and benefits. It is not clear whether Fannie Mae's and Freddie Mac's new FOIA staff would be hired using civil service procedures, such as posting jobs through the Office of Personnel Management (OPM). Additionally, it is unclear whether these FOIA staff would be considered federal employees for purposes of pay, benefits, annuities, and protections.<sup>63</sup>

FOIA requires an agency to post information about FOIA request procedures on the agency's website, and to make annual reports to DOJ that include statistics on FOIA request receipts, processing, and costs. As noted earlier in this report, in FY2010 FHFA reported it employed 1.6 full-time FOIA staff to comply with the act's requirements. If H.R. 463 were enacted, it appears likely that Fannie Mae and Freddie Mac would require similar staff resources to meet FOIA's processing and reporting requirements. This staff would need to receive training in how to implement FOIA, which may add to startup time and costs. It is unclear how long Fannie Mae and Freddie Mac will remain in conservatorship. If the GSEs conservatorship were to end shortly after enactment, the preparation to administer FOIA could take longer than the conservatorship will last.

Another consideration is whether records created prior to FHFA's conservatorship would be covered by FOIA. Language in H.R. 463 provides that FOIA would apply to Fannie Mae and Freddie Mac "during any period that the Corporation is under conservatorship or receivership," but the legislation is silent on what records would be eligible for release pursuant to FOIA. Depending on how narrowly FOIA Exemption 4 (for trade secrets) is construed, information that was created in the expectation of confidentiality could be disclosed. In the context of conservatorship, release of such records could amount to taking valuable, confidential information (such as special arrangements with business partners) and releasing it to any requestor for a nominal processing fee. This disclosure could make return to stockholder control more difficult.

A related issue would be the applicability of FOIA after the GSEs leave conservatorship. It is unclear whether the GSEs would have to maintain certain recordkeeping or transparency requirements once conservatorship had ended. It is not clear if these records would be sent to the National Archives.

## Legislative History

The Fannie Mae and Freddie Mac Transparency Act of 2011 (H.R. 463), as introduced, would require Fannie Mae and Freddie Mac to adhere to FOIA's requirements.

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<sup>63</sup> For information on white-collar federal pay rates and how they are calculated, see CRS Report RL34463, *Federal White-Collar Pay: FY2009 and FY2010 Salary Adjustments*, by Barbara L. Schwemle. For information on certain civil service annuities, see CRS Report 94-834, *Cost-of-Living Adjustments for Federal Civil Service Annuities*, by Katelin P. Isaacs.



In a May 13, 2011, press release, Representative Chaffetz said the following regarding the GSEs:

Fannie and Freddie were chartered by the federal government. They're currently managed by board members chosen by the federal government. And the federal government has sunk at least \$145 billion into Fannie and Freddie, with hundreds of billions more in potential liability. FOIA makes possible a level of transparency and accountability in federal agencies that is desperately needed here.<sup>64</sup>

On May 23, 2011, H.R. 463 was referred to the House Committee on Financial Services, Subcommittee on Capital Markets and Government Sponsored Enterprises. On May 25, 2011, the subcommittee held a hearing entitled "Transparency, Transition and Taxpayer Protection: More Steps to End the GSE Bailout," which, in part, examined H.R. 463.

At the hearing, Edward J. DeMarco, acting director of the FHFA, testified that FOIA was not designed to apply to private companies like Fannie Mae and Freddie Mac. He continued:

FOIA's "core purpose" is to enhance "public understanding of the operations or activities of the government;" FOIA is "often explained as a means for citizens to know what their Government is up to." This core purpose is not served by applying FOIA to Fannie Mae and Freddie Mac, which are still private companies operating in conservatorship. They did not cease to be private legal entities when they were placed into conservatorship, nor did they become part of FHFA.

The mandates that FHFA as conservator preserve and conserve the property and assets of the Enterprises, and minimize losses to the taxpayers, may be undermined by subjecting the Enterprises to FOIA, as they will incur significant operational and compliance costs in establishing and administering a function to respond to such information requests. FOIA requests made to the Enterprises would also lead directly to added legal administrative burdens on FHFA, as conservator.

Given that FOIA was not written to apply to private companies, there could also be significant litigation expense, as parties and courts grapple with unique interpretive questions. The draft raises significant collateral issues: if other private companies for which a government agency could be appointed as conservator or receiver—banks, thrifts, and even bank holding companies and nonbank financial companies—believe that they too could become subject to FOIA, then the boards of such companies, in an appropriate exercise of their fiduciary duty, may act to resist that appointment. Finally, there are many other avenues for stakeholders to obtain information from or about the Enterprises that have well-tested and appropriate safeguards. I urge you to consider carefully the harm that could be done by subjecting the Enterprises to FOIA.<sup>65</sup>

David C. John, a senior research fellow at the Heritage Foundation, however, testified that subjecting Fannie Mae and Freddie Mac to FOIA could help other financial institutions from repeating their mistakes. He said:

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<sup>64</sup> Representative Jason Chaffetz, "Financial Services Republicans Unveil Second Round of GSE Reform: Introduce seven more bills to end the bailouts, protect taxpayers and get private capital off the sidelines," press release, May 13, 2011, <http://chaffetz.house.gov/press-releases/2011/05/financial-services-republicans-unveil-second-round-of-gse-reform-introduce-seven-more-bills-to-end-t.shtml>.

<sup>65</sup> U.S. Congress, House Committee on Financial Services, Subcommittee on Capital Markets and Government Sponsored Enterprises, *Transparency, Transition and Taxpayer Protection: More Steps to End the GSE Bailout*, hearing, in part, on H.R. 463, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., May 25, 2011, at <http://financialservices.house.gov/uploadedfiles/052511demarco.pdf>.

Rep[resentative] Chaffetz's bill would enable citizens to better understand how these two entities failed at such a massive cost. It would also make it easier for private sector replacements to avoid the same errors, and to find and prosecute those officials who may have committed criminal acts that helped to weaken them.<sup>66</sup>

## **Related Legislation**

A number of bills concerned with political campaign contributions by publicly traded companies have been introduced in the 112<sup>th</sup> Congress. Like H.R. 463, these bills could make the actions of publicly traded companies more transparent, but may prompt concerns related to private-sector autonomy or appropriate levels of information protection:

- H.R. 2517 and S. 1360, both titled the Shareholder Protection Act of 2011, would require publicly traded companies to obtain shareholder approval before making corporate campaign contributions.
- H.R. 2728, the Corporate Politics Transparency Act, would require quarterly reports to stockholders of campaign contributions of more than \$10,000 for any single candidate in any single election.

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<sup>66</sup> Ibid., at <http://financialservices.house.gov/uploadedfiles/052511john.pdf>.

## **Appendix. 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)).

For further information on the nine FOIA exemptions, see CRS Report R40766, *Freedom of Information Act (FOIA): Issues for the 111<sup>th</sup> Congress*, by Wendy Ginsberg.

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