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The Freedom of Information Act¹ generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions.

Enacted in 1966, and taking effect on July 5, 1967, the FOIA firmly established an effective statutory right of public access to executive branch information in the federal government.² The principles of government openness and accountability underlying the FOIA, however, are inherent in the democratic ideal: "The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."³ The United States Supreme Court has emphasized that only "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose."⁴

To be sure, achieving an informed citizenry is a goal often counterpoised against other vital societal aims. Society's strong interest in an open government can conflict with other fundamental societal values, "[a]mong [which] are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy."⁵ Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable scheme that encompasses, balances, and appropriately protects all interests -- while placing primary

¹ 5 U.S.C. § 552 (2000 & Supp. IV 2004).

² See *FOIA Post*, "World Now Celebrates 'International Right-to-Know Day'" (posted 9/28/04) (observing that "when the Freedom of Information Act was enacted, the United States stood nearly alone in the world in providing an enforceable legal mechanism for public access to the official records of a national government").

³ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); see also *NARA v. Favish*, 541 U.S. 157, 171-72 (emphasizing that the FOIA's underlying purpose of allowing "citizens to know 'what their government is up to'" is "a structural necessity in a real democracy" (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989))), *reh'g denied*, 541 U.S. 1057 (2004).

⁴ *Reporters Comm.*, 489 U.S. at 773.

⁵ See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) [hereinafter Attorney General Ashcroft's FOIA Memorandum], reprinted in *FOIA Post* (posted 10/15/01).

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emphasis on the most responsible disclosure possible.⁶ It is this accommodation of strongly countervailing public concerns, with disclosure as the animating objective, that the FOIA seeks to achieve.

The FOIA evolved after a decade of debate among agency officials, legislators, and public interest group representatives.⁷ It revised the public disclosure section of the Administrative Procedure Act,⁸ which generally had been recognized as "falling far short" of its disclosure goals⁹ and had come to be looked upon as more a withholding statute than a disclosure statute.¹⁰

By contrast, under the thrust and structure of the FOIA, virtually every record of a federal executive branch agency must be made available to the public in one form or another, unless it is specifically exempted from disclosure or specially excluded from the Act's coverage in the first place.¹¹ The nine exemptions of the FOIA ordinarily provide the only bases for non-disclosure,¹² and generally they are discretionary, not mandatory, in nature.¹³ (For a discussion of the discretionary nature of FOIA exemptions, see Discretionary Disclosure and Waiver, below.) Dissatisfied record re-

⁶ See S. Rep. No. 89-813, at 3 (1965) (stating the FOIA's statutory objective as that of achieving "the fullest responsible disclosure"); see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 30 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum] (same) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979)); cf. 5 U.S.C. § 552b note (2000 & Supp. III 2003) (policy statement enacted as part of the Government in the Sunshine Act specifying that it is "the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government").

⁷ See 112 Cong. Rec. H13641 (daily ed. June 20, 1966) (statement of Rep. John Moss describing protracted legislative efforts, including decade of media-driven hearings, required to develop and achieve enactment of FOIA).

⁸ 5 U.S.C. § 1002 (1964) (enacted in 1946, amended in 1966, and now codified at 5 U.S.C. § 552).

⁹ EPA v. Mink, 410 U.S. 73, 79 (1973).

¹⁰ See S. Rep. No. 89-813, at 5 (1965).

¹¹ See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

¹² See 5 U.S.C. § 552(d); see also FOIA Update, Vol. V, No. 4, at 1-2 (describing first of several "operational files" provisions enacted by Congress to remove, as a threshold matter, such national security-classified files at certain intelligence agencies from FOIA's reach).

¹³ See Chrysler Corp., 441 U.S. at 293.

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questers are given a relatively speedy remedy in the United States district courts, where judges determine the propriety of agency withholdings de novo and agencies bear the burden of proof in defending their nondisclosure actions.¹⁴

The FOIA contains seven subsections, the first two of which establish certain categories of information that must "automatically" be disclosed by federal agencies.¹⁵ Subsection (a)(1) of the FOIA¹⁶ requires disclosure (through publication in the Federal Register) of information such as descriptions of agency organizations, functions, and procedures; substantive agency rules; and statements of general agency policy.¹⁷ This requirement provides the public with automatic access to very basic information regarding the transaction of agency business.¹⁸

Subsection (a)(2) of the FOIA¹⁹ requires that certain types of records -- final agency opinions and orders rendered in the adjudication of cases, specific policy statements, certain administrative staff manuals, and some records previously processed for disclosure under the Act²⁰ -- be routinely

¹⁴ See 5 U.S.C. § 552(a)(4)(B)-(C).

¹⁵ See FOIA Update, Vol. XIII, No. 3, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)").

¹⁶ 5 U.S.C. § 552(a)(1).

¹⁷ See, e.g., Splane v. West, 216 F.3d 1058, 1065 (Fed. Cir. 2000); Aulencback, Inc. v. Fed. Highway Admin., 103 F.3d 156, 168 (D.C. Cir. 1997); Hughes v. U.S., 953 F.2d 531, 539 (9th Cir. 1992); NI Indus., Inc. v. United States, 841 F.2d 1104, 1107 (Fed. Cir. 1988); Bright v. INS, 837 F.2d 1330, 1331 (5th Cir. 1988); see also DiCarlo v. Comm'r, T.C. Memo 1992-280, slip op. at 9-10 (May 14, 1992) (holding that publication in United States Government Manual, special edition of Federal Register, satisfies publication requirement of subsection (a)(1)(A) (citing 1 C.F.R. § 9 (1991))); cf. Nat'l Leased Housing Ass'n v. United States, 105 F.3d 1423, 1433 & n.13 (Fed. Cir. 1997) (noting difficulty in determining which government documents fall within FOIA's publication requirements as opposed to APA's notice-and-comment requirements, and describing distinction as "'fuzzy,'" "'blurred,'" "'enshrouded by smog,'" and "'baffling'" (quoting Cnty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987))).

¹⁸ See FOIA Update, Vol. XIII, No. 3, at 3-4 (advising agencies to meet their subsection (a)(1) responsibilities on no less than quarterly basis).

¹⁹ 5 U.S.C. § 552(a)(2).

²⁰ See id. § 552(a)(2)(A)-(D); see also FOIA Post, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03).

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made "available for public inspection and copying."²¹ This is commonly referred to as the "reading room" provision of the FOIA,²² and it requires that some such records be made available by agencies in "electronic reading rooms" as well.²³ (For a discussion of the operation of this FOIA subsection, see FOIA Reading Rooms and Web Sites, below.)

The courts have held that providing official notice and guidance to the general public is the fundamental purpose of the publication requirement of subsection (a)(1) and the "reading room" availability requirement of subsection (a)(2).²⁴ Failure to comply with the requirements of either subsection can result in invalidation of related agency action,²⁵ unless the

²¹ 5 U.S.C. § 552(a)(2); see Fed. Open Market Comm. v. Merrill, 443 U.S. 340, 360 n.23 (1979) (acknowledging that portions of subsection (a)(2) records may nevertheless be protected by FOIA exemptions).

²² See FOIA Update, Vol. XIII, No. 3, at 4; see also FOIA Update, Vol. XIX, No. 1, at 3-4; FOIA Update, Vol. XVIII, No. 1, at 3-5.

²³ See FOIA Update, Vol. XVII, No. 4, at 1-2 (discussing provisions of Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048); see also FOIA Update, Vol. XIX, No. 3, at 3-4 ("OIP Guidance: Recommendations for FOIA Web Sites"); FOIA Update, Vol. XVIII, No. 3, at 1-2 (describing early agency development of World Wide Web sites for "electronic reading room" purposes). See generally *FOIA Post*, "Follow-Up Report on E-FOIA Implementation Issued" (posted 9/27/02) (discussing need for agencies to devote further attention to compliance with FOIA's electronic availability obligations); *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (reminding agencies to take all steps necessary to both attain and maintain full compliance with their electronic availability obligations through their FOIA Web sites).

²⁴ See, e.g., Welch v. United States, 750 F.2d 1101, 1111 (1st Cir. 1985).

²⁵ See, e.g., Kennecott Utah Copper Corp. v. U.S. Dep't of the Interior, 88 F.3d 1191, 1203 (D.C. Cir. 1996) ("Congress has provided [a] means for encouraging agencies to fulfill their obligation to publish materials in the Federal Register" by "protect[ing] a person from being adversely affected" by an unpublished regulation.); Checkosky v. SEC, 23 F.3d 452, 459, 482 (D.C. Cir. 1994) (per curiam) (finding that SEC cannot rely on unpublished opinion as precedent) (Silberman & Randolph, JJ., filing separate opinions); NI Indus., 841 F.2d at 1108 (holding that agency could not rely on unpublished policy pertaining to its "value engineering change program" to deny contractor its share of savings from that program); D&W Food Ctrs. v. Block, 786 F.2d 751, 757-58 (6th Cir. 1986) (ruling that agency's interpretation of statute requiring certain businesses to be continuously inspected could not be enforced against noncomplying parties because it was not published); Anderson v. Butz, 550 F.2d 459, 462-63 (9th Cir. 1977) (holding HUD instruction describing what must be treated as income for food stamp

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complaining party had actual and timely notice of the unpublished agency policy,²⁶ unless he is unable to show that he was adversely affected by the lack of publication,²⁷ or unless he fails to show that he would have been able to pursue "an alternative course of conduct" had the information been published.²⁸ However, unpublished interpretive guidelines that were available for copying and inspection in an agency program manual have been held not to violate subsection (a)(1),²⁹ and it also has been held that regula-

²⁵(...continued)

purposes void for failure to publish in Federal Register); Lewis v. Weinberger, 415 F. Supp. 652, 661 (D.N.M. 1976) (finding that an agency's policy regarding eligibility for an Indian Health Service program "has no effect for lack of publication in the Federal Register"); see also Tex. Health Care Ass'n v. Bowen, 710 F. Supp. 1109, 1113-14, 1116 (W.D. Tex. 1989) (enjoining agency from enforcing criteria established to implement Medicaid law, because criteria were not published and offered for comment).

²⁶ See, e.g., Splane, 216 F.3d at 1065 (finding it unnecessary to decide whether publishing only summary of agency opinion violated subsection (a)(1), because plaintiff had actual notice of entire opinion); United States v. F/V Alice Amanda, 987 F.2d 1078, 1084-85 (4th Cir. 1993) (denying statutory defense of subsection (a)(1) when defendant had copy of unpublished regulations); United States v. Bowers, 920 F.2d 220, 222 (4th Cir. 1990) (finding that the IRS's failure to publish tax forms did not preclude the defendants' convictions for income tax evasion, as the defendants had notice of their duty to pay those taxes, that duty was "manifest on the face" of the statutes, a listing of places where forms can be obtained is published in Code of Federal Regulations, and those defendants had filed tax returns before); Lonsdale v. United States, 919 F.2d 1440, 1447 (10th Cir. 1990); Tearney v. NTSB, 868 F.2d 1451, 1454 (5th Cir. 1989); Bright, 837 F.2d at 1331; Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1018 (9th Cir. 1987); Sierra Club N. Star Chapter v. Peña, 1 F. Supp. 2d 971, 980 (D. Minn. 1998) (holding organization subject to unpublished agency interpretation when it was "repeatedly informed" of agency's position); see also United States v. \$200,000 in U.S. Currency, 590 F. Supp. 866, 874-75 (S.D. Fla. 1984) (alternative holding) (determining that published regulations adequately apprised individuals of obligation to use unpublished reporting form).

²⁷ See, e.g., Splane, 216 F.3d at 1065; Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv., 78 F.3d 1360, 1368 (9th Cir. 1996); Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1136 (D.C. Cir. 1994); Bowers, 920 F.2d at 222; Sheppard v. Sullivan, 906 F.2d 756, 762 (D.C. Cir. 1990); Nguyen v. United States, 824 F.2d 697, 702 (9th Cir. 1987); Coos-Curry Elec. Coop., Inc. v. Jura, 821 F.2d 1341, 1347 (9th Cir. 1987).

²⁸ Alliance for Cannabis Therapeutics, 15 F.3d at 1136 (citing Zaharakis v. Heckler, 744 F.2d 711, 714 (9th Cir. 1984)).

²⁹ See McKenzie v. Bowen, 787 F.2d 1216, 1222-23 (8th Cir. 1986); see

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tions pertaining solely to internal personnel matters that do not affect members of the public need not be published.³⁰ Of course, an agency is not required to publish substantive rules and policy statements of general applicability that it has not adopted.³¹

²⁹(...continued)

also Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1372 (Fed. Cir. 2005) (finding that agency was not required to publish interpretive letter once it published Federal Register notice directing affected parties to agency Web site where letter was located); Lake Mohave Boat Owners, 78 F.3d at 1368 (finding rate-setting guidelines to be "an agency staff manual governed by § 552(a)(2)," requiring only public availability, not Federal Register publication under subsection (a)(1)); Capuano v. NTSB, 843 F.2d 56, 57-58 (1st Cir. 1988); Pagan-Astacio v. Dep't of Educ., No. 93-2173, slip op. at 9 (D.P.R. June 1, 1995) (determining that agency need not publish directory explaining existing regulation when it publishes Federal Register notice explaining where directory is available), aff'd, 81 F.3d 147 (1st Cir. 1996) (unpublished table decision); Medics, Inc. v. Sullivan, 766 F. Supp. 47, 52-53 (D.P.R. 1991); Sturm v. James, 684 F. Supp. 1218, 1223 n.6 (S.D.N.Y. 1988).

³⁰ See Hamlet v. United States, 63 F.3d 1097, 1103 (Fed. Cir. 1995) (holding that publication is not required for personnel manuals "related solely to the [agency's] internal personnel rules and practices"); Pruner v. Dep't of the Army, 755 F. Supp. 362, 365 (D. Kan. 1991) (holding that Army regulation governing procedures for applications for conscientious objector status concerned internal personnel matters and were not required to be published); see also Dilley v. NTSB, 49 F.3d 667, 669-70 (10th Cir. 1995) (holding that publication of policy regarding FAA's authority to suspend pilot certificates is not required when statute clearly grants agency broad disciplinary powers); Lonsdale, 919 F.2d at 1446-47 (holding that FOIA does not require publication of Treasury Department orders that internally delegate authority to enforce internal agency revenue laws); cf. Smith v. NTSB, 981 F.2d 1326, 1328-29 (D.C. Cir. 1993) (holding that unpublished policy bulletin regarding sanctions was not valid basis for suspension of license because sanctions policy affects public by altering public's behavior).

³¹ See 5 U.S.C. § 552(a)(1); see, e.g., Xin-Chang Zhang v. Slattery, 55 F.3d 732, 749 (2d Cir. 1995) (reversing a district court's order that had required the agency to give effect to an unpublished rule based upon the lower court's finding that the plaintiff had been adversely affected by lack of publication, because the rule actually was to be effective only on the date of its publication and "[b]y its own terms, the [r]ule never became effective"); Clarry v. United States, 891 F. Supp. 105, 110-11 (E.D.N.Y. 1995) (stating that failure to publish notice of ban for reemployment of strikers did not violate FOIA's notice requirement when rule was not "formulated and adopted" by agency but was authorized by presidential directive and by statute); Peng-Fei Si v. Slattery, 864 F. Supp. 397, 405 (S.D.N.Y. 1994) ("The FOIA cannot be used to force an agency to adopt a new regulation that it with-

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Under subsection (a)(3) of the FOIA -- by far the most commonly utilized part of the Act -- all records not made available to the public under subsections (a)(1) or (a)(2), or exempted from mandatory disclosure under subsection (b), or excluded under subsection (c), are subject to disclosure upon an agency's receipt of a proper FOIA request from any person.³² (See the discussions of the procedural aspects of subsection (a)(3) (including fees and fee waivers), the exemptions of subsection (b), and the exclusions of subsection (c), below.)

Subsection (c) of the FOIA,³³ which was added as part of the Freedom of Information Reform Act of 1986,³⁴ establishes three special categories of law enforcement-related records that are entirely excluded from the coverage of the FOIA in order to safeguard against unique types of harm.³⁵ The extraordinary protection embodied in subsection (c) permits an agency to respond to a request for such records as if the records in fact did not ex-

³¹(...continued)

drew from publication for the specific purpose of determining whether or not it should be adopted."); Xiu Qin Chen v. Slattery, 862 F. Supp. 814, 822 (E.D.N.Y. 1994) ("[A]n agency cannot be bound by [an un]published rule in a situation in which the agency never actually adopted the rule."); cf. Kenecott, 88 F.3d at 1202-03 (finding that FOIA does not authorize district court to order publication of regulation that was withdrawn by new Administration before it could be published).

³² See 5 U.S.C. § 552(a)(3)(A) (stating that FOIA requests under subsection (a)(3) cannot be made for any records "made available" under subsections (a)(1) or (a)(2)); see also FOIA Update, Vol. XVI, No. 1, at 2; FOIA Update, Vol. XIII, No. 3, at 4; FOIA Update, Vol. XII, No. 2, at 5. But see FOIA Update, Vol. XVIII, No. 1, at 3 (advising that while ordinary rule is that records placed in reading room under subsection (a)(2) cannot be subject of regular FOIA request, Congress made clear that this rule does not apply to subsection (a)(2)(D) category of FOIA-processed records (citing H.R. Rep. No. 104-795, at 21 (1996))); see also FOIA Post, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (describing second exception, applicable to certain intelligence agencies only); cf. FOIA Post, "NTIS: An Available Means of Record Disclosure" (posted 8/30/02; supplemented 9/23/02) (describing how the National Technical Information Service "occupies a special status" with respect to making records available to the public, pursuant to a provision of the 1986 FOIA amendments, 5 U.S.C. § 552(a)(4)(A)(vi)).

³³ 5 U.S.C. § 552(c).

³⁴ Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207, 3207-48.

³⁵ See generally Attorney General's 1986 Amendments Memorandum 18-30; see also Favish, 541 U.S. at 169 (evinced the Supreme Court's reliance on "the Attorney General's consistent interpretation of" the FOIA in successive such Attorney General memoranda).

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ist.³⁶ (See the discussion of the operation of these special provisions under Exclusions, below.)

Subsection (d) of the FOIA³⁷ makes clear that the Act was not intended to authorize any new withholding of information, including from Congress. While individual Members of Congress possess merely the same rights of access as those guaranteed to "any person" under subsection (a)(3), Congress as a body (or through its committees and subcommittees) cannot be denied access to information on the grounds of FOIA exemptions.³⁸

Subsection (e) of the FOIA,³⁹ which was modified as part of the Electronic Freedom of Information Act Amendments of 1996,⁴⁰ requires an annual report from each federal agency regarding its FOIA operations and an annual report from the Department of Justice to Congress regarding both FOIA litigation and the Department of Justice's efforts (primarily through the Office of Information and Privacy) to encourage agency compliance with the FOIA.⁴¹ Agencies now prepare annual reports of their FOIA sta-

³⁶ See Attorney General's 1986 Amendments Memorandum 18, 27.

³⁷ 5 U.S.C. § 552(d).

³⁸ See FOIA Update, Vol. V, No. 1, at 3-4 ("OIP Guidance: Congressional Access Under FOIA" (citing, e.g., H.R. Rep. No. 89-1497, at 11-12 (1966) and 5 U.S.C. § 552a(b)(9) (2000 & Supp. IV 2004) (counterpart provision of Privacy Act of 1974) to advise that "[e]ven where a FOIA request is made by a Member clearly acting in a completely official capacity, such a request does not properly trigger the special access rule of subsection ([d]) unless it is made by a committee or subcommittee chairman, or otherwise under the authority of a committee or subcommittee")); Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members, Op. Off. Legal Counsel (Dec. 5, 2001), available at http://www.usdoj.gov/olc/2001/privacy_act_opinion.pdf (discussing congressional access under the Privacy Act); see also Leach v. RTC, 860 F. Supp. 868, 878-79 & n.13 (D.D.C. 1994) (treating contrary statements in Murphy v. Dep't of the Army, 613 F.2d 1151, 1155-59 (D.C. Cir. 1979), as no better than "mere dicta"), appeal dismissed per stipulation, No. 94-5279 (D.C. Cir. Dec. 22, 1994).

³⁹ 5 U.S.C. § 552(e).

⁴⁰ Pub. L. No. 104-231, 110 Stat. 3048.

⁴¹ See 5 U.S.C. § 552(e)(5); see, e.g., FOIA Update, Vol. XIX, No. 3, at 6 (describing range of OIP policy activities in connection with government-wide implementation of Electronic FOIA amendments); FOIA Update, Vol. XIV, No. 3, at 8-9 (describing range of OIP policy activities, including its "ombudsman" function); see also FOIA Update, Vol. VIII, No. 3, at 2 (further description of same); FOIA Post, "FOIA Conferences Held by Growing

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tistics for submission to the Department of Justice,⁴² which reviews them for completeness⁴³ and then makes them available to the public, in a consolidated compilation, at a single World Wide Web site.⁴⁴ Each agency also must make its annual FOIA report readily available on its own FOIA Web site,⁴⁵ and it should do so promptly in order to facilitate the Department of Justice's preparation of summary compilations of all agencies' aggregate annual report data.⁴⁶ Significantly, as is further described below, as a result of the President's issuance of Executive Order 13,392, agency

⁴¹(...continued)

Numbers of Agencies" (posted 2/22/05) (describing OIP's efforts to strongly encourage and support agencywide FOIA conferences throughout executive branch); *cf.* *FOIA Post*, "World Now Celebrates 'International Right to Know Day'" (posted 9/28/04) (describing OIP's extensive "implementation and training assistance" to several other nations with new FOIA-like regimes).

⁴² See 5 U.S.C. § 552(e)(1); *FOIA Update*, Vol. XVIII, No. 3, at 3-7 ("OIP Guidance: Guidelines for Agency Preparation and Submission of Annual FOIA Reports"); *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (detailing requirements for new Section XII in annual FOIA reports describing agency progress in implementing its FOIA Improvement Plan pursuant to Executive Order 13,392); see also *FOIA Post*, "FOIA Counselor Q&A: Annual FOIA Reports" (posted 12/19/03); *FOIA Post*, "Annual Report Guidance for DHS-Related Agencies" (posted 8/8/03); *FOIA Post*, "Supplemental Guidance on Annual FOIA Reports" (posted 8/13/01); *FOIA Update*, Vol. XIX, No. 3, at 2 (advising agencies on additional aspect of annual FOIA reports).

⁴³ See *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (describing Office of Information and Privacy's process of reviewing all annual FOIA reports and contacting individual agencies to resolve any discrepancies found); see also *FOIA Post*, "Follow-Up Report on E-FOIA Implementation Issued" (posted 9/27/02) (describing progress made by agencies in improving quality of their annual FOIA reports).

⁴⁴ See *FOIA Update*, Vol. XIX, No. 3, at 2 (advising agencies on proper FOIA Web site treatment of their annual FOIA reports in compliance with electronic availability requirements of 5 U.S.C. § 552(e)(2)-(3), including through agency identification of URL (Uniform Resource Locator) for each report, and also referencing Department of Justice's FOIA Web site at <http://www.usdoj.gov/04foia>).

⁴⁵ See 5 U.S.C. § 552(e)(2); see also *FOIA Post*, "FOIA Counselor Q&A: Annual FOIA Reports" (advising agencies to correct any annual report error on Web site as well as in paper form); *FOIA Update*, Vol. XIX, No. 3, at 4 (advising agencies to "clearly indicate the year of each of [their annual FOIA] reports" on their FOIA Web sites).

⁴⁶ See, e.g., *FOIA Post*, "Summary of Annual FOIA Reports for Fiscal Year 2003" (posted 7/29/04).

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annual FOIA reports now include a narrative description of the agency's progress in implementing the milestones and goals of its FOIA Improvement Plan, including highlights of agency achievements, a description of any deficiencies in meeting plan milestones, as well as the time range of pending requests and consultations.⁴⁷

Subsection (f) of the FOIA⁴⁸ defines the term "agency" so as to subject the records of nearly all executive branch entities to the Act and defines the term "record" to include information maintained in an electronic format. (See the discussions of these terms under Procedural Requirements, Entities Subject to the FOIA, below, and Procedural Requirements, "Agency Records," below.) Lastly, subsection (g) of the FOIA⁴⁹ requires agencies to prepare FOIA reference guides describing their information systems and their processes of FOIA administration, as an aid to potential FOIA requesters.⁵⁰

As originally enacted in 1966, the FOIA contained, in the views of many, several weaknesses that detracted from its ideal operation. In response, the courts fashioned certain procedural devices, such as the requirement of a "Vaughn Index" -- a detailed index of withheld documents and the justification for their exemption, established in Vaughn v. Rosen⁵¹ -- and the requirement that agencies release reasonably segregable, non-exempt portions of a partially exempt record, which was first articulated in EPA v. Mink.⁵²

⁴⁷ See 70 Fed. Reg. 75,373 (Dec. 14, 2005).

⁴⁸ 5 U.S.C. § 552(f)(1)-(2).

⁴⁹ Id. § 552(g).

⁵⁰ See Exec. Order No. 13,392, Sec. 2(b)(v) (referencing requirement to prepare handbook and linking that to facilitation of public understanding of FOIA operations); FOIA Update, Vol. XIX, No. 3, at 3 (referencing revised Office of Management and Budget guidance to agencies on contents of FOIA reference guides); FOIA Update, Vol. XVIII, No. 2, at 1 (discussing electronic availability of Justice Department's FOIA Reference Guide); see also Mount of Olives' Paralegals v. Bush, No. 04-CV-0044, 2004 U.S. Dist. LEXIS 8504, at 6 (S.D. Ill. Jan. 23, 2004) (suggesting to plaintiff that it consult Justice Department's FOIA Reference Guide in future); Pub. Citizen v. Lew, 127 F. Supp. 2d 1, 21 (D.D.C. 2000) (finding that several agencies initially misapplied OMB guidance on what constitutes "major information system").

⁵¹ 484 F.2d 820, 827 (D.C. Cir. 1973).

⁵² 410 U.S. at 91; see 5 U.S.C. § 552(b) (sentence immediately following exemptions) (requiring disclosure of any "reasonably segregable" nonexempt information); see also FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation"); cf. FOIA Update, Vol.

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In an effort to further extend the FOIA's disclosure requirements, and also as a reaction to the abuses of the "Watergate era,"⁵³ the FOIA was substantially amended in 1974.⁵⁴ The 1974 FOIA amendments considerably narrowed the overall scope of the Act's law enforcement and national security exemptions, and also broadened many of its procedural provisions -- such as those relating to fees, time limits, segregability, and in camera inspection by the courts.⁵⁵ At the same time, Congress enacted the Privacy Act of 1974,⁵⁶ which supplements the FOIA when requests are made by individuals for access to records about themselves⁵⁷ and also contains a variety of separate privacy protections.⁵⁸ (For an extensive discussion of the Privacy Act's provisions, see the Department of Justice's "Overview of the Privacy Act of 1974," the most recent edition of which is contained in the Freedom of Information Act Guide & Privacy Act Overview (May 2004 ed.).)

In 1976, Congress again limited what could be withheld as exempt from disclosure under the FOIA, this time by narrowing the Act's incorpo-

⁵²(...continued)

XVII, No. 1, at 1-2 (describing agency use of document imaging in automated FOIA processing).

⁵³ See, e.g., Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 860 (D.C. Cir. 1981) (dealing with records of Watergate Special Prosecution Force); Congressional News Syndicate v. U.S. Dep't of Justice, 438 F. Supp. 538, 544 (D.D.C. 1977) (speaking of "aura of Watergate" in applying provisions of 1974 FOIA amendments).

⁵⁴ See Pub. L. No. 93-502, 88 Stat. 1561.

⁵⁵ See Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 1-26 (Feb. 1975) (addressing provisions of 1974 FOIA amendments); see also James T. O'Reilly, Federal Information Disclosure § 3.8 (3d ed. 2000) (summarizing 1974 FOIA amendments' provisions).

⁵⁶ 5 U.S.C. § 552a (2000 & Supp. IV 2004).

⁵⁷ See id. § 552a(d); see, e.g., Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987) (discussing relation between two acts); see also 5 U.S.C. § 552a(t) (addressing interrelationship of exemptions in two acts); FOIA Update, Vol. VII, No. 1, at 6 (advising agencies to treat all first-party access requests as FOIA requests as well as Privacy Act requests).

⁵⁸ See 5 U.S.C. § 552a; see also Memorandum on Privacy and Personal Information in Federal Records, 34 Weekly Comp. Pres. Doc. 870 (May 14, 1998), available in Westlaw, 1998 WL 241263 (May 14, 1998) (executive memorandum to heads of all federal departments and agencies on Privacy Act-related matters); FOIA Update, Vol. XIX, No. 2, at 1 (describing executive memorandum).

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ration of the nondisclosure provisions of other statutes.⁵⁹ (See the discussion of Exemption 3, below.) A technical change was made in 1978 to update the FOIA's provision for administrative disciplinary proceedings,⁶⁰ and in 1984 Congress repealed the expedited judicial review provision previously contained in former subsection (a)(4)(D) of the Act, replacing it with a more general statutory provision that allows courts to expedite a FOIA lawsuit only if "good cause therefor is shown."⁶¹

In 1986, after many years of administrative experience with the FOIA demonstrated that the Act was in need of both substantive and procedural reform,⁶² Congress enacted the Freedom of Information Reform Act of 1986,⁶³ which amended the FOIA to provide broader exemption protection for law enforcement information, plus special law enforcement record exclusions, and also created a new fee and fee waiver structure.⁶⁴ The Department of Justice and other federal agencies took several steps to implement the provisions of the 1986 FOIA amendments.⁶⁵

In 1996, after several years of legislative consideration of "electronic

⁵⁹ See Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976) (single FOIA amendment enacted together with the Government in the Sunshine Act in 1976, 5 U.S.C. § 552b (2000 & Supp. III 2003)). See generally *FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03).

⁶⁰ See 5 U.S.C. § 552(a)(4)(F).

⁶¹ See Federal Courts Improvement Act of 1984, Pub. L. No. 98-620, § 402, 98 Stat. 3335, 3357 (codified at 28 U.S.C. § 1657 (2000)) (repealing provision formerly codified at 5 U.S.C. § 552(a)(4)(D) (1982)); see also *FOIA Update*, Vol. VI, No. 2, at 6.

⁶² See generally Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) (two volumes); see also *FOIA Update*, Vol. VII, No. 2, at 1; *FOIA Update*, Vol. V, No. 4, at 1; *FOIA Update*, Vol. V, No. 3, at 1, 4; *FOIA Update*, Vol. V, No. 1, at 1, 6; *FOIA Update*, Vol. IV, No. 3, at 1-2; *FOIA Update*, Vol. IV, No. 2, at 1; *FOIA Update*, Vol. III, No. 3, at 1-2; *FOIA Update*, Vol. III, No. 2, at 1-2; *FOIA Update*, Vol. III, No. 1, at 1-2, 3-8; *FOIA Update*, Vol. II, No. 4, at 1-2; *FOIA Update*, Vol. II, No. 3, at 1-2.

⁶³ Pub. L. No. 99-570, 100 Stat. 3207.

⁶⁴ See *FOIA Update*, Vol. VII, No. 4, at 1-2; see also *id.* at 3-6 (setting out statute in its amended form, interlineated to show exact changes made).

⁶⁵ See *FOIA Update*, Vol. VIII, No. 1, at 1-2; *FOIA Update*, Vol. IX, No. 3, at 1-14; *FOIA Update*, Vol. IX, No. 1, at 2; see also Attorney General's 1986 Amendments Memorandum 1-30.

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record" issues,⁶⁶ Congress enacted the Electronic Freedom of Information Act Amendments of 1996,⁶⁷ which addressed the subject of electronic records, as well as the subject areas of FOIA reading rooms and agency backlogs of FOIA requests, among other procedural provisions.⁶⁸ (See the discussions of the various provisions of the Electronic FOIA amendments under FOIA Reading Rooms and Web Sites, Procedural Requirements, Fees and Fee Waivers, and Litigation Considerations, below.) The Department of Justice and other federal agencies took a number of steps to implement the provisions of the Electronic FOIA amendments.⁶⁹

⁶⁶ See, e.g., FOIA Update, Vol. XIII, No. 2, at 1, 3-10 (congressional testimony discussing need to modify FOIA to accommodate "electronic record" environment); see FOIA Update, Vol. XVII, No. 3, at 1-2 (describing electronic record legislative proposal); FOIA Update, Vol. XVII, No. 2, at 1 (same); see also FOIA Update, Vol. XV, No. 4, at 1-6; FOIA Update, Vol. XV, No. 3, at 1-2; FOIA Update, Vol. XV, No. 1, at 1; FOIA Update, Vol. XII, No. 4, at 1-2.

⁶⁷ Pub. L. No. 104-231, 110 Stat. 3048.

⁶⁸ See FOIA Update, Vol. XVII, No. 4, at 1-2, 10-11 (discussing statutory changes); see also id. at 3-9 (setting out statute in its amended form, interlineated to show exact changes made); President's Statement on Signing the Electronic Freedom of Information Act Amendments of 1996, 32 Weekly Comp. Pres. Doc. 1949 (Oct. 7, 1996), reprinted in FOIA Update, Vol. XVII, No. 4, at 9.

⁶⁹ See FOIA Post, "Electronic Compilation of E-FOIA Implementation Guidance" (posted 2/28/03); FOIA Post, "FOIA Officers Conference Scheduled" (posted 9/17/02); FOIA Post, "GAO to Update Its E-FOIA Implementation Study" (posted 3/8/02); FOIA Post, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (discussing governmentwide Electronic FOIA amendment implementation activities); FOIA Update, Vol. XIX, No. 3, at 5-6 (Department of Justice congressional testimony describing agency's amendment-implementation activities); id. at 3-4 ("OIP Guidance: Recommendations for FOIA Web Sites"); FOIA Update, Vol. XIX, No. 1, at 3-5 ("OIP Guidance: Electronic FOIA Amendments Implementation Guidance Outline"); FOIA Update, Vol. XVIII, No. 3, at 1-2 (describing agency amendment-implementation activities involving development of World Wide Web sites); id. at 3-7 (Department of Justice guidelines on implementation of new annual reporting requirements); FOIA Update, Vol. XVIII, No. 2, at 1 (describing Justice Department's amendment-implementation activities, including development of FOIA Reference Guide); FOIA Update, Vol. XVIII, No. 1, at 3-7 (addressing amendment-implementation questions); FOIA Update, Vol. XVII, No. 4, at 1-11 (describing amendments); see also FOIA Post, "FOIA Counselor Q&A: Annual FOIA Reports" (posted 12/19/03); FOIA Post, "Annual Report Guidance for DHS-Related Agencies" (posted 8/8/03); FOIA Post, "Supplemental Guidance on Annual FOIA Reports" (posted 8/13/01); FOIA Post, "Agencies Continue E-FOIA Implementation" (continued...)

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A more recent significant Freedom of Information Act development was the issuance in October 2001 of a statement of FOIA policy by Attorney General John Ashcroft.⁷⁰ The Ashcroft FOIA Memorandum emphasizes the Bush Administration's commitment to full compliance with the FOIA as an important means of maintaining an open and accountable system of government.⁷¹ At the same time, it recognizes the importance of protecting the sensitive institutional, commercial, and personal interests that can be implicated in government records -- such as the need to safeguard national security, to enhance law enforcement effectiveness, to respect business confidentiality, to protect internal agency deliberations, and to preserve personal privacy.⁷²

The Ashcroft FOIA Memorandum establishes a "sound legal basis" standard governing the Department of Justice's decisions on whether to defend agency actions under the FOIA when they are challenged in court.⁷³ Under this newer standard, agencies should reach the judgment that their

⁶⁹(...continued)

(posted 3/14/01); FOIA Update, Vol. XIX, No. 4, at 4-5 (emphasizing importance of "new partnership" between agency FOIA officers and agency Information Technology (IT) personnel in Electronic FOIA amendment implementation); FOIA Update, Vol. XIX, No. 3, at 2 (addressing additional amendment-implementation questions); FOIA Update, Vol. XIX, No. 2, at 2 ("Web Site Watch" discussion of agency FOIA Web sites); FOIA Update, Vol. XIX, No. 1, at 2 (same); FOIA Update, Vol. XIX, No. 1, at 6 (addressing additional amendment-implementation questions); FOIA Update, Vol. XVIII, No. 2, at 2 (same); cf. *FOIA Post*, "Summary of Annual FOIA Reports for Fiscal Year 2003" (posted 7/29/04). See generally Department of Justice FOIA Regulations, 28 C.F.R. pt. 16 (2006); *FOIA Post*, "Follow-Up Report on E-FOIA Implementation Issued" (posted 9/27/02) (describing GAO supplemental review of agency amendment-implementation activities); FOIA Update, Vol. XIX, No. 3, at 1 (describing 1998 congressional hearing on agency amendment-implementation activities).

⁷⁰ Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01) (superseding predecessor Attorney General FOIA policy memorandum that had been in effect since 1993).

⁷¹ See *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (describing Attorney General Ashcroft's FOIA Memorandum); see also Presidential Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), reprinted in FOIA Update, Vol. XIV, No. 3, at 3 (emphasizing importance of FOIA).

⁷² See Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01) (recognizing protection of such interests as among "fundamental values that are held by our society").

⁷³ Id.

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use of a FOIA exemption is on sound footing, both factually and legally, whenever they withhold requested information.⁷⁴ Significantly, the Ashcroft FOIA Memorandum also recognizes the continued agency practice of considering whether to make "discretionary disclosures" of information that is exempt under the Act, upon "full and deliberate consideration" of all interests involved.⁷⁵ The Ashcroft FOIA Memorandum describes the "institutional, commercial, and personal privacy" interests that are protected by the Act's exemptions,⁷⁶ and reminds agencies "to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA."⁷⁷

Most significantly, during this past year the FOIA landscape saw an unprecedented development in the issuance of Executive Order 13,392, which is entitled "Improving Agency Disclosure of Information."⁷⁸ This first-of-its-kind FOIA executive order establishes a "citizen-centered" and "results-oriented" policy for improving the Act's administration throughout the executive branch and it draws new attention to the challenges presented by agency backlogs of pending FOIA requests.⁷⁹ Fundamentally, Executive Order 13,392 emphasizes the FOIA's importance to "[t]he effective

⁷⁴ See *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (discussing new FOIA policy).

⁷⁵ Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01); see also *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (reminding agencies that much FOIA-exempt information is subject to statutory disclosure prohibitions as well as standard prudential considerations).

⁷⁶ See Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01); see also *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01).

⁷⁷ Attorney General Ashcroft's FOIA Memorandum, reprinted in *FOIA Post* (posted 10/15/01); see White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Related to Homeland Security (Mar. 19, 2002), reprinted in *FOIA Post* (posted 3/21/02) (focusing on need to protect sensitive homeland security-related information); *FOIA Post*, "New Attorney General FOIA Memorandum Issued" (posted 10/15/01) (highlighting government's "need to protect critical systems, facilities, stockpiles, and other assets from security breaches and harm -- and in some instances from their potential use as weapons of mass destruction in and of themselves"); see also *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (discussing the Ashcroft FOIA Memorandum in the context of homeland security-related considerations and the protection of "information viewed as sensitive through a post-9/11 lens").

⁷⁸ 70 Fed. Reg. 75,373.

⁷⁹ Exec. Order No. 13,392, Sec. 1(b), (c).

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functioning of our constitutional democracy," and it pointedly reminds all federal agencies that "FOIA requesters are seeking a service from the federal government and should be treated as such."⁸⁰

Accordingly, the Executive Order states an overall policy of responding to FOIA requests "courteously and appropriately" and in ways that permit FOIA requesters to "learn about the FOIA process," most particularly "about the status of a person's FOIA request."⁸¹ It calls upon all federal agencies to discharge their FOIA responsibilities in an efficient and "results-oriented" manner and to "achieve tangible, measurable improvements in FOIA processing."⁸² Its stated goal is to "improve service and performance" and "increase efficiency" in agency FOIA operations, "thereby strengthening compliance with the FOIA" and minimizing both "disputes and related litigation" arising under it.⁸³ It takes great strides toward that goal through the establishment of such creative new mechanisms as Chief FOIA Officers, FOIA Requester Service Centers, FOIA Public Liaisons, and FOIA Improvement Plans at all federal agencies.⁸⁴

Under Executive Order 13,392, each of the ninety-two federal agencies subject to the Act now has a Chief FOIA Officer, all of whom are listed on the Department of Justice's FOIA site on the World Wide Web.⁸⁵ In accordance with the Executive Order's requirements, during the first half of 2006 these newly designated high-level agency officials undertook wide-ranging reviews of their agencies' FOIA operations, in order to develop detailed FOIA Improvement Plans.⁸⁶ These plans were developed in close coordination with the Department of Justice, which issued extensive written guidance and conducted several governmentwide meetings in order to fa-

⁸⁰ Id. at Sec. 1(a), (b).

⁸¹ Id. at Sec. 1(b).

⁸² Id. at Sec. 1(c).

⁸³ Id. at Sec. 1(c), (d).

⁸⁴ See id. at Sec. 2(a), (c); id. at Sec. 3(b).

⁸⁵ See <http://www.usdoj.gov/04foia/chieffoiaofficers.html>.

⁸⁶ See Exec. Order No. 13,392, Sec. 3(a)-(b); see also Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information," 4 (Oct. 16, 2006), available at http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf (noting that "OIP has compiled these plans and makes them available for convenient public access at a single location on its FOIA Web site" and that "any interested person can examine all agency FOIA improvement plans under Executive Order 13,392, side by side, through a standard format recommended for ease of reference, just as they are able to do with the annual FOIA reports that agencies file").

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cilitate full and proper Executive Order 13,392 implementation.⁸⁷ Agencies then reported on their progress under their FOIA Improvement Plans in their annual FOIA reports for fiscal year 2006, which are made available on the Department of Justice's FOIA Web site.⁸⁸ (For further discussions of Executive Order 13,392, see FOIA Reading Rooms and Web Sites, below, Procedural Requirements, Executive Order 13,392, below, and Fees and Fee Waivers, below.)

Lastly, it should be noted that the FOIA was amended by the Intelligence Authorization Act of 2003, effective as of November 27, 2002.⁸⁹ The FOIA now contains language that precludes agencies of the "intelligence community"⁹⁰ from disclosing records in response to any FOIA request that

⁸⁷ See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (providing more than two dozen potential improvement areas for possible inclusion in agency plans); accord Exec. Order No. 13,392, Sec. 4(b) (directing Department of Justice to "issue such instructions and guidance . . . as may be appropriate" to implement certain provisions of Executive Order).

⁸⁸ See Annual FOIA Reports, available at <http://www.usdoj.gov/oip/fy06.html>; see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (establishing uniform template for reporting Executive Order 13,392 results as part of annual FOIA reports); Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information," 15 (Oct. 16, 2006), available at http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf (recommending special conference of agency Chief FOIA Officers, subsequently conducted by Department of Justice on Nov. 9, 2006, for purpose of placing pointed emphasis on importance of meeting then-upcoming executive order deadlines); Implementing FOIA [Freedom of Information Act] - Assessing Agency Efforts to meet FOIA Requirements: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the Comm. on Oversight and Government Reform, 110th Cong. (2007) (statement of Melanie Ann Pustay, Acting Director, Office of Information and Privacy), available at <http://www.usdoj.gov/oip/foia30.pdf> (describing OIP's extensive executive order implementation efforts, including its "public outreach activities"); Implementing FOIA [Freedom of Information Act] - Does the Bush Administration Executive Order Improve Processing?: Hearing Before the Subcomm. on Government Management, Finance and Accountability of the Comm. on Government Reform, 109th Cong. (2006), available at http://www.usdoj.gov/oip/metcalfe_foia_testimony07252006.pdf (same).

⁸⁹ Pub. L. No. 107-306, 116 Stat. 2383 (2002).

⁹⁰ See 50 U.S.C.A. § 401a(4) (2003 & West Supp. 2006) (provision of the National Security Act of 1947, as amended, that specifies the federal agencies and agency subparts that are deemed "elements of the intelligence

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is made by any foreign government or international governmental organization, either directly or through a representative.⁹¹ Significantly, this is the first time that Congress has departed from the general rule that "any person" may submit a FOIA request.⁹²

In sum, the FOIA is a vital and continuously developing government disclosure mechanism which, with refinements over time to accommodate both technological advancements and society's maturing interests in an open and fully responsible government, truly enhances our democratic way of life.⁹³

FOIA READING ROOMS AND WEB SITES

Subsection (a)(2) of the FOIA,¹ which provides for what is commonly referred to as "reading room" access to certain agency records,² serves an increasingly vital role in achieving the "informed citizenry" that is the cen-

⁹⁰(...continued)
community").

⁹¹ Pub. L. No. 107-306, 116 Stat. 2383, § 312 (codified at 5 U.S.C. § 552(a)(3)(A), (E) (2000 & Supp. IV 2004)); see also *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (advising that "for any FOIA request that by its nature appears as if it might have been made by or on behalf of a non-U.S. governmental entity, a covered agency may inquire into the particular circumstances of the requester in order to properly implement this new FOIA provision").

⁹² 5 U.S.C. § 552(a)(3)(A); see *Favish*, 541 U.S. at 170 (observing that the FOIA has "a general rule" that "the identity of the requester" is not taken into consideration) (emphasis added).

⁹³ See *FOIA Post*, "*FOIA Post* Interview: Chairman Stephen Horn" (posted 12/23/03) (publicizing observations by the outgoing chairman of the FOIA subcommittee of the House of Representatives regarding, inter alia, "the critical role that public access to Government information plays in our democracy"); see also Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information," 1 (Oct. 16, 2006), available at http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf (describing the FOIA as "a fundamental cornerstone of our modern democratic system of government"); *Favish*, 541 U.S. at 172 (emphasizing that the FOIA is vital to "a real democracy"); *FOIA Post*, "OIP Gives Implementation Advice to Other Nations" (posted 12/12/02) (describing progress in establishing "transparency in government" worldwide).

¹ 5 U.S.C. § 552(a)(2) (2000 & Supp. IV 2004).

² See *FOIA Update*, Vol. XIII, No. 3, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)").