

## Legal Sidebar

# The Freedom of Information Act Turns Fifty & Is Revised

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Fifty years ago, President Lyndon B. Johnson signed the [Freedom of Information Act](#) (FOIA) into law to confer the public with a statutory right of access to many federal agency records. On June 30, 2016, President Barack Obama [signed The FOIA Improvement Act \(S.337\) into law](#) to reform FOIA. The FOIA was drafted to clarify the [Administrative Procedure Act](#), which agency heads had interpreted as authorizing broad, discretionary powers to withhold records. Although the original FOIA proposal was well received by the press, federal agencies were resistant. The Senate passed S. 1160 in 1965 after nearly 6 years of consideration, the House in 1966 after 11 years of [legislative development](#).

The FOIA was enacted on July 4, 1966. As originally enacted, FOIA required that,

- certain types of records be published in the *Federal Register*: descriptions of agency organization and office addresses; statements of the general course and method of agency operation; rules of procedure and descriptions of forms; and substantive rules of general applicability and general policy statements;
- certain types of records be made available for public inspection: final opinions and orders; statements of policy and interpretations adopted by the agency and not published in the *Federal Register*; administrative staff manuals and instructions to staff that affect a member of the public; copies of all records which have been released which the agency determines have become or are likely to become the subject of subsequent requests; and a general index of records;
- all other records be subject to requests in writing;
- three categories of law enforcement and national security records be excluded from FOIA;
- records not available via publication or inspection, not covered by one or more of FOIA's nine exemptions from disclosure, nor excluded from coverage be subject to disclosure; and
- disputes over access to requested records be reviewed in federal court where the burden is on the agency to sustain its action.

All of these provisions [remain](#) applicable to this day. During its fifty-year history however, the FOIA has evolved as a result of judicial interpretation and legislative amendment. Congress [amended the FOIA](#) in [1974](#), [1976](#), [1986](#), [1996](#), [2002](#), [2007](#), [2009](#), and [2016](#) for a variety of reasons: ambiguity in the text and legislative history; agency and Department of Justice resistance to broader disclosure; increased oversight by Congress; response to judicial interpretations of the statute and its procedural requirements and exemptions; time delays by agencies in responding to requests and litigation; and to accommodate technological advances.

Over the years there have been numerous [Supreme Court decisions](#) interpreting the Act's provisions. In some cases, Congress amended FOIA in response to the Court's decisions. For example, in the wake of the 1975 Court decision in [Federal Aviation Administration v. Robertson](#), which held that FOIA's Exemption 3 (which covers information exempted from disclosure by other federal statutes) permitted disclosure of certain travel safety reports, Congress amended Exemption 3 to require specific language mandating confidentiality. More recent instances of Supreme Court interpretations of the statute include the 2001 case of [Dep't of the Interior v. Klamath Water Users Protective Association](#), which held that documents exchanged between the tribe and a water users association were not exempt

from disclosure since they were not inter-agency or intra-agency records; and the Court's 2011 ruling in [Milner v. Dep't of the Navy](#), which held that Exemption 2, consistent with the plain meaning of the term "personnel rules and practices," encompasses only records relating to issues of employee relations and human resources. Congress did not amend the FOIA in response to the decisions in *Klamath* and *Milner*.

The FOIA has brought about numerous changes in the policies, practices and procedures of agencies with regard to the disclosure of information to the public. Nonetheless, some observers, including panelists at a recent National Press Club event entitled [FOIA at 50](#), are concerned about purported delays in processing requests; overly broad redactions of records and abuse of exemptions; excessive denials of requests; outdated technology; failures to post frequently requested records online; and jurisdictional disputes between the National Archives and Records Administration's (NRA) Office of Government Information Services (OGIS)--which mediates FOIA disputes--and the DOJ's Office of Information Policy (OIP), which publishes the comprehensive [legal treatise on the FOIA](#) and oversees agency FOIA compliance.

Congress itself has shared some of these [concerns](#) and has undertaken an examination of FOIA in hearings, which has resulted in legislation to reform the Act. [S. 2520](#), the FOIA Improvement Act of 2014 passed the Senate unanimously in the 113<sup>th</sup> Congress, was reintroduced and passed again in the 114<sup>th</sup> Congress as [S. 337](#). [The FOIA Improvement Act \(S.337\)](#) will codify the "presumption of openness standard" enunciated in President Obama's [FOIA presidential memorandum](#), signed on his first day in office in 2009, that instructed all government agencies to "adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government." The law mandates that an agency may withhold information only if it reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law. This is commonly referred to as the "presumption of openness." The bill also directs the Office of Management and Budget to establish a single website for requesters to submit and track FOIA requests, and grants more oversight powers to the [Office of Government Information Services](#) (OGIS), also known as the FOIA Ombudsman. The law also amends Exemption 5, which applies to internal agency deliberations and has been most often relied upon by agencies to justify the permanent withholding of records in their entirety. Under The FOIA Improvement Act, however, agencies can only withhold records pertaining to internal deliberations for 25 years. Two years ago, the [Department of Justice strongly opposed](#) the FOIA reform bill and questioned its necessity in light of [administrative action on these matters](#). S. 337 passed with unanimous consent in the Senate on March 15, 2016, and on June 13th in the House under suspension of the rules. On June 22, 2016, S. 337 was presented to the President for signature. On June 30, 2016, President Barack Obama [signed S. 337 into law](#).

As FOIA moves into its second half-century, the law will likely continue to serve as a primary legal authority supporting requests by private entities for government information. The subject of such requests seems likely to evolve over time, as will the nature of information which the government believes should be shielded from public disclosure. Given the changing nature of these issues, legislative interest in FOIA is likely to continue.

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