# Law and the Public's Health

This installment of *Law and the Public's Health* examines the Freedom of Information Act (FOIA), the central federal legal tool by which access to law and law-related public health information not in the general public domain is secured. The column offers a highly accessible exploration of FOIA and related laws.

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# THE FREEDOM OF INFORMATION ACT: IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

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This installment of *Law and the Public's Health* provides an overview of the federal Freedom of Information Act (FOIA).¹ FOIA is important to public health practitioners for at least three reasons: its power to aid public health advocacy, its impact on government accountability and transparency, and its ability to aid public health practice and policy-making. All states also have enacted laws governing open access to governmental information, many with provisions similar to the federal FOIA.²

Over the years, FOIA has played a central role in advancing public health policy by enabling investigations and research on topics as wide-ranging as human radiation experiments conducted during the Cold War,<sup>3–5</sup> federal farm subsidies,<sup>6–8</sup> reports about ill airline passengers,<sup>9</sup> implementation of the President's Emergency Plan for AIDS Relief,<sup>10</sup> and distracted driving due to cell phone use.<sup>11</sup>

This column explains the history of FOIA's enactment, explores its operational elements, and discusses other relevant laws that may overlap with FOIA or prove useful when FOIA is inapplicable, including the Privacy Act and state freedom-of-information and open-public-meeting laws. The article concludes with a discussion of the implications of FOIA for public health practice.

## **BACKGROUND**

FOIA, enacted in 1966, is part of the Administrative Procedure Act, which includes provisions governing rulemaking, administrative hearings, recordkeeping, and public information. FOIA's enactment came amid concern that the then-in-effect law was "used more as an excuse for withholding than as a disclosure statute." 12-14 One contemporaneous legislative report noted the "vastness" of the government and the need to promote trust and accountability.

In enacting FOIA, Congress strived to balance the encouragement of government disclosure and the need for accountability with a desire also to "protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records."14 This attempt to balance government accountability and transparency with protection of sensitive information has characterized FOIA debates since its enactment. For example, enhanced security concerns following 9/11 prompted then-Attorney General John Ashcroft to issue a memorandum to federal agencies in October 2001 recognizing FOIA's importance in promoting accountability and reducing fraud and government waste, but also emphasizing "other fundamental values held by our society" including "safeguarding our national security," "protecting sensitive business information," and promoting "functional and efficient" government.<sup>15</sup> In a January 2009 memorandum to federal agency leaders, President Barack Obama set a different tone for his incoming administration, writing that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails."16 Two months later, Attorney General Eric Holder issued a memorandum expressly rescinding the Ashcroft memorandum and advising that "[a]n agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of an FOIA exemption."17

The Holder and Presidential FOIA memorandums were well-received by journalists and open-government advocates who had regarded the Ashcroft memorandum's change in emphasis from previous FOIA policy with skepticism and concern. Nonetheless, despite the current administration's pronounced

public commitment to FOIA, some reports suggest that it has, similar to previous administrations, faced challenges in actual FOIA execution. In addition to the concerns about security, protecting confidential corporate and personal information, and ensuring government efficiency, the large number of FOIA requests—612,000 in fiscal year (FY) 2009, according to the Department of Justice (DOJ), some of which can produce thousands of responsive documents that must be reviewed by staff—can pose a challenge to FOIA implementation.

Backlogs of FOIA requests from previous years may slow agency response to new requests.<sup>25,29–31</sup> Staffing also may be an issue. DOJ estimates that in FY 2009, roughly 4,000 full-time FOIA staff were employed by the federal government.<sup>28</sup> In a recent survey, government FOIA professionals identified as key FOIA implementation obstacles both the lack of staff and shortage of funding for FOIA activities and agency staff awareness and training.<sup>25</sup>

#### **HOW FOIA WORKS**

FOIA's public disclosure provisions are codified at 5 U.S.C. §552(a);<sup>32</sup> these rules require the proactive disclosure of records such as final opinions, policy statements, and staff manuals. The provisions also require public access to certain frequently requested records, publication of regulations in the *Federal Register*, and prompt disclosure of records upon request (subject to certain exemptions).

FOIA applies to all "records" in the control or possession of a "federal agency" subject to nine exemptions and certain exclusions. Records within an agency's possession and control include those stored in databases as well as those that have been archived. Records include papers, videos, e-mails, audio recordings, maps, and computer documents. However, physical objects, such as old computers or tape recorders, are not considered records.

An "agency" for FOIA purposes "includes any executive department, military department, government corporation, government-controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency."<sup>33–35</sup> FOIA's definition of "agency" has been subject to litigation and debate but clearly does not encompass Congress; the federal courts; private individuals and corporations; and local, state, and foreign governments.<sup>34–36</sup>

Likewise, FOIA does not apply to nongovernmental or private organizations (e.g., contractors, associations, or other organizations) simply because they may receive federal funds or support.<sup>34,35,37,38</sup> However, FOIA may become applicable to these entities and others *indirectly* if relevant documents from or about these entities are in the control or possession of a federal agency and are released under FOIA. For instance, organizations have used FOIA along with other records to create a database of federal corporate contractor misconduct and to investigate state spending of federal homeland security grants.<sup>39,40</sup>

Any "person" may make an FOIA request for a record to a federal agency, even those who are not citizens or residents of the United States.<sup>34,35</sup> This includes state agencies, organizations, and corporations. On occasion, citizens of other countries have used FOIA to obtain U.S. government records about *their* governments' activities.<sup>41</sup>

To facilitate FOIA implementation, agencies are required to publish procedures and fees for FOIA requests, including contact information for FOIA requests. <sup>34,35,38,42</sup> Agency FOIA websites may be a good starting point in obtaining information about FOIA procedures, including applicable fees. In addition to agency FOIA procedures (available at http://www.justice.gov/oip/other\_age.htm), various nonprofit organizations have published useful guides about FOIA. <sup>34,36</sup>

Once an agency receives an FOIA request, the request will be logged. As the request is processed, agency FOIA staff may contact the requestor to obtain further information as to the scope and nature of the request. A search<sup>43</sup> for responsive records will be conducted. FOIA staff may themselves conduct a search for responsive documents and/or ask others in their agency to do so, including public health and regulatory program staff. Agency staff may be asked as part of a search to review their files and e-mails, and agency archives also may be searched.

Once identified, any responsive records will be reviewed by agency FOIA staff to determine if the record should be exempted from disclosure. Records may be redacted, or staff may determine that an entire record is not subject to disclosure. The agency will then respond to the request, denying the request in entirety or in part, releasing responsive records (with portions redacted if the agency has determined exemptions should apply), or stating that records will be released upon payment of an applicable fee. <sup>29,30,34,36,38,44</sup> FOIA fees may be charged for both searching/locating responsive documents and for copying/duplicating documents. Fees are detailed in each agency's FOIA policy. <sup>34,36,45</sup>

FOIA provides that agencies should respond to FOIA requests within 20 working days, but in practice most requests are not processed in this time frame. <sup>29,30,34–36,46</sup>

An agency's partial or complete denial of a request or its application of a particular exemption to all or part of a particular record may be appealed within the agency and litigated in court.

#### **FOIA** exemptions

In reviewing a record, agency FOIA staff will determine whether one of nine exemptions applies.<sup>47</sup> These exemptions include:

- 1. Records that are formally classified pursuant to an Executive Order (e.g., classified information)
- 2. Records "related solely to the internal personnel rules and practices of an agency"
- 3. Records exempted from disclosure by statute
- 4. "[T]rade secrets and commercial or financial information obtained from a person and privileged or confidential"
- 5. "[I]nter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"
- 6. "[P]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"
- 7. Law enforcement records
- 8. Federal financial institution reports
- 9. "[G]eological and geophysical information and data, including maps, concerning wells"

It is important to note that more than one exemption may apply to all or part of a record. With the exception of Exemption 3, which applies to records for which disclosure is prohibited by another statute, even should an exemption be applicable, an agency still may have the discretion to disclose a record in its entirety or in part if it determines such disclosure to be in the public interest. 34-36,48-50 Agencies will determine whether the benefit of releasing information will contribute to citizens' knowledge of government information and activities such that it outweighs any potential harm of disclosure to private individuals, organizations, or the federal government. 34,44,48,49

Although the exemptions have many valid purposes and uses, they can also frustrate attempts by journalists, researchers, and others to further FOIA's purpose of promoting government transparency and accountability. For instance, the deliberative process privilege (Exemption 5) allows pre-decisional government documents (e.g., draft agency memorandums and reports) to remain exempt from disclosure. Some

commentators have questioned agency application of this privilege.<sup>50,51</sup>

Exemptions 3 and 4 also play an important role in the public health context. Commercial confidential or trade-secret information may include information about pesticide, food, drug, or cosmetic ingredients and drug safety information. In some cases, statutes such as the Federal Insecticide, Pesticide and Rodenticide Act and the Census Act expressly prohibit agency disclosure of certain information. Information about public health regulatory agency exempt from disclosure under Exemption 7.34–36,49,52–57

#### Other related information and disclosure laws

It is important to be aware of other laws related to FOIA, government transparency, and release of information because some of these laws may overlap with FOIA or prove useful for situations in which FOIA is not applicable. Relevant laws include, but are not limited to the following:

- The Privacy Act,<sup>58</sup> enacted in 1974, which allows individuals to request certain records that federal agencies have compiled on *them* subject to certain exemptions, such as law enforcement investigations. The law also restricts federal agencies from disclosing records they have compiled about an individual without that individual's consent (again subject to certain exemptions [e.g., for law enforcement investigations]).<sup>35,59-61</sup>
- The Federal Advisory Committee Act (FACA), 62 which governs the role and functioning of federal advisory committees and includes disclosure and open-meeting provisions. 35,63-66
- The Federal Records Act<sup>67</sup> and other federal records laws, which establish procedures for managing, maintaining, and disposing of federal records. The National Archives and Records Administration oversees federal agency recordkeeping and archiving.<sup>68</sup>
- The Government in the Sunshine Act, 35,69 which requires most government meetings to be open to the public, subject to certain exceptions, such as for privacy/personnel issues, law enforcement, trade secrets, and internal agency meetings.

States also have enacted laws allowing the public to access and copy records with exemptions similar to those for the federal FOIA. States have enacted "sunshine" laws that permit the promotion of public participation in government meetings at which policy and budget decisions are made, subject to certain exemptions such as public safety and personnel matters. The Reporters Committee for the Freedom of the Press Open Government Guide includes information about freedom-of-information and public-access laws in the 50 states.<sup>35</sup>

#### **CONCLUSIONS**

By understanding FOIA's purpose and key provisions, public health workers, journalists, and researchers can make use of this powerful tool to obtain information about important public health issues. With other relevant laws such as the FACA, FOIA can help ensure that important information is disclosed to the public and help advocates of all backgrounds and ideologies participate in government decision-making. Public health workers in government agencies who understand the purpose of FOIA and similar state laws can help promote transparency and accountability in government by being responsive to FOIA requests when received and by properly understanding the relevant exemptions, and when and how they should apply. FOIA's effectiveness ultimately depends upon both the attitude and commitment with which it is approached by government agencies and their staff members and the public's insistence that the statute be implemented in a way that fulfills its vital purpose.

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