

INTRODUCTION

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)").

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tral purpose of the FOIA.³ While the usefulness of this provision historically has depended on the public's ability to visit an agency's reading room in person, agencies now are required to maintain these records on the World Wide Web in "electronic reading rooms"⁴ and now use FOIA Web sites as a major part of their processes of FOIA administration -- which has brought ever-increasing attention to this FOIA provision in particular and to agency FOIA Web sites overall.⁵

FOIA Reading Rooms

Subsection (a)(2) of the FOIA applies to certain basic agency records that, while not automatically published under subsection (a)(1) of the Act,⁶ must routinely be made "available for public inspection and copying" in agency reading rooms.⁷ This public inspection obligation applies to all federal agencies, it governs all records covered by subsection (a)(2) except those "offered for sale,"⁸ and it extends to the maintenance of "electronic reading rooms" as well.⁹ By the same token, records required to be made publicly available pursuant to subsection (a)(2) ordinarily cannot be the

³ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (emphasizing importance of "reading room" access under first-of-its-kind FOIA executive order, Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005)).

⁴ 5 U.S.C. § 552(a)(2).

⁵ See, e.g., *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (describing GAO report's emphasis on agency compliance with "electronic reading room" obligations); *FOIA Post*, "Agencies Continue E-FOIA Implementation" (posted 3/14/01) (advising of growing attention being paid to agencies' "electronic reading rooms"); see also Exec. Order No. 13,392 (requiring agencies to review practices relating to making information available on agency Web sites).

⁶ 5 U.S.C. § 552(a)(1) (2000 & Supp. IV 2004) (providing for Federal Register publication of very basic agency information, as discussed under Introduction, above).

⁷ Id. § 552(a)(2); see Jordan v. U.S. Dept't of Justice, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc) (observing that subsection (a)(2) records must be made "automatically available for public inspection; no demand is necessary"); see also FOIA Update, Vol. XVIII, No. 1, at 4 (advising that large agencies with decentralized FOIA operations may maintain separate reading rooms for agency components).

⁸ 5 U.S.C. § 552(a)(2).

⁹ See FOIA Update, Vol. XVII, No. 4, at 1-2 (describing "electronic reading room" requirements under Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048).

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subject of regular "FOIA requests."¹⁰

For the first thirty years of the FOIA's operation, three categories of records -- "final opinions [and] . . . orders" rendered in the adjudication of administrative cases,¹¹ specific agency policy statements,¹² and certain ad-

¹⁰ See 5 U.S.C. § 552(a)(3)(A) (stating general rule that "FOIA request" under subsection (a)(3) cannot be made for any record that is "made available" under subsections (a)(1) or (a)(2)); see also U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 152 (1989) ("Under subsection (a)(3) . . . an agency need not make available those materials that have already been disclosed under subsections (a)(1) and (a)(2)."); Schwarz v. U.S. Patent & Trademark Office, No. 95-5349, 1996 U.S. App. LEXIS 4609, at *1 (D.C. Cir. Feb. 22, 1996) (finding that agency was not required to disclose records from patent files in response to a subsection (a)(3) request because patent files are available for public inspection and copying under subsection (a)(2)); Crews v. Internal Revenue, No. 99-8388, 2000 U.S. Dist. LEXIS 21077, at *16 (C.D. Cal. Apr. 26, 2000) (declaring that policy statements and administrative staff manuals made available under subsection (a)(2) are not required to be made available in response to subsection (a)(3) requests); Reeves v. United States, No. 94-1291, 1994 WL 782235, at *1-2 (E.D. Cal. Nov. 16, 1994) (dismissing lawsuit because FOIA requests sought publicly available agency regulations). But see FOIA Update, Vol. XVIII, No. 1, at 3 (advising of major exception to general rule for records falling within subsection (a)(2)(D)).

¹¹ 5 U.S.C. § 552(a)(2)(A); see, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 155-59 (1975) (holding that NLRB "advice and appeals" memorandum deciding not to file unfair labor complaint was "final opinion" when decision not to file effectively put an end to formal complaint procedure); Rockwell Int'l Corp. v. U.S. Dep't of Justice, 235 F.3d 598, 603 (D.C. Cir. 2001) (finding that agency report of voluntarily conducted internal investigation into propriety of Rocky Flats prosecution was not "final opinion" because determination of propriety of prosecution was neither "case" nor "adjudication"); Nat'l Prison Project v. Sigler, 390 F. Supp. 789, 792-93 (D.D.C. 1975) (determining that parole board decisions denying inmate applications for parole were "reading room" records).

¹² 5 U.S.C. § 552(a)(2)(B); see, e.g., Bailey v. Sullivan, 885 F.2d 52, 62 (3d Cir. 1977) (stating that Social Security Ruling providing examples of medical conditions to be treated as "per se nonsevere" fell under subsection (a)(2)(B)); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *90 (W.D. Pa. Feb. 7, 2001) (holding that HHS documents that advised regional offices of agency's view on policy matters pertaining to certain welfare programs were "interpretations adopted by the agency"); Tax Analysts v. IRS, No. 94-923, 1996 U.S. Dist. LEXIS 3259, at *9 (D.D.C. Mar. 15, 1996) (holding that IRS Field Service Advice Memoranda, even though not binding on IRS personnel, were "statements of policy"), aff'd on other grounds, 117 F.3d 607 (D.C. Cir. 1997); Pub. Citizen v. Office of U.S. Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (conclud-

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ministrative staff manuals "that affect a member of the public"¹³ -- have been made available routinely in agency reading rooms.¹⁴ Such records must be indexed by agencies in order to facilitate the public's convenient access to them.¹⁵

¹²(...continued)

ing that agency submissions to a trade panel containing an agency's interpretation of U.S.'s international legal obligations were "statements of policy and interpretations adopted by the [agency]"); see also Vietnam Veterans of Am. v. Dep't of the Navy, 876 F.2d 164, 165 (D.C. Cir. 1989) (finding that opinions in which Judge Advocates General of Army and Navy have authority only to dispense legal advice -- rendered in subject areas for which those officials do not have authority to act on behalf of agency -- were not "statements of policy or interpretations adopted by" those agencies and were not required to be published or made available for public inspection).

¹³ 5 U.S.C. § 552(a)(2)(C); see, e.g., Sladek v. Bensinger, 605 F.2d 899, 901 (5th Cir. 1979) (finding DEA agents' manual concerning treatment of confidential informants and search warrant procedures to be subsection (a)(2)(C) record); Stokes v. Brennan, 476 F.2d 699, 701 (5th Cir. 1973) (determining that "Training Course for Compliance Safety and Health Officers," including all instructor and student manuals, training slides, films, and visual aids, must be made available for public inspection and copying); Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359, 1364-65 (N.D. Ohio 1976) (ruling that memoranda approved by Office of Standards Enforcement, which set forth agency's policy regarding sampling plans that office must follow when tire fails lab test under Federal Motor Vehicle Safety Standards, were "reading room" records); see also Stanley v. DOD, No. 98-CV-4116, slip op. at 9-10 (S.D. Ill. June 22, 1999) (finding that administrative staff manuals pertaining to military hospital procedures did not "affect the public" and were not required to be given "reading room" treatment).

¹⁴ See FOIA Update, Vol. XIII, No. 3, at 4 (describing categories of records required to be placed in agency reading rooms).

¹⁵ See 5 U.S.C. § 552(a)(2); see, e.g., Irons & Sears v. Dann, 606 F.2d 1215, 1223 (D.C. Cir. 1979) (requiring agency to provide "reasonable index" of requested decisions); Taxation With Representation Fund v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 81,028, at 81,080 (D.D.C. Apr. 22, 1980) (recognizing agency's "continuing duty" to make subsection (a)(2) records and indices available); see also Pa. Dep't of Pub. Welfare, 2001 U.S. Dist. LEXIS 3492, at *82 (finding agency in violation of indexing requirement because index was incomplete and it was "nearly impossible" to distinguish precedential material from obsolete material). See generally FOIA Update, Vol. XVII, No. 4, at 2 (discussing statutory indexing requirements under Electronic FOIA amendments). But cf. Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *5 (D.D.C. May 1, 1998) (concluding that court has "no statutory authority for actually ordering . . . a remedy" regarding indexing requirement), appeal dismissed voluntarily, No. 94-5252 (D.C. Cir. Aug. 11, 1998).

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Routine public access to such records serves to guard against the development of agency "secret law" known to agency personnel but not to members of the public who deal with agencies, so records that have no precedential value and do not constitute the working law of the agency are not required to be made available under this part of the Act.¹⁶ In addition, agencies may "withhold" (i.e., not make available) a subsection (a)(2) record (or portion of such a record) if it falls within a FOIA exemption, just as

¹⁶ See Sears, 421 U.S. at 153-54 (observing that the reading room provision "represents a strong congressional aversion to 'secret [agency] law,' . . . and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law'" (quoting H.R. Rep. No. 89-1497, at 7 (1966))); Skelton v. USPS, 678 F.2d 35, 41 (5th Cir. 1982) ("That requirement was designed to help the citizen find agency statements 'having precedential significance' when he becomes involved in 'a controversy with an agency.'" (quoting H.R. Rep. No. 89-1497, at 8)); Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 19 (Feb. 1975) (explaining that the "primary purpose of subsection (a)(2) was to compel disclosure of what has been called 'secret law,' or as the 1966 House Report put it, agency materials which have 'the force and effect of law in most cases'" (quoting H.R. Rep. No. 89-1497, at 7)); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 15 (June 1967) [hereinafter Attorney General's 1967 FOIA Memorandum] (advising that keeping "orders available in reading rooms . . . [that] have no precedential value, often would be impracticable and would serve no useful purpose"); see also Smith v. NTSB, 981 F.2d 1326, 1328 (D.C. Cir. 1993) (stating that the purpose of this "requirement is obviously to give the public notice of what the law is so that each individual can act accordingly"); Vietnam Veterans of Am., 876 F.2d at 165 (rejecting argument that legal opinions issued by Judge Advocates General of Army and Navy must be placed in agency reading room, because those opinions are not statements of policy that "operate as law"); Doe v. U.S. Dep't of Labor, No. 05-2449, 2006 WL 2615101, at *13 (D.D.C. Sept. 6, 2006) (finding that Employee Compensation Appeals Board decisions "form an essential corpus of administrative precedent" and are properly placed in an agency's reading room); Pa. Dep't of Pub. Welfare, 2001 U.S. Dist. LEXIS 3492, at *78 (holding that a FOIA reading room index "must include those matters that the agency considers to be of precedential value"); Stanley, No. 98-CV-4116, slip op. at 9-10 (S.D. Ill. June 22, 1999) (holding that administrative staff manuals that do not have any "precedential significance" and would not assist members of the public in "tailor[ing] their behavior to the law" are not required to be made publicly available in an agency reading room). But see Nat'l Prison Project, 390 F. Supp. at 793 (ruling otherwise prior to Supreme Court's instructive emphasis on legislative history of subsection (a)(2) in Sears); Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298, 1303 (D.D.C. 1973) (same), modified & remanded on other grounds, 505 F.2d 350 (D.C. Cir. 1974).

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they can do in response to FOIA requests.¹⁷ Likewise, records that are published and offered for sale by an agency, either directly or indirectly,¹⁸ are not required to be placed in an agency's reading room.¹⁹

¹⁷ See, e.g., Fed. Open Market Comm. v. Merrill, 443 U.S. 340, 360 n.23 (1979) (applying commercial privilege to subsection (a)(1) record and recognizing that subsection (a)(2) records likewise may be protected by FOIA exemptions); Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 n.21 (1975) (acknowledging that subsection (a)(2) records may be protected by FOIA exemptions); Sears, 421 U.S. at 160 (finding it unnecessary to decide whether documents were subsection (a)(2) records, because attorney work-product privilege protected them in any event); Sladek, 605 F.2d at 901 (applying Exemption 2 to portions of subsection (a)(2)(C) record); Doe, 2006 WL 2615101, at *13 (finding that agency's placement of subsection (a)(2)(A) decisions in reading room without redacting claimants' names violated Privacy Act of 1974, 5 U.S.C. § 552a (2000 & Supp. IV 2004)); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-3777, 2006 WL 1826185, at *3 n.2 (D.D.C. June 30, 2006) (recognizing that contents of subsection (a)(2)(C) documents can be withheld pursuant to FOIA exemptions) (appeal pending); Tax Analysts, 1996 U.S. Dist. LEXIS 3259, at *9-10 (applying attorney work-product privilege to subsection (a)(2)(B) records); see also FOIA Update, Vol. XIII, No. 3, at 4 (advising that "an agency may withhold any record or record portion falling within subsection (a)(2) . . . if it is of such sensitivity as to fall within a FOIA exemption").

¹⁸ See, e.g., FOIA Post, "NTIS: An Available Means of Record Disclosure" (posted 8/30/02) (describing operation of National Technical Information Service (commonly known as "NTIS") in governmentwide process of record dissemination); Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,018 (1987) (recognizing NTIS as "statutor[il]y-based" government record distribution program); cf. White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002) [hereinafter White House Homeland Security Memorandum], reprinted in FOIA Post (posted 3/21/02) (requiring agencies to exercise special care in distributing information through Defense Technical Information Center (commonly known as "DTIC"), particularly regarding information relating to development of weapons of mass destruction, in light of heightened homeland security concerns).

¹⁹ See, e.g., Gaunce v. Burnett, 849 F.2d 1475, 1475 (9th Cir. 1988) (unpublished table decision) (finding assessment of \$13.25 for copy of FAA order proper, notwithstanding its subsection (a)(2) character, because "FOIA allows copies of orders to be 'offered for sale'"); Jackson v. Heckler, 580 F. Supp. 1077, 1081 (E.D. Pa. 1984) (holding that Social Security Ruling relied on by administrative law judge need not be made "available for inspection and copying" pursuant to subsection (a)(2)(B) because it was

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Agencies have made good use of their FOIA reading rooms in achieving efficient "affirmative" disclosure of records that otherwise might be sought through less efficient FOIA requests.²⁰ In so doing, though, they must be mindful of the distinction between subsection (a)(2) records (i.e., "reading room" records) and subsection (a)(3) records (i.e., records subject to standard "FOIA requests") under the Act.²¹

The Electronic Freedom of Information Act Amendments of 1996²² heavily modified the requirements of subsection (a)(2) by creating a fourth category of "reading room" records,²³ and by establishing a requirement for the electronic availability of "reading room" records in what are referred to

¹⁹(...continued)

"published for sale"); see also FOIA Update, Vol. XVII, No. 4, at 1 (noting that "reading room" obligation does not apply to any records that "are promptly published and [are] offered for sale" (quoting 5 U.S.C. § 552(a)(2))); Attorney General's 1967 FOIA Memorandum 15 (noting that "[t]his is to afford the agency 'an alternative means of making these materials available through publication'" (quoting S. Rep. No. 89-813, at 7 (1966))); cf. NARA v. Favish, 541 U.S. 157, 169 (evincing the Supreme Court's reliance on "the Attorney General's consistent interpretation of" the FOIA in successive such Attorney General memoranda), reh'g denied, 541 U.S. 1057 (2004).

²⁰ See, e.g., FOIA Update, Vol. XVI, No. 1, at 1-2 (promoting "affirmative" agency disclosure practices through "reading room" access, among other means); FOIA Update, Vol. XIX, No. 1, at 1 (discussing Department of the Air Force affirmative electronic information disclosure program); see also Exec. Order No. 13,392, Sec. 3(b)(ii) (requiring agencies' FOIA Implementation Plans to include increased reliance on affirmative availability of records); FOIA Post, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (discussing importance of continuing obligation to make subsection (a)(2) records affirmatively available); FOIA Post, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (emphasizing that bringing any "pre-existing reading room availability" to "FOIA requesters' attention . . . could be a basis for resolving their requests most efficiently").

²¹ See, e.g., FOIA Update, Vol. XVI, No. 1, at 2 (reminding that "an agency cannot convert a subsection (a)(3) record into a subsection (a)(2) record (which cannot be the subject of a FOIA request under subsection (a)(3)) just by voluntarily placing it into its reading room"); FOIA Update, Vol. XII, No. 2, at 5 (advising that FOIA requesters may not be deprived of subsection (a)(3) access rights through voluntary "reading room" availability). But cf. Tax Analysts, 1998 WL 419755, at *4 (failing to distinguish between records subject to subsection (a)(2) and those subject to subsection (a)(3)).

²² Pub. L. No. 104-231, 110 Stat. 3048.

²³ See 5 U.S.C. § 552(a)(2)(D).

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as "electronic reading rooms."²⁴ The Electronic FOIA amendments greatly elevated the role of agency reading rooms -- and, in turn, agency sites on the World Wide Web -- in the processes of FOIA administration.²⁵

First, in addition to the traditional three categories of "reading room" records discussed above, agencies must also include any records processed and disclosed in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."²⁶ Under this provision, when records are disclosed in response to a FOIA request, an agency is required to determine whether they have been the subject of multiple FOIA requests (i.e., two or more additional ones) or, in the agency's best judgment based upon the nature of the records and the types of requests regularly received, are likely to be the subject of multiple requests in the future.²⁷

Inasmuch as this requirement by definition begins with the processing of records disclosed in response to a FOIA request, and then is met by multiple other such "requests,"²⁸ it is either the receipt or the anticipation of the third such request that triggers it.²⁹ If either is the case,³⁰ then those

²⁴ See *id.* § 552(a)(2); see also *FOIA Update*, Vol. XIX, No. 4, at 4-5 (emphasizing importance of "electronic reading rooms" in satisfying FOIA obligations); *FOIA Update*, Vol. XVII, No. 4, at 1-2 (discussing statutory changes).

²⁵ See *FOIA Post*, "Agencies Continue E-FOIA Implementation" (posted 3/14/01) (advising of growing attention being paid to agencies' "electronic reading rooms"); see also *FOIA Post*, "Follow-Up Report on E-FOIA Implementation Issued" (posted 9/27/02) (describing results of GAO's updated review of agency compliance with "electronic reading room" requirements); *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (describing GAO report's emphasis on agency compliance with "electronic reading room" obligations); *FOIA Update*, Vol. XIX, No. 3, at 1 (describing 1998 congressional hearing on agency amendment-implementation activities).

²⁶ 5 U.S.C. § 552(a)(2)(D).

²⁷ See *FOIA Update*, Vol. XVIII, No. 1, at 3-4 (advising on processes for exercise of agency judgment under fourth "reading room" category).

²⁸ 5 U.S.C. § 552(a)(2)(D) (speaking of "requests" in plural form, above and beyond FOIA request already received).

²⁹ See *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (explaining the "rule of three" that is employed to determine the applicability of subsection (a)(2)(D)); see also *FOIA Update*, Vol. XVII, No. 4, at 1 (describing subsection (a)(2)(D) obligations); *FOIA Update*, Vol. XVIII, No. 1, at 3-4 (same). But see *FOIA Update*, Vol. XVIII, No. 2, at 2 (advising that agencies need not include records processed for "flur-

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records in their FOIA-processed form become "reading room" records,³¹ which must automatically be made available to potential FOIA requesters.³² Ideally, this availability will satisfy much of the future public demand for those processed records in a more efficient fashion.³³ Nevertheless, any subsequent FOIA request received for such records has to be responded to in the regular way as well, if the requester so chooses.³⁴

²⁹(...continued)

ry" of contemporaneous multiple requests when they are not likely to be requested again -- e.g., requests for certain types of routine government contract submissions); see also *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (addressing the "comparable circumstances" in which agencies may determine likewise over time).

³⁰ See *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (discussing placement of records in a reading room based upon the subsection's "likely to become the subject of subsequent requests" standard).

³¹ See *id.* (reminding that "an agency's (a)(2)(D) obligation arises only with respect to any FOIA-processed record that is disclosed at least in some part," and at the same time advising that with slightly different multiple requests only "'overlap' records" are included within the obligation).

³² See *FOIA Update*, Vol. XVII, No. 4, at 1-2 (discussing operation of subsection (a)(2)); see also *FOIA Update*, Vol. XIX, No. 1, at 3-4 (compilation of OIP policy guidance regarding "reading room" matters); cf. *Tax Analysts*, 1998 WL 419755, at *4, 6 (requiring agency to place exceptionally large volume of FOIA-processed records in reading room on weekly basis, as they are processed, rather than all at once at conclusion of lengthy processing period). But see *FOIA Update*, Vol. XVIII, No. 1, at 3 (cautioning that any information about any first-party requester that would not be disclosed to any other FOIA requester, such as information protected by Privacy Act of 1974 or Trade Secrets Act, 18 U.S.C. § 1905 (2000 & Supp. IV 2004), would not be appropriate for automatic public disclosure under fourth "reading room" category).

³³ See *FOIA Update*, Vol. XVIII, No. 2, at 2 (citing H.R. Rep. No. 104-795, at 21 (1996)); see also *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (discussing underlying purpose of fourth "reading room" category); *FOIA Update*, Vol. XVII, No. 4, at 1 (emphasizing connection between fourth "reading room" category and "electronic reading room" mechanism in meeting public access demands); cf. 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 (expressing "hope that there will be less need to use FOIA to obtain government information").

³⁴ 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
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Second, the Electronic FOIA amendments require agencies to use electronic information technology to enhance the availability of their "reading room" records: Agencies must make the records created by them on or after November 1, 1996³⁵ in all four "reading room" categories available to the public by "electronic means."³⁶ The Electronic FOIA amendments embodied a strong statutory preference that electronic availability be provided by agencies in the form of online, World Wide Web access -- which is most efficient for both agencies and the public alike³⁷ -- and this expectation has been met by the development of agency FOIA sites on the World Wide Web.³⁸

Agencies therefore must maintain in their conventional "paper" reading rooms copies of any FOIA-processed records determined to fall within

³⁴(...continued)

be subject of regular FOIA request, Congress made clear that such rule does not apply to fourth "reading room" category of FOIA-processed records (citing H.R. Rep. No. 104-795, at 21 (1996)); see also *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (advising that "the pre-existing reading room availability of records responsive to those subsequent requests in an electronic reading room on an agency's FOIA Web site, once brought to those FOIA requesters' attention, could be a basis for resolving those requests most efficiently").

³⁵ See 5 U.S.C. § 552(a)(2); see also *FOIA Post*, "Electronic Compilation of E-FOIA Implementation Guidance" (posted 2/28/03); FOIA Update, Vol. XVIII, No. 1, at 4-5.

³⁶ 5 U.S.C. § 552(a)(2); see also FOIA Update, Vol. XVIII, No. 1, at 3 (advising that records made available in "electronic reading rooms" must nevertheless be made available in conventional "paper" reading rooms as well (citing H.R. Rep. No. 104-795, at 21 (1996))).

³⁷ See 5 U.S.C. § 552(a)(2) (stressing use of "computer telecommunications," and establishing absolute requirement of World Wide Web use by all agencies); see also FOIA Update, Vol. XIX, No. 4, at 4-5 (emphasizing importance of "new partnership" between agency FOIA officers and agency Information Technology (IT) personnel to achieve efficient disclosure through electronic means); FOIA Update, Vol. XVIII, No. 3, at 1-2 (describing efficiency of online public access).

³⁸ See *FOIA Post*, "Follow-Up Report on E-FOIA Implementation Issued" (posted 9/27/02) (discussing GAO conclusion that agencies are not devoting sufficient attention to on-line electronic availability requirements); *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (recognizing universal development of agency FOIA Web sites, but nonetheless urging "careful vigilance in both the establishment and the augmentation of agency FOIA Web sites with the passage of time").

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the fourth subsection (a)(2) category,³⁹ and must identify such records that were created by them on or after the November 1, 1996 "cut-off" date in order to make them available through their "electronic reading rooms" as well.⁴⁰ In doing so, they should be mindful that some of the records falling under this fourth category might not have been created by the agency and instead might have been generated elsewhere; while such records may be determined by the agency to fall within subsection (a)(2)(D), they are not "created" by the agency and should not be regarded as subject to the electronic availability requirement.⁴¹ However, an agency may as a matter of administrative discretion choose to make such records available electronically even though they were not generated by the agency, or not created after November 1, 1996, when to do so would be most cost-effective in serving public access needs under subsection (a)(2)(D).⁴²

Furthermore, agencies should make clear to the users of their "electronic reading rooms" that while all of their subsection (a)(2) records are

³⁹ See FOIA Update, Vol. XIX, No. 1, at 3 (advising that agencies "should use their judgment as to the length of time that records determined to fall within the new reading room category should continue to be maintained in a reading room"); FOIA Update, Vol. XVIII, No. 1, at 4 (advising that agencies may determine that records no longer fall within fourth "reading room" category after passage of time); see also *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (advising that agencies "certainly can consider the absence of predicted FOIA requests as a factor in determining whether the continued maintenance of a record as a 'frequently requested' record is warranted").

⁴⁰ See FOIA Update, Vol. XVIII, No. 1, at 5 (advising that redaction of record during FOIA processing does not amount to record "creation" for purposes of determining applicability of electronic availability requirement); see also FOIA Update, Vol. XVII, No. 4, at 2 (observing that in case of FOIA-processed records, very large proportion of those records would have been created prior to Nov. 1, 1996 "cut-off" date, until long after Electronic FOIA amendments' initial implementation, and therefore would not have been subject to electronic availability requirement); cf. *FOIA Post*, "Use of 'Cut-Off Dates in FOIA Searches" (posted 5/6/04) (advising in comparable FOIA-request context that "scope" of agency's search obligation "has both substantive and temporal aspects").

⁴¹ See FOIA Update, Vol. XVIII, No. 1, at 4-5 (citing U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144 (1989)); see also 63 Fed. Reg. 29,591, 29,592 (June 1, 1998) (discussing Department of Justice regulation on point, currently at 28 C.F.R. § 16.2(c) (2006)).

⁴² See FOIA Update, Vol. XIX, No. 1, at 4; see, e.g., FOIA Update, Vol. XIX, No. 3, at 5; accord Exec. Order No. 13,392, Sec. 3(a)(iv). But see FOIA Update, Vol. XVIII, No. 1, at 5 (cautioning agencies to guard against possibility that "electronic reading room" treatment of record generated by outside party might be regarded as copyright infringement by that party).

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available in their conventional reading rooms,⁴³ generally only those records created on or after November 1, 1996 are available in their electronic ones.⁴⁴ In addition, they should utilize indices to facilitate use of both types of reading rooms;⁴⁵ indeed, they are required by the Electronic FOIA amendments to maintain indexes of the FOIA-processed records in the fourth "reading room" category and to make them available on their FOIA Web sites.⁴⁶

FOIA Web Sites

Under the Electronic FOIA amendments, all federal agencies have FOIA sites on the World Wide Web to serve the "electronic reading room" function,⁴⁷ as well as for other FOIA-related purposes.⁴⁸ Especially now

⁴³ See FOIA Update, Vol. XVIII, No. 1, at 3 (advising agencies of utility of using computer terminals to meet statutory obligation, thus beginning trend that is becoming universal among agencies).

⁴⁴ See FOIA Update, Vol. XIX, No. 3, at 4; FOIA Update, Vol. XVII, No. 4, at 2; see also FOIA Update, Vol. XVIII, No. 2, at 2 (advising agencies on practical treatment of written signatures on adjudicatory orders for "electronic reading room" purposes).

⁴⁵ See FOIA Update, Vol. XIX, No. 3, at 4 (recommending use of "visible links" for electronic indexing purposes); cf. FOIA Update, Vol. XVIII, No. 3, at 1-2 (describing early agency use of home pages and electronic links for FOIA-related purposes on agency World Wide Web sites).

⁴⁶ 5 U.S.C. § 552(a)(2)(E); cf. *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (setting forth guidelines for new section in annual FOIA reports describing agency's progress under its FOIA Improvement Plan, in accordance with Executive Order 13,392); FOIA Update, Vol. XVIII, No. 3, at 3-7 (setting forth Justice Department guidelines for agency preparation and submission of revised form of annual FOIA reports, as required to be prepared by all agencies electronically and made available on FOIA Web sites); FOIA Update, Vol. XIX, No. 3, at 2 (advising agencies on proper FOIA Web site treatment of 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); see also *FOIA Post*, "FOIA Counselor Q&A: Annual FOIA Reports" (posted 12/19/03) (providing additional guidance regarding posting of annual FOIA reports).

⁴⁷ 5 U.S.C. § 552(a)(2) (2000 & Supp. IV 2004); see *FOIA Post*, "Supplemental Guidance on Annual FOIA Reports" (posted 8/13/01) (recognizing that all federal agencies now have established Web sites for FOIA purposes); FOIA Update, Vol. XIX, No. 3, at 3-4 ("OIP Guidance: Recommendations for FOIA Web Sites"); FOIA Update, Vol. XIX, No. 2, at 2 ("Web Site Watch" discussion of agency FOIA Web sites); FOIA Update, Vol. XIX, No.

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under Executive Order 13,392,⁴⁹ special attention should be paid to FOIA Web sites by all agencies because they are a matter of great and growing importance to the processes of FOIA administration.⁵⁰

There are two distinct elements of a well-designed FOIA page of which agencies should be mindful.⁵¹ First and foremost is the ease of locating and accessing agency FOIA information.⁵² In order for Web users to be able to access an agency's FOIA home page quickly and simply, every agency's main home page should have a clear, unmistakable link to its main FOIA page.⁵³ Furthermore, agencies' "electronic reading rooms"

⁴⁷(...continued)

1, at 2 (same); FOIA Update, Vol. XVIII, No. 3, at 1-2 (describing early agency development of World Wide Web sites for FOIA-related purposes, including "electronic reading rooms").

⁴⁸ See, e.g., 5 U.S.C. § 552(e)(2) (setting forth requirement that each agency make its annual FOIA report available to public electronically); see also FOIA Update, Vol. XIX, No. 3, at 3-4 (recommending that FOIA Web sites include links to agency's FOIA Reference Guide and its FOIA/Privacy Act regulations); cf. FOIA Update, Vol. XIX, No. 1, at 6 (encouraging agencies to consider as matter of administrative discretion establishing capability to receive FOIA requests via World Wide Web).

⁴⁹ 70 Fed. Reg. 75,373 (Dec. 14, 2005) (requiring agencies to review practices relating to making information available on agency Web sites); see also FOIA Post, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (emphasizing importance of agency FOIA Web sites to processes of FOIA administration).

⁵⁰ See Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information," 8 (Oct. 16, 2006), available at http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf (recognizing significance of agency Web sites to "modern agency administration" of FOIA); FOIA Update, Vol. XIX, No. 4, at 5 (observing that "an agency's FOIA Web site has become an essential means by which its FOIA obligations are satisfied," so FOIA Web site support "should be a primary mission of each agency's IT staff"); FOIA Update, Vol. XIX, No. 3, at 1 (describing congressional interest in agency Web site development for purposes of FOIA administration); id. at 1, 3 (describing governmentwide attention to same). See generally FOIA Post, "GAO to Update Its E-FOIA Implementation Study" (posted 3/8/02).

⁵¹ See FOIA Update, Vol. XIX, No. 3, at 3-4 (recommending basic elements and features of agency FOIA Web sites).

⁵² See FOIA Update, Vol. XIX, No. 3, at 3 (advising that "[c]larity to the [W]eb site user is essential to the effectiveness of the site").

⁵³ See FOIA Update, Vol. XIX, No. 3, at 3-4 (emphasizing vital impor-

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should be clearly designated as such and should contain index listings of agency reading room contents with direct links to those records that are available electronically.⁵⁴ Agencies of such size that they contain sub-agencies or major agency components that administer the FOIA on a decentralized basis and have their own Web sites may maintain multiple "electronic reading rooms," so long as they are linked together clearly and efficiently for Web site users.⁵⁵

Second, agencies should pay very close attention to both the accuracy and the timeliness of the information that they maintain on their FOIA Web site pages.⁵⁶ The very nature of this FOIA obligation is such that without continuous diligent attention to it an agency can quickly fall out of compliance with the passage of time.⁵⁷ This can best be achieved by thoroughly reviewing each aspect of agency FOIA pages on no less than a quarterly basis, if not more frequently.⁵⁸

The need to consistently review and update agency Web sites has become even more important after the issuance of Executive Order 13,392, which specifically addressed the use of agency Web sites in making more

⁵³(...continued)

tance of ability to access agency's FOIA Web site directly from agency's main home page); see also Office of Management and Budget Memorandum for Heads of Executive Departments and Agencies Concerning Policies for Federal Agency Public Websites (Dec. 17, 2004) (requiring agencies to link to certain basic information from main agency home page, including FOIA information).

⁵⁴ See FOIA Update, Vol. XIX, No. 3, at 4 (recommending that part of FOIA Web site be specifically designated as agency "reading room" and that reading room records be grouped according to category).

⁵⁵ See FOIA Update, Vol. XIX, No. 1, at 6 (advising on use of FOIA Web sites by all agency components "once an agency has established its World Wide Web capability"); FOIA Update, Vol. XVIII, No. 1, at 4 (advising that agencies with separate "electronic reading rooms" for separate components "should ensure that [they] are linked together electronically so as to facilitate efficient user access").

⁵⁶ See FOIA Update, Vol. XIX, No. 2, at 2 (emphasizing importance of keeping Web sites accurate and up-to-date).

⁵⁷ See FOIA Post, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (emphasizing that, with passage of time, "careful vigilance" is needed in maintaining FOIA Web sites).

⁵⁸ See FOIA Update, Vol. XIX, No. 3, at 4 (recommending that agencies check both accuracy and viability of their FOIA Web site links and text content of their FOIA Web site home pages on regular basis).

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information available to the public.⁵⁹

All agencies were required by Executive Order 13,392 to review their FOIA operations with both efficiency and customer service in mind, and to develop plans to improve their administration of the FOIA.⁶⁰ Agencies were specifically called upon to review the use of their World Wide Web sites in making subsection (a)(2) records available, as well as in making proactive disclosures of other information.⁶¹ They also were required to include in their FOIA Improvement Plans specific information regarding the dissemination of information through the agency's Web site.⁶²

Significantly, Executive Order 13,392 addressed both the spontaneous disclosure of records to the public pursuant to subsection (a)(2) of the FOIA and the public disclosure of information on a voluntary basis.⁶³ In

⁵⁹ See Executive Order 13,392, Sec. 1(b).

⁶⁰ See id. at Sec. 1(b), (c); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (containing more than two dozen potential improvement areas for possible inclusion in agency FOIA Improvement Plans).

⁶¹ See Exec. Order No. 13,392, Sec. 3(a)(iv) (requiring agencies to "review the agency's policies and practices relating to the availability of public information through websites and other means, including the use of websites to make available the records described in section 552(a)(2)"); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (urging agencies to consider related areas of affirmative disclosure and proactive disclosure, as well as overall FOIA Web site improvement, in developing their FOIA Improvement Plans).

⁶² See Exec. Order No. 13,392, Sec. 3(b)(ii) ("The plan shall include specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog, including . . . increased reliance on the dissemination of records that can be made available to the public through a website or other means that do not require the public to make a request for the records under the FOIA."); cf. Department of Justice FOIA Improvement Plan at 10-11, 21, 117-18 (describing goals to use component FOIA Web sites for both affirmative and proactive disclosures); Federal Deposit Insurance Corporation FOIA Improvement Plan at 7-10 (describing significant efforts in improving affirmative disclosure of subsection (a)(2) information as well as proactive disclosure of other information of interest to public).

⁶³ See Exec. Order 13,392, Sec. 3(a)(iv), (b)(ii); see also Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled "Improving Agency Disclosure of Information," 8 (Oct. 16, 2006), available at http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf (explaining that affirmative disclosure "involves the spontaneous disclosure of information to the public pursuant to subsection (a)(2)," while proactive disclosure

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both cases, the agency's disclosure efforts can meet the public demand for information and thereby greatly reduce the need for the public to make FOIA requests.⁶⁴ (For a further detailed discussion of Executive Order 13,392 see Procedural Requirements, Executive Order 13,392, below.)

In accordance with Executive Order 13,392, agencies are encouraged to make a wide range of records available through their World Wide Web sites as a matter of administrative discretion.⁶⁵ But in so doing, of course, they should make sure that all possible security concerns regarding these records have been carefully considered.⁶⁶

In sum, all agencies should continue to be vigilant in maintaining and augmenting their FOIA Web sites in order to ensure consistent compliance with both the Electronic FOIA amendments¹ and Executive Order 13,392's important electronic availability requirements.⁶⁷

⁶³(...continued)

"refers to the public disclosure of records or information on a voluntary (i.e., not FOIA-compelled) basis"); *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (encouraging proactive disclosure "when an agency has public information that does not fall into any subsection (a)(2) category but nevertheless could be made readily available to the public").

⁶⁴ See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (emphasizing that proactive disclosure of information can reduce need for FOIA requests).

⁶⁵ See *Information Policy in the 21st Century: A Review of the Freedom of Information Act: Hearing Before the Subcommittee on Government Management, Finance, and Accountability, Committee on Government Reform, House of Representatives, 109th Cong. 72 (2005)* (statement of Department of Justice describing difference between removal from agency Web site of information not required to be there in first place -- which is not FOIA issue -- and removal of information required by FOIA to be made available in electronic reading room).

⁶⁶ See, e.g., *White House Homeland Security Memorandum, reprinted in FOIA Post* (posted 3/21/02) (requiring agencies to ensure appropriate protection of information relating to weapons of mass destruction and of other sensitive homeland security-related information); *accord* Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), *reprinted in FOIA Post* (posted 10/15/01) (urging agencies to "carefully consider" the protection of fundamental societal values, including "safeguarding our national security").

⁶⁷ See Exec. Order No. 13,392, Sec. 3(a)(iv), (b)(ii); *see also* Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled (continued...)

PROCEDURAL REQUIREMENTS

PROCEDURAL REQUIREMENTS

The Freedom of Information Act requires federal agencies to make their records promptly available to any person who makes a proper request for them.¹ To provide a general overview of the Act's procedural requirements, this section first will discuss the new executive order on the FOIA, Executive Order 13,392,² followed by a roughly chronological discussion of how a typical FOIA request is processed -- from the point of determining whether an entity in receipt of a request is subject to the FOIA in the first place to the review of an agency's initial decision regarding a FOIA request on administrative appeal. (The subject of fees under the Act is discussed more fully and separately under Fees and Fee Waivers, below.) In administering the Act's procedural requirements, agencies should remember Executive Order 13,392's reminder that "FOIA requesters are seeking a

⁶⁷(...continued)

"Improving Agency Disclosure of Information," 8, 12 (Oct. 16, 2006), available at http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf (emphasizing "particular[] importan[ce]" of FOIA Web sites and also agency use of "FOIA Intranet site[s]" for more efficient FOIA administration); *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (advising that overall FOIA Web site improvement is "particularly worthwhile area for agency attention"); *FOIA Post*, "Electronic Compilation of E-FOIA Implementation Guidance" (posted 2/28/03) (urging agencies to "redouble their efforts to ensure complete E-FOIA compliance"); *FOIA Post*, "Follow-Up Report on E-FOIA Implementation Issued" (posted 9/27/02) (discussing continued congressional focus on governmentwide implementation of FOIA's electronic availability requirements); *FOIA Post*, "FOIA Officers Conference Scheduled" (posted 9/17/02) (scheduling governmentwide FOIA officers conference to focus on 2002 GAO Report as "basis for all agencies to review and improve wherever necessary their compliance with E-FOIA's requirements"); *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (advising that agencies must take all steps necessary to "both attain[] and maintain[] proper compliance with all of [the FOIA's] electronic availability requirements"); *FOIA Post*, "Agencies Continue E-FOIA Implementation" (posted 3/14/01) (identifying prospective GAO report as "excellent basis upon which all agencies can review their E-FOIA implementation compliance").

¹ 5 U.S.C. § 552(a)(3)(A) (2000 & Supp. IV 2004) (providing that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person"). But see id. at § 552(a)(3)(E) (prohibiting, as of 2002, certain agency FOIA disclosures to foreign governments or representatives of such governments); see also *FOIA Post*, "FOIA Amended by Intelligence Authorization Act" (posted 12/23/02) (advising on 2002 FOIA amendments' implementation).

² Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).