

THE FOIA “FIVE” – AFTER 50 YEARS, CHANGES IN THE FREEDOM OF INFORMATION ACT THAT (MIGHT) MATTER

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Public Policy Alert

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The Freedom of Information Act (FOIA), passed by Congress and signed into law in 1966, "established a policy of openness toward information within the control of the Executive Branch, and a presumption that such records should be accessible to the American public." Since its enactment, FOIA has been frequently utilized by journalists, historians, attorneys, and members of the American public to track the inner workings of the federal government, as well as to hold it accountable. Although an excellent source of public agency information, its utility has been hampered by long delays (sometimes for years), overuse of exemptions resulting in nondisclosure, high fees, and a cumbersome pre-digital age process often resulting in the need for specialists to get access to government documents.

The FOIA Improvement Act of 2016 (Pub. L. No. 114-185) made changes to the request process in an effort for increased government transparency and a streamlined system for the public to access government records and other documents. Here are five changes that might make a difference.

1. Electronic Records

The law now requires all federal agencies to make disclosable documents and records within their purview available to the public via an electronic format. This will speed up production and reduce costs. **2. Repeat Requests and “Public Reading Rooms”**

The law now requires agencies to make available for public viewing any disclosable document requested three or more times. Some already have reading rooms, but this requires it of all agencies. The challenge is whether the information will be organized and searchable in a user-friendly way. **3. The Presumption of Openness**

The law still contains numerous exemptions. But instead of documents being withheld simply because they theoretically fit within an exemption, agencies are now prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will lead to harm of an interest protected by the exemption. **4. Internal Agency Deliberations (Exemption 5)**

Agencies can no longer withhold “intra- or inter-agency communications” that could otherwise be withheld under FOIA Exemption 5 alone if the internal documents are more than 25 years old. **5. Mediation of Disputes**

Under current law, if an agency denies a request, the requester has few options other than to go to court and challenge it. The internal agency appeals process — because it remained within the agency —

seldom provided any relief. The new law requires the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes that arise between the government and FOIA requesters, gives OGIS greater independence from the Department of Justice and Office of Management and Budget, and calls on each agency to designate a Chief FOIA Officer to act as an intermediary within the government and to serve on a Chief FOIA Officers Council. In addition to these five changes, there are also some mechanical changes that may provide greater disclosures. Agencies are now prohibited from charging a fee from requesters in cases where the agency itself misses the FOIA compliance deadline, so long as the request can be fulfilled with 5,000 or fewer pages. To enhance the ease with which requests can be made, the FOIA Improvement Act calls for the development of a consolidated online request portal. It also mandates the identification and disclosure of records of general interest to the public.

MOVING FORWARD

Nearly all involved in the enactment of the FOIA Improvement Act agreed that in the 50 years since the original FOIA became law, it had succeeded in promoting a culture of government openness and accountability, but revisions were necessary to modernize FOIA for the digital age and to remove the potential for abuse of its discretionary exemption provisions. Despite the view of some that even more reforms could be made in the future, the legislation passed Congress with overwhelming support. As a practical matter, those utilizing FOIA should experience increased ease when making a request, increased access to intra- and inter-agency documents created over 25 years ago, and increased efficiency in seeing their requests fulfilled.

A redline version showing the specific changes made by the FOIA Improvement Act to the underlying statute is available [here](#).

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