

Freedom of Information Act (FOIA): Background and Policy Options for the 112th Congress

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Summary

The Freedom of Information Act (FOIA; 5 U.S.C. §552) enables any person to access—without explanation or justification—certain existing, identifiable, unpublished, executive branch agency records. Pursuant to FOIA, the public has presumptive access to requested agency records unless the material falls within any of FOIA's nine categories of exemption from disclosure. Disputes over the accessibility of requested records can be appealed administratively or ultimately settled in court.

FOIA is a widely used tool of inquiry and information gathering for various sectors of American society—including the press, businesses, scholars, attorneys, consumers, and activists. Agency responses to FOIA requests may involve a few sheets of paper, several linear feet of records, or information in an electronic format. Assembling responses requires staff time, search time, and duplication efforts, among other resource commitments. Agency information management professionals are responsible for efficiently and economically responding to, or denying, FOIA requests.

FOIA was enacted in 1966, after 11 years of investigation and legislative development in the House, and nearly six years of consideration in the Senate. The perception that FOIA implementation at agencies was not being implemented properly has resulted in amendments in 1974, 1976, 1986, 1996, 2007, and 2010. Among the requirements in the OPEN Government Act of 2007 (P.L. 110-175), was the creation of an Office of Government Information Services (OGIS) within the National Archives and Records Administration (NARA). The office was established to review FOIA design and implementation and recommend ways to improve the statute and offer mediation services between requesters and agencies as an alternative to litigation.

The Obama Administration issued a memorandum that requires agencies to reduce their backlog of FOIA requests by 10% per year. Additionally, the Department of Justice launched FOIA.gov, an online database that gives users access to interactive tools to examine agencies' annual reports on FOIA implementation.

The 112th Congress has examined FOIA implementation at three hearings—two in the House and one in the Senate. Among the issues discussed at the hearings were concerns about a growing number of statutory exemptions to FOIA, the value of President Barack Obama's decision to make public White House visitor logs, and concerns over whether political appointees were improperly vetting FOIA responses at a federal agency.

Companion bills, known as the Faster FOIA of 2011, have been introduced in the 112th Congress. The bills (H.R. 1564 and S. 627) seek to create a 12-member commission that would examine the implementation of FOIA and recommend ways to reduce processing delays and improve FOIA administration. The 112th Congress may choose to clarify whether photographs taken of Osama Bin Laden's death should be exempted from public release or whether White House visitor logs should be released to the public. Moreover, the 112th Congress may decide to continue its oversight of agency implementation of FOIA, including whether each executive branch agency is responding properly to requests within appropriate amounts of time.

This report discusses FOIA's history, examines its implementation, and provides potential policy approaches for Congress. It will be updated as events warrant.

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Introduction[1]

The Freedom of Information Act (FOIA; 5 U.S.C. § 552), often referred to as the embodiment of "the people's right to know" about the activities and operations of government, statutorily established a presumption of public access to information held by federal departments and agencies. Enacted in 1966 to replace the public information section of the Administrative Procedure Act (APA; 5 U.S.C. Subchapter II), FOIA allows any person—individual or corporate, regardless of citizenship—to request and obtain, without explanation or justification, existing, identifiable, and unpublished agency records on any topic.[2]

Each new presidential administration has implemented FOIA differently. For example, the Department of Justice (DOJ) in the George W. Bush Administration cautioned federal agencies to give "full and deliberate consideration of the institutional, commercial, and personal privacy interests when making disclosure determinations" and assured them that DOJ would defend agency decisions in court "unless they lack[ed] a sound legal basis or present[ed] an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."[3] In contrast, the Barack Obama Administration requires agencies "to adopt a presumption in favor of disclosure."[4]

There have been several congressional hearings on the implementation of FOIA during the 112th Congress. Among the FOIA issues that the 112th Congress has addressed, and may continue to address, are

- whether political appointees were or are improperly vetting FOIA responses at federal agencies;
- whether to limit, maintain, or expand the number of exemptions to FOIA;
- how to assist agencies in reducing their FOIA backlogs;
- whether to prohibit or require the public release of photographs related to the killing of Osama bin Laden;
- whether White House visitor logs, portions of which are currently made public pursuant to Obama Administration policy, include appropriate and necessary information; and
- whether to drastically shift FOIA implementation by centralizing it in a single entity, rather than continue its implementation within each individual agency.

[1] Parts of this report are adapted from CRS Report RL32780, *Freedom of Information Act (FOIA) Amendments: 110th Congress*, by Harold C. Relyea.

[2] The Intelligence Authorization for Fiscal Year 2003 amended FOIA to preclude agencies of the intelligence community from disclosing records in response to FOIA requests made by any foreign government or international government organization. Intelligence Authorization Act for Fiscal Year 2003, (P.L. 107-306, § 312, codified at 5 U.S.C. § 552(a)(3)(E)).

[3] Memorandum from Attorney General John Ashcroft for *Heads of Federal Departments and Agencies: Freedom of Information Act*, October 12, 2001, at http://www.doi.gov/foia/foia.pdf.

[4] Memorandum from President Barack Obama for *Heads of Executive Departments and Agencies: Freedom of Information Act*, January 21, 2009, at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

This report discusses FOIA's history, examines its implementation, and discusses policy options for Congress.

FOIA Background[5]

An understanding of FOIA's history is an essential component of understanding the act's scope and its utility to Congress. FOIA applies only to the departments and agencies of the federal executive branch, and serves as the foundation for public oversight and transparency of government operations.[6] FOIA is the primary tool for the public to access federal executive branch records.

The scope of FOIA has been shaped by both historical and constitutional factors. During the latter half of the 1950s, when congressional subcommittees examined government information availability, the practices of federal departments and agencies were a primary focus. The public, the press, and even some congressional committees and subcommittees were sometimes rebuffed when seeking information from executive branch entities.[7] At the time, the preservation of, and access to, presidential records had not yet become a great public or congressional concern, so the records were ultimately not covered by FOIA.[8]

The accessibility of federal court records and congressional records, likewise, was not a primary congressional concern. Some Members and academics have asserted that, in the case of Congress, the secret journal clause or the speech or debate clause of the Constitution[9] could be impediments to the effective application of FOIA to Congress.[10] In a 1955 hearing, Representative John E.

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[5] For a more in-depth legislative history of FOIA, see CRS Report RL32780, *Freedom of Information Act (FOIA) Amendments: 110th Congress*, by Harold C. Relyea.

[6] At present, FOIA makes the requirements of the statute applicable only to an "agency," which "means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include - (A) the Congress; or (B) the courts of the United States[.]" (5 U.S.C. § 551)

The committees that developed FOIA—the House Committee on Government Operations (now known as the House Oversight and Government Reform Committee) and the Senate Committee on the Judiciary—were responding to perceived secrecy problems in the executive branch. Thus, FOIA was created, approved, and implemented with an executive branch focus. For more information on the limitations of FOIA applicability see Harold C. Relyea, "Congress and Freedom of Information: A Retrospective and a Look at the Current Issue," *Government Information Quarterly*, vol. 26 (2009), pp. 437-440.

[7] Senator Edward Kennedy, "The Freedom of Information Act Experience," remarks in the Senate, *Congressional Record*, September 22, 1976, p. 31823.

[8] For more information on preservation of and access to presidential records and vice presidential records, see CRS Report R40238, *The Presidential Records Act: Current Policy Issues for Congress*, by Wendy Ginsberg.

[9] U.S. Constitution, art. I, sec. 5, cl. 3, which directs each house of Congress to keep a journal of its proceedings and publish the same, except such parts as may be judged to require secrecy, has been interpreted to authorize the House and the Senate to keep certain records secret. See, for example, the National Constitution Center, "Interactive Constitution," at http://ratify.constitutioncenter.org/constitution/details_explanation.php?link=010&const=01_art_01. U.S. Constitution, art. 1, sec. 6, cl. 1, which specifies that Members of Congress, "for any Speech or Debate in either House ... shall not be questioned in any other Place," might be regarded as a bar to requests to Members for records concerning their floor, committee, subcommittee, or legislative activity.

[10] See U.S. Congress, Senate Committee on Governmental Affairs, *To Eliminate Congressional and Federal Double Standards*, hearing, 96th Cong., 1st sess., September 20, 1979 (Washington: GPO, 1979); Harold C. Relyea, "Public Access to Congressional Records: Present Policy and Reform Considerations," *Government Information Quarterly*, vol. 2, 1985, pp. 235-256.

Moss, chairman of the newly created Special Subcommittee on Government Information, delineated the intended scope of freedom of information legislation, saying,

> We are not studying the availability of information from Congress, although many comments have been made by the press in that field, but we are taking a long, hard look at the amount of information available from the executive and independent agencies for both the public and its elected representatives.[11]

Eleven years after that hearing, FOIA was enacted and was made applicable only to federal, executive-branch departments and agencies. At the time of its enactment, FOIA was regarded as a somewhat revolutionary law. Only two other nations—Sweden and Finland—had comparable disclosure laws, and neither law was as sweeping as the new American model. The law's premise reversed the burden of proof that had existed under the public information section of the APA, which required requesters to establish a justification or a need for the information being sought.[12] Under FOIA, in contrast, access is presumed. Agencies must justify denying access to requested information.

FOIA's enactment was revolutionary in another regard: no executive branch department or agency head had supported the legislation, and President Lyndon B. Johnson was reportedly reluctant to sign the measure.[13] Because the law was not enthusiastically received by the executive branch, supporters maintained that FOIA implementation and use sometimes requires close attention from congressional overseers.[14]

FOIA Exemptions

FOIA exempts nine categories of records from the statute's rule of disclosure.[15] The exemptions are as follows:

1. Information properly classified for national defense or foreign policy purposes as secret under criteria established by an executive order;
2. Information relating solely to agency internal personnel rules and practices;
3. Data specifically exempted from disclosure by a statute other than FOIA if that statute

[11] U.S. Congress, House Committee on Government Operations, *Availability of Information from Federal Departments and Agencies*, hearing, 84th Cong., 1st sess., November 7, 1955 (Washington: GPO, 1956), p. 3.

[12] Senator Edward Kennedy, "The Freedom of Information Act Experience," remarks in the Senate, *Congressional Record*, September 22, 1976, p. 31822.

[13] See Samuel J. Archibald, "The Freedom of Information Act Revisited," *Public Administration Review*, vol. 39, July-August 1979, pp. 311-318. See also "NOW With Bill Moyers – Politics and Economy: Bill Moyers on the Freedom of Information Act," at http://www.pbs.org/now/commentary/moyers4.html. According to Moyers, Johnson "had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets; hated them challenging the official view of reality." See also Harold C. Relyea, "Federal Freedom of Information Policy: Highlights of Recent Developments," *Government Information Quarterly*, vol. 26 (January 12, 2009), p. 314.

[14] For a detailed history of amendments to FOIA, see CRS Report R40766, *Freedom of Information Act (FOIA): Issues for the 111th Congress*, by Wendy Ginsberg.

[15] 5 U.S.C. § 552(b).

a. requires that the data be withheld from the public in such a manner as to leave no discretion on the issue;

b. establishes particular criteria for withholding information or refers to particular types of matters to be withheld; or

c. specifically cites to this exemption (if the statute is enacted after October 28, 2009, the date of enactment of the OPEN FOIA Act of 2009, P.L. 111-83);

4. Trade secrets and commercial or financial information obtained from a person that is privileged or confidential;
5. Inter- or intra-agency memoranda or letters that would not be available by law except to an agency in litigation;
6. Personnel, medical, or similar files the disclosure of which would constitute an unwarranted invasion of personal privacy;
7. Certain kinds of investigatory records compiled for law enforcement purposes;
8. Certain information relating to the regulation of financial institutions; and
9. Geological and geophysical information and data.

Some of these exemptions, such as the one concerning trade secrets and commercial or financial information, have been litigated and undergone considerable judicial interpretation.[16]

A person denied access to requested information, in whole or in part, may make an administrative appeal to the head of the agency for reconsideration. If an agency appeal is denied, an appeal for further consideration may be made in federal district court.[17] The Office of Government Information Services (OGIS), which was created within the National Archives and Records Administration (NARA) by the OPEN Government Act of 2007, and which opened in September 2009, also may provide "mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation."[18] OGIS services are advisory and non-binding. The creation and role of OGIS will be discussed in more detail later in this report.

Obama Administration Initiatives

On January 21, 2009, President Obama issued a memorandum on FOIA, stating that the act "should be administered with a clear presumption: In the face of doubt, openness prevails."[19] The memorandum stated that under the new administration

[16] For sources concerning judicial interpretation of FOIA, see Harry A. Hammitt, Marc Rotenberg, John A. Verdi and Mark S. Zaid, eds., *Litigation Under the Federal Open Government Laws:* 2010, fifth edition (Washington: EPIC Publications and The James Madison Project, 2008); James T. O'Reilly, *Federal Information Disclosure*, third edition (Eagan, MN: West Group, first published in 2000, with supplements); U.S. Department of Justice, *Freedom of Information Act Guide*, June 2009 edition (Washington, DC: GPO, 2009).

[17] 5 U.S.C. § 552(4)(B). See U.S. Congress, House Committee on Government Reform, *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, H.Rept. 109-226, 109th Cong., 1st sess. (Washington: GPO, 2005).

[18] 5 U.S.C. § 552(h)(3).

[19] Barack Obama, U.S. President, *Memorandum for the Heads of Executive Departments and Agencies: Freedom of Information Act,* January 21, 2009, at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

> All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.[20]

The memorandum directed the Attorney General to "issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*."[21]

Department of Justice Guidance

On March 19, 2009, Attorney General Eric Holder issued a memorandum in which he required "A Presumption of Openness." The memorandum explicitly rescinded former Attorney General John Ashcroft's October 12, 2001, memorandum.[22] Holder's memorandum read as follows:

> First, an agency should not withhold information simply because it may do so legally.… An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.
>
> Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.
>
> At the same time, the disclosure obligation under the FOIA is not absolute.…
>
> [T]he Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.[23]

The Obama and Holder memoranda reflected a shift from the policies of the George W. Bush Administration,[24] which required agency and department heads to release documents "only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information."[25]

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[20] Ibid.

[21] Ibid. The memorandum did not include a deadline by which such guidelines must be published.

[22] This memorandum is described in more detail below.

[23] U.S. Department of Justice, Attorney General Eric Holder, *Memorandum For the Heads of Executive Departments and Agencies: The Freedom of Information Act (FOIA)*, Washington, DC, March 19, 2009, pp. 1-2, at http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

[24] In an editorial, the Los Angeles Times called President Obama's new policy "a transformation of incalculable significance." "Obama Gives New Life to the FOIA," *The Los Angeles Times*, January 23, 2009, at http://www.latimes.com/news/printedition/opinion/la-ed-foia23-2009jan23,0,4722159.story. The Sunshine in Government Initiative said the memorandum demonstrated that transparency was a "wonderful" priority for the Obama Administration. The Sunshine in Government Initiative," January 21, 2009, press release, at http://www.sunshineingovernment.org/index.php?cat=31.

[25] John Ashcroft, U.S. Attorney General, *Memorandum for the Heads of all Federal Departments and Agencies: The Freedom of Information Act*, October 12, 2001, at http://www.doi.gov/foia/foia.pdf.

Soliciting Public Input

The Obama Administration solicited information and ideas from the public on how to make FOIA a more useful tool. In May 2009, the Administration announced a three-phase "Open Government Initiative" aimed at collecting ideas from the public on how to make government more collaborative, transparent, and participatory. From May 21 through June 3, 2009, the Obama Administration's Office of Science & Technology Policy (OSTP) entered the first phase of the directive by tapping the National Academy of Public Administration (NAPA) to host an online "brainstorming session,"[26] seeking public comment on "innovative approaches to policy, specific project suggestions, government-wide or agency-specific instructions, and any relevant examples and stories relating to law, policy, technology, culture, or practice."[27] The brainstorming session garnered 4,205 suggestions and comments, some of which addressed FOIA. One suggestion, for example, said that agencies should be required to post documents online that are released in relation to a FOIA request. The suggestion stated that such action could reduce the number of duplicative requests to which agencies and departments must respond.

From June 3 through June 26, 2009, OSTP began the second phase of its Open Government Initiative, which focused in greater depth on some of the ideas that emerged in the brainstorming session forums. On June 10, 2009, Michael Fitzpatrick, associate administrator for the Office of Information and Regulatory Affairs within the Office of Management and Budget, posted a question on OSTP's blog asking for "recommendations … for agencies to pro-actively post information on their websites to avoid a FOIA request from even occurring" and "recommendations to make FOIA reading rooms more useful and information more easily searchable, as they are meant to be a mechanism for information dissemination to the public."[28] The request prompted 58 responses, including one response that suggested documents released as part of a FOIA request not only be published online, but also be text searchable.[29]

From June 22 through July 6, 2009, OSTP conducted the third phase of the initiative: drafting. Using an online program, members of the public created online documents that included policy recommendations. Participants critiqued, endorsed, and rated the policy recommendations.[30] OSTP said that the "recommendations will inform the drafting of an 'Open Government Directive' to Executive branch agencies."[31] Among the policy recommendations posted was a suggestion to "rebuild technical capacity for information dissemination in the agencies (and government-wide)" so historical agency information can be stored electronically and accessed more efficiently when it is requested by the public.[32]

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[26] National Academy of Public Administration (NAPA), *Open Government Dialogue*, May 21, 2009, at http://opengov.ideascale.com/akira/panel.do?id=4049. When the dialogue began, users could offer ideas without signing up for a log-on identity. On May 23, 2009, NAPA changed that policy and required all participants to log into the website before their comments could be posted.

[27] Ibid.

[28] Michael Fitzpatrick, Associate Administrator for OIRA, *Transparency: Access to Information*, Executive Office of the President, Office of Science & Technology Policy, June 10, 2009, at http://blog.ostp.gov/2009/06/10/transparency-access-to-information/.

[29] *Transparency: Access to Information*, Executive Office of the President, Office of Science & Technology Policy, June 10, 2009, at http://blog.ostp.gov/2009/06/10/transparency-access-to-information/.

[30] For more information on the technology used to conduct this phase, see http://www.vimeo.com/2674991.

[31] U.S. Office of Science and Technology Policy, Executive Office of the President, *Open Government Directive, Phase 3: Drafting*, 2009.

[32] MixedInk, "Institutionalizing Transparency in Government," at http://www.mixedink.com/#/Opengov/
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On March 16, 2010, then-White House Chief of Staff Rahm Emanuel and then-Counsel to the President Bob Bauer released an additional memorandum stating their appreciation for current agency efforts to implement the FOIA in accordance with the Administration's directives, but also said "more work remains to be done."[33] The memorandum then instructed department and agency heads to "update all FOIA guidance and training materials to include the principles articulated in the President's [January 21, 2009] Memorandum."[34] It then asked department and agency heads to "assess whether [they] are devoting adequate resources to responding to FOIA requests promptly and cooperatively, consistent with the requirements for addressing this Presidential priority."[35]

Changing Agency Culture

According to FOIA.gov, a Department of Justice (DOJ) website that allows users to analyze data on FOIA requests and processing, federal agencies received 597,415 FOIA requests in FY2010, 16.1% more requests than the 514,541 made in FY2009.[36] In FY2008, agencies received 561,016 requests—9.0% more than in FY2009.[37] In FY2010, federal agencies answered or claimed exemption from answering 407,283 requests.[38] All agencies end each fiscal year with a backlog of FOIA requests. DOJ defines a backlog as "The number of requests or administrative appeals that are pending beyond the statutory time period for a response."[39]

On December 8, 2009, President Obama released his Open Government Directive—a memorandum describing how agencies were to implement the open government and transparency values he discussed in earlier Administration memoranda.[40] The directive restated the Administration's commitment to the "principle that openness is the Federal Government's default position for FOIA issues."[41] The directive also encouraged agencies to release data and information "online in an open format that can be retrieved, downloaded, indexed, and searched

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Institutionalizingtransparency.

[33] The White House, Rahm Emanuel and Bob Bauer, *Memorandum for Agency and Department Heads: Freedom of Information Act*, March 16, 2010, at http://www.whitehouse.gov/sites/default/files/rss_viewer/foia_memo_3-16-10.pdf.

[34] Ibid.

[35] Ibid.

[36] U.S. Department of Justice, "FOIA.gov," at http://www.foia.gov/index.html. FOIA.gov uses data from agencies' statutorily required annual FOIA reports. According to DOJ, "[o]ccasionally, agencies will have to make an alteration to a value from a prior year's report, and this may result in a discrepancy in a particular field from one year to the next. Additionally, please note that FOIA.Gov contains data from all agencies for Fiscal Year 2010, and contains data from many, but not all agencies for Fiscal Years 2008 and 2009." Despite these data limitations, CRS used FOIA.gov for consistency and timeliness. FOIA.gov does not include data on FOIA implementation costs. CRS, therefore, relied on Department of Justice annual reports for that information.

[37] Ibid. The number of FOIA requests made prior to this time period is difficult to quantify because DOJ data on FOIA requests was collected using a different standard than what is currently used. DOJ's new reporting requirements limit the Annual FOIA Report to information access requests that involve only use of the FOIA. Previously, requests involving the Privacy Act and other records-related laws were included in the tally.

[38] Ibid.

[39] U.S. Department of Justice, "FOIA.gov: Glossary," at http://www.foia.gov/glossary.html.

[40] Executive Office of the President, Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive*, Washington, DC, December 8, 2009, at http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.

[41] Ibid., p. 1.

by commonly used applications."[42] The information, according to the directive, was to be placed online even prior to a FOIA request, to preempt the need for such requests.[43] Pursuant to the memorandum, agencies were required to put their annual FOIA report on the Open Government website in an accessible format.

The Obama Administration directive requires agencies with a backlog of FOIA requests to reduce the number of outstanding requests by 10% per year,[44] but does not state how the Administration will address agencies that do not comply with its requirements. Moreover, a reduction in backlog does not necessarily mean an agency is more efficiently administering FOIA. For example, an agency could be eliminating a backlog by simply denying complex requests that could otherwise be released in part. Denying requests may take less time than negotiating a partial release. Additionally, some agencies may have reduced their backlog simply because they received fewer requests and not because they applied FOIA more effectively.

According to FOIA.gov, executive branch agencies have significantly reduced their backlogged requests, although the largest reductions occurred before President Obama issued the December 2009 "Open Government" directive. The number of backlogged requests at executive branch agencies dropped from 130,419 at the end of FY2008 to 75,594 at the end of FY2009 (a 42% reduction), and to 69,526 at the end of FY2010 (another 8% decline).[45] The Department of Homeland Security (DHS) alone reduced its backlogs from 74,879 at the end of FY2008 to 18,919 at the end of FY2009 (a 74.7% reduction), and to 11,383 at the end of FY2010 (another 39.8% decline).[46] Therefore, variations in other departments and agencies notwithstanding, DHS alone accounted for all of the govermentwide reductions in FOIA backlogs during this period.

Backlogs varied both between and within departments and agencies. For example, within DHS, the U.S. Citizenship and Immigration Service (USCIS) reported that it reduced its FOIA backlog by nearly 50%, from 16,081 backlogged requests in FY2009 to 8,209 requests in FY2010. According to FOIA.gov, USCIS received 71,429 requests in FY2009 and 91,503 requests in FY2010.[47] The Customs and Border Patrol, which is also within DHS, increased its backlog by 583%—from 88 requests backlogged in FY2009 to 601 backlogged requests in FY2010. USCIS received 14,804 requests in FY2009 and 18,948 in FY2010.

The House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Governmental Affairs examined whether executive branch agencies had adopted the Obama Administration's "presumption in favor of disclosure."[48] Some agencies

[42] Ibid.

[43] Publishing agency records online is one suggestion that was repeated by several members of the public who participated in the Open Government Initiative's online collaboration. On June 19, 2009, for example, a user identifying himself as Adam Rappaport from the Citizens for Responsibility and Ethics in Washington, wrote a blog comment suggesting that "agencies could pro-actively disclose information and records on their websites that would help avoid a FOIA request from even occurring." See Office of Science and Technology Policy, "OSTP Blog," at http://blog.ostp.gov/2009/06/10/transparency-access-to-information/comment-page-2/#comments.

[44] According to FOIA.gov, a backlogged request is different from a pending request, which is a "FOIA request or administrative appeal for which an agency has not yet taken final action in all respects." See U.S. Department of Justice, "FOIA.gov: Glossary," at http://www.foia.gov/glossary.html#.

[45] U.S. Department of Justice, "FOIA.gov," at http://www.foia.gov/index.html.

[46] Ibid.

[47] U.S. Department of Justice, "FOIA.gov: Glossary," at http://www.foia.gov/glossary.html#.

[48] U.S. Congress, House Committee on Oversight and Government Reform, *The Freedom of Information Act: Crowd-*
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appeared to have embraced this presumption more than others.[49] As noted previously, certain agencies reduced their FOIA backlogs, while backlogs at other agencies increased. Among the actions some agencies took in 2010 to influence their internal culture, were distributing the President's FOIA Memorandum and the Attorney General's FOIA Guidelines throughout their agencies, creating agency-specific FOIA guidance, requiring employees to attend government-wide FOIA training, and providing agency-specific FOIA training.[50]

Fees for Service

FOIA permits agencies responding to information requests to charge fees for certain administrative activities, such as records searching, reviewing, and duplicating. The amount of the fee depends on the type of requester—specifically, whether the request is made by a commercial user, the media, the general public, or an educational or noncommercial scientific institution whose purpose is scholarly or scientific research. Moreover, certain requesters may be exempted from FOIA-related fees.[51] For example, requested records may be furnished by an agency without any charge or at a reduced cost, pursuant to FOIA, "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."[52] Requesters seeking a fee exemption must explicitly request it, and the agency then determines whether they qualify.

As shown in **Figure 1**, costs to administer FOIA dropped between FY2006 and FY2008. Costs, however, rose from FY2008 to FY2009, but not to levels as high as those in FY2006. In FY2009, the latest full year for which cost information is available, the total cost of all FOIA-related activities for all federal departments and agencies, as reported in their annual FOIA reports, was an estimated $382,244,225.[53] The data reflect "an increase of nearly $44 million from FY2008."[54] According to OIG, agencies reported "[a]pproximately $28 million of the FY2009 costs were … spent on litigation-related activities. Of total FY2009 costs, $9,067,078, or approximately 3%, was reported to have been recouped by the government through the collection of FOIA fees."[55] It is unclear why FOIA costs went down from FY2006 through FY2008. One possible reason for

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Sourcing Government Oversight, 112th Cong., 1st sess., March 17, 2011, at http://oversight.house.gov/index.php?option=com_content&view=article&id=1204%3A3-17-11-qthe-freedom-of-information-act-crowd-sourcing-government-oversightq&catid=12&Itemid=20. U.S. Congress, Senate Committee on the Judiciary, *The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age*, 112th Cong., 1st sess., March 15, 2011, at http://judiciary.senate.gov/hearings/hearing.cfm?id=5033.

[49] For some examples, see U.S. Department of Justice, "2010-2011 Agency FOIA Success Stories: Creating a Culture of Transparency," at http://www.justice.gov/oip/docs/agency-success-stories2011.pdf.

[50] U.S. Department of Justice, Office of Information Policy, "FOIA Post: Summary of Agency Chief FOIA Officer Reports with Finding and OIP Guidance for Improvement," July 29, 2010, at http://www.justice.gov/oip/foiapost/2010foiapost23.htm.

[51] Ibid.

[52] 5 U.S.C. § 552(a)(4)(A)(iii).

[53] U.S. Department of Justice, FOIA Post, "Summary of Annual FOIA Reports for FY2009," at http://www.justice.gov/oip/foiapost/2010foiapost18.htm. FOIA.gov does not include data on FOIA processing costs.

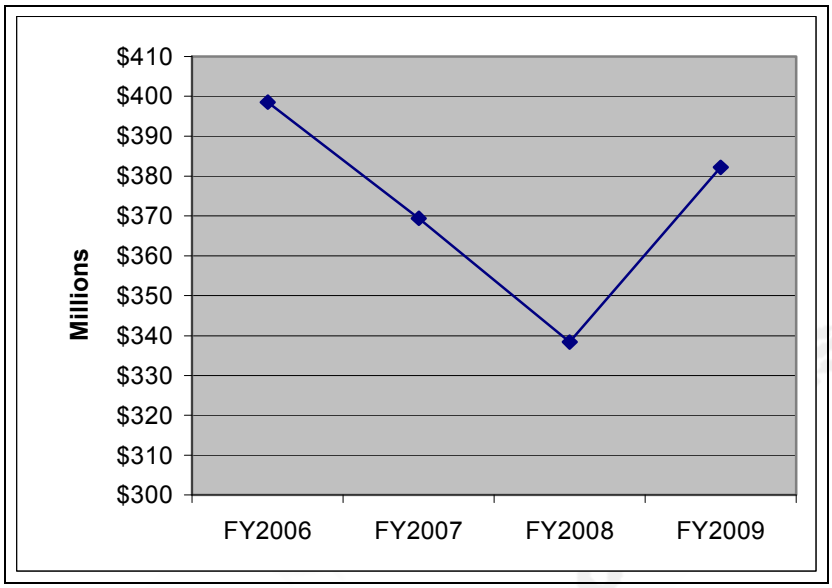
[54] U.S. Department of Justice, FOIA Post, "Summary of Annual FOIA Reports for FY2008," at http://www.justice.gov/oip/foiapost/2009foiapost16.htm.

[55] U.S. Department of Justice, FOIA Post, "Summary of Annual FOIA Reports for FY2009," at http://www.justice.gov/oip/foiapost/2010foiapost18.htm.

this cost reduction could be receipt of fewer FOIA requests, but, as noted earlier, it is not possible to determine the number of FOIA-related requests received by agencies prior to FY2008.[56] Costs could have also been affected by the expenses of pending FOIA-related lawsuits or by changes in federal employee costs.[57]

Figure 1. Costs of FOIA-Related Activities for Federal Departments and Agencies

FY2006 to FY2009



Source: U.S. Department of Justice, Office of Information Privacy, "FOIA Post," for 2007 through 2009. Information is available online at http://www.justice.gov/oip/foiapost/2007foiapost11.htm; http://www.justice.gov/oip/foiapost/2008foiapost23.htm; http://www.justice.gov/oip/foiapost/2009foiapost16.htm; and http://www.justice.gov/oip/foiapost/2010foiapost18.htm.

Notes: Data were created by the U.S. Department of Justice using the annual FOIA reports required by 5 U.S.C. § 552(e).

FOIA and the 112th Congress

The 112th Congress has demonstrated an interest in the implementation of FOIA. Legislation to create an advisory commission to examine and improve the FOIA process has been introduced in each chamber. The House has held two hearings on FOIA and the Senate has held one. In addition, FOIA-related issues have been mentioned at hearings that focused policies or actions that appeared outside the scope of FOIA. Among the issues discussed at congressional hearings were, including the increasing number and use of statutes that exempt certain records from FOIA,

[56] See footnote 37. The number of FOIA requests made prior to this time period is difficult to quantify because DOJ data on FOIA requests was collected using a different standard than what is currently used.

[57] In May 2008, the Department of Justice released a memorandum entitled "2008 Guidelines for Agency Preparation of Annual FOIA Reports" that clarified and unified how agencies are to calculate the number of FOIA personnel it employs prior to FY2009; therefore, it is not possible to compare the number of FOIA personnel across federal agencies or aggregate the total number of federal employees who work on FOIA implementation over time. See U.S. Department of Justice, *2008 Guidelines for Agency Preparation of Annual FOIA Reports*, Washington, DC, May 2008, p. 26, http://www.justice.gov/oip/foiapost/guidance-annualreport-052008.pdf.

the involvement of political appointees in FOIA request processing, the operations and use of the Office of Government Information Services (OGIS), the change or lack of change in agency implementation of new FOIA guidelines, and the release of sensitive or confidential information.

Faster FOIA

On March 17, 2011, Senator Patrick Leahy introduced S. 627, the Faster FOIA Act of 2011. The legislation would establish a temporary, 12-member advisory commission to examine FOIA request processing delays, the application of processing fees, and the clarity and proper use of exemptions. The commission would report its findings and recommendations to improve FOIA implementation to Congress and the President. Pursuant to S. 627, the chairman and ranking member of the Senate Oversight and Governmental Reform Committee and the chairman and ranking member of the House Oversight and Government Reform Committee would each appoint two members of the commission. The remaining four positions would be single appointments by each of the following persons: the Attorney General, the Director of the Office of Management and Budget, the Archivist of the United States, and the Comptroller General of the United States. At least one of the two commission members appointed by each of the chairmen and ranking members would have to possess experience "as a FOIA requester, or in the fields of library science, information management, or public access to Government information."[58] S. 627 incorporates ideas from similar pieces of legislation that were introduced in each of last three Congresses.[59] The Senate Committee on the Judiciary reported S. 627 favorably with amendments on April 8, 2011.[60] On May 26, 2011, the Senate passed S. 627 under unanimous consent.[61] In the House, S. 627 has been referred to the Committee on Oversight and Government Reform.

Use and Growth of Exemptions

The House Oversight and Government Reform Committee and the Senate Homeland Security and Governmental Affairs Committee held hearings related to oversight of FOIA during Sunshine Week (March 13-19, 2011),[62] an annual initiative to examine current practices and discuss new options to make government more accountable and transparent.[63] At both hearings, committee members discussed the difficulties of keeping track of the increasing creation and use of so-called

[58] S. 627. Section (c)(2).

[59] S. 3111 and H.R. 5087 in the 111th Congress; H.R. 541 in the 110th Congress; and S. 589 and H.R. 1620 in the 109th Congress.

[60] On April 14, 2011, Representative Brad Sherman introduced a companion bill, H.R. 1564, in the House of Representatives, and the bill was referred to the House Committee on Oversight and Government Reform.

[61] Senator Amy Klobuchar, "Faster FOIA Act of 2011," bill consideration in the Senate, *Congressional Record*, May 26, 2011, p. S3458.

[62] Sunshine Week 2011 was scheduled to coincide with American Founding Father James Madison's birthday (March 16th). For more information on Sunshine Week, see Sunshine Week: Your Right to Know, "Sunshine Week 2011—March 13-19," at http://www.sunshineweek.org/Home.aspx.

[63] U.S. Congress, House Committee on Oversight and Government Reform, *The Freedom of Information Act: Crowd-Sourcing Government Oversight*, 112th Cong., 1st sess., March 17, 2011, at http://oversight.house.gov/index.php?option=com_content&view=article&id=1204%3A3-17-11-qthe-freedom-of-information-act-crowd-sourcing-government-oversightq&catid=12&Itemid=20. U.S. Congress, Senate Committee on the Judiciary, *The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age*, 112th Cong., 1st sess., March 15, 2011, at http://judiciary.senate.gov/hearings/hearing.cfm?id=5033.

"b(3)" FOIA exemptions. These exemptions are created pursuant to FOIA's third exemption, which appears in 5 U.S.C. § 552(b)(3). The exemption protects from disclosure any information that is specifically withheld from public release by a statute other than FOIA. Since the October 28, 2009, enactment of the OPEN FOIA Act of 2009 (P.L. 111-83), any statute that exempts material from public release must specifically cite FOIA to qualify for exemption. Despite this reference requirement, it is difficult to keep track of existing and newly created b(3) FOIA exemptions or to systematically examine such exemptions prior to enactment. One example of such an exemption to FOIA was written into the Dodd-Frank Wall Street Reform and Consumer Protection Act, and will be discussed as a case study below.

Use of b(3) Exemptions[64]

ProPublica[65] reported that executive branch agencies cited more than 240 different statutory b(3) exemptions to deny FOIA requests over the past decade.[66] For example, the Consumer Product Safety Commission (CPSC) reportedly denied a total of 810 FOIA requests between 2008 and 2009. Within those 810 requests, the CPSC reportedly claimed 1,238 b(3) exemptions—sometimes responding to a single request for information with multiple b(3) exemption claims. The exemptions reportedly included claims of identity protection of certain brand-name consumer products under particular circumstances, protection of trade secrets, and protection of the identity of injured persons. The Central Intelligence Agency reportedly denied 2,437 FOIA requests and claimed 2,316 b(3) exemptions between 2008 and 2009. All of the CIA exemptions were pursuant to 50 U.S.C. 403(g), which exempts certain information for "security of the foreign intelligence activities of the United States." According to ProPublica, the Department of Veterans Affairs used b(3) exemptions the most between 2008 and 2009, with 8,331 b(3) claims.

FOIA and the Securities and Exchange Commission: A Recent Case Study

While the creation and use of b(3) exemptions may be a policy concern for the 112th Congress, one recent example of the enactment and subsequent elimination of a b(3) exemption occurred in the 111th Congress.

On July 21, 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203), which, among other things, granted the Securities and Exchange Commission (SEC) an exemption from FOIA for certain information received from entities it regulates and for information used for other regulatory and oversight activities. The SEC's FOIA exemption—which was in Section 929I of the act, "Protecting Confidentiality of Materials Submitted to the Commission"—prompted controversy over its potential application, with certain groups arguing that the exemption would allow the SEC to withhold too much information from public release.[67] Many questions were raised regarding the scope and application of this

[64] For more information on b(3) exemptions, see CRS Report R41406, *The Freedom of Information Act and Nondisclosure Provisions in Other Federal Laws* , by Gina Stevens.

[65] According to its website, ProPublica is "an independent, non-profit newsroom that produces investigative journalism in the public interest." ProPublica, "About Us," at http://www.propublica.org/about/.

[66] ProPublica, "FOIA Eyes Only: How Buried Statutes are Keeping Information Secret," March 14, 2011, at http://www.propublica.org/article/foia-exemptions-sunshine-law. The Sunshine in Government Initiative used agency annual FOIA reports to create the dataset of b(3) exemptions. These data, therefore, include only b(3) exemptions that were used to deny requests, and may not represent the total number of b(3) exemptions that exist.

[67] Dunstan Prial, "SEC Chief Schapiro Defends New FOIA Provision to Congress," *Fox Business*, (continued...)

exemption. Some asserted that Section 929I inappropriately exempted the SEC entirely from FOIA. The SEC, however, reportedly contended that the provision was necessary to obtain confidential or sensitive business information from entities now subject to SEC regulation—hedge funds, private equity funds, and venture capital funds. [68]

On September 16, 2010, the House Financial Services Committee held a hearing on the Section 929I exemption, at which SEC Chairman Mary L. Schapiro appeared. She testified that some entities had previously resisted sharing potentially sensitive information with the commission in light of concerns that FOIA and litigation could compromise the SEC's ability to protect certain information from disclosure.[69]

On August 5, 2010, Senator Patrick Leahy, chairman of the Committee on the Judiciary, introduced S. 3717, which sought to strike Section 929I from the Dodd-Frank Act.[70] The Senate passed S. 3717 by unanimous consent on September 21, 2010.[71] The House passed S. 3717 on September 23, 2010. On October 5, 2010, the bill was signed into law (P.L. 111-257).

In his opening statement at the Senate Judiciary Committee's March 15, 2011, hearing on FOIA, Chairman Leahy referred to b(3) exemptions within P.L. 111-257:

> Implementation of FOIA continues to be hampered by the increasing use of exemptions - especially under section (b)(3) of FOIA.
>
> Last year, Senators Grassley, Cornyn and I worked together on a bipartisan basis to repeal an overly-broad FOIA b(3) exemptions (sic) in the historic Wall Street reform bill, so that the American public will have access to important information about the state of our financial system.[72]

Involvement of Political Appointees

On March 30, 2011, the House Committee Oversight and Government Reform held a hearing to investigate the Department of Homeland Security's (DHS) implementation of FOIA and to examine charges of improper involvement of political appointees in the disposition of FOIA requests.[73] In Chairman Darrell Issa's "preview statement" for the hearing, he said that political

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http://www.foxbusiness.com/markets/2010/09/16/sec-chief-schapiro-defends-new-fioa-provision-congress/; and Zach Goldfarb, "Does New Financial Law Block FOIA Requests at SEC?" Washington Post, at http://voices.washingtonpost.com/market-cop/2010/07/does_new_financial_law_block_f.html.

[68] Elizabeth MacDonald, "What SEC Sources Say About Fin Reg and FOIA," *Fox Business*, July 30, 2010, at http://emac.blogs.foxbusiness.com/2010/07/30/what-sec-sources-say-about-finreg-and-foia.

[69] U.S. Congress, House Committee on Financial Services, *Legislative Proposals to Address Concerns Over the SEC's New Confidentiality Provision*, 111th Cong., 2nd sess., September 16, 2010, at http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1353.

[70] Senator Patrick Leahy, "Statements on Introduced Bills and Joint Resolutions," introductory remarks in the Senate, *Congressional Record*, August 5, 2010, pp. S6889-S6890.

[71] Senator Edward E. (Ted) Kaufman, "Freedom of Information Act Amendments," request for consideration of a bill, *Congressional Record*, September 21, 2010, pp. S7298-S7299.

[72] U.S. Congress, Senate Committee on the Judiciary, *The Freedom of Information Act: Ensuring Transparency and Accountability in the Digital Age*, 112th Cong., 1st sess., March 15, 2011, at http://judiciary.senate.gov/hearings/hearing.cfm?id=5033.

[73] U.S. Congress, House Committee on Oversight and Government Reform, *Why Isn't the Department of Homeland*
(continued...)

staff at DHS had "corrupted the agency's FOIA compliance procedures, exerted unlawful political pressure on FOIA compliance officers, and undermined the federal government's accountability to the American people."[74] In his opening statement, Chairman Issa said DHS political appointees "delayed responses" and "withheld documents."[75]

At the hearing, Mary Ellen Callahan, chief FOIA officer and chief Privacy officer at DHS, said that nearly one half of one percent of the 138,000 FOIA requests to DHS in FY2010 qualified as "significant,"[76] and, therefore, warranted notification of senior management. Ms. Callahan continued:

> In these relatively few cases, senior Department management was provided an opportunity to become aware of the contents of a release prior to its issuance to the public, primarily to enable them to respond to inquiries from members of Congress and their staffs, the media, and the public and to engage the public on the merits of the underlying policy issues. I am not aware of a single case in which anyone other than a career FOIA professional or an attorney in the Office of the General Counsel made a substantive change to a proposed FOIA release. Further, to my knowledge, no information deemed releasable by the FOIA Office or the Office of the General Counsel has at any point been withheld and responsive documents have neither been abridged nor edited.[77]

It may not be uncommon for a political appointee to be notified of the status of a FOIA request if denial of the request is likely to prompt litigation from the requester. Investigation findings released by the Office of Inspector General at the Environmental Protection Agency (EPA) on January 10, 2011, for example, found that,

> Generally, political appointees are not involved in deciding FOIA requests, unless there is denial of information. We found exceptions, but political appointees were usually involved only to sign denials or partial denials. FOIA coordinators provided regular status reports on the processing of FOIA requests to managers at various levels within the office.[78]

Oversight of the Office of Government Information Services

In addition to examining other substantive issues related to FOIA implementation, the 112th Congress may continue oversight of OGIS, an entity created in the OPEN Government Act of 2007. OGIS is required by 5 U.S.C. §552 to

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Security Meeting the President's Standard on FOIA, 112th Cong., 1st sess., March 30, 2011, http://oversight.house.gov/index.php?option=com_content&view=article&id=1223%3A3-31-11-qwhy-isnt-the-department-of-homeland-security-meeting-the-presidents-standard-on-foiaq&catid=12&Itemid=20. The first hearing on FOIA, *The Freedom of Information Act: Crowd-Sourcing Government Oversight*, was discussed earlier in this report.

[74] Ibid.

[75] Ibid.

[76] Ibid. According to Ms. Callahan, "significant" requests "included requests involving significant ongoing litigation, requests relating to sensitive topics, requests made by the media, and requests relating to Presidential or agency priorities."

[77] Ibid.

[78] U.S. Environmental Protection Agency, *Congressionally Requested Inquiry Into EPA's Handling of Freedom of Information Act Requests*, Rept. No. 11-P-0063, Washington, DC, January 10, 2011, Summary, at http://www.epa.gov/oig/reports/2011/20110110-11-P-0063.pdf.

- mediate disputes between FOIA requesters and federal agencies;
- review the policies and procedures of administrative agencies under FOIA;
- review agency compliance with FOIA; and
- recommend policy changes to the Congress and President to improve the administration of FOIA.[79]

The Creation of the Office of Government Information Services

Congress, at times, has encountered executive-branch resistance to FOIA amendments. OGIS's inception provides one such example. The OPEN Government Act of 2007 (P.L. 110-175) created OGIS to review FOIA policies and agency compliance as well as to recommend ways to improve FOIA. Pursuant to the OPEN Government Act, the office was to be placed within the National Archives and Records Administration (NARA). President George W. Bush's FY2009 budget recommendations, however, attempted to remove OGIS from NARA and place its responsibilities within the Department of Justice.[80]

Some Members and open government organizations were concerned that the Bush Administration's desired arrangement could give DOJ control over the OGIS, perhaps to the point of eradicating it. DOJ, could, for example, allocate OGIS funds to its own Office of Information and Privacy, which oversees FOIA compliance by federal agencies.[81] In creating OGIS, legislators had consciously placed it outside of the Department of Justice, which represents agencies sued by FOIA requesters.

The 111th Congress responded to the Administration's recommendation by appropriating $1 million for OGIS and explicitly requiring its establishment within NARA.[82] OGIS began operations within NARA in September 2009.[83] Subsequent appropriations for OGIS have come from NARA's general appropriation and have not appeared as a separate line-item.

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[79] OGIS would review agency policies and procedures, audit agency performance, recommend policy changes, and mediate disputes between FOIA requesters and agencies with a view to alleviating the need for litigation, while not limiting the ability of a requester to litigate FOIA claims.

[80] U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2009—Appendix* (Washington: GPO, 2008), p. 239. Sec. 519 of the budget recommendations read as follows:

> The Department of Justice shall carry out the responsibilities of the office established in 5 U.S.C. 552(h), from amounts made available in the Department of Justice appropriation for "General Administration Salaries and Expenses." In addition, subsection (h) of section 552 of title 5, United States Code, is hereby repealed, and subsections (i) through (l) are redesignated as (h) through (k).

[81] See U.S. Senator Patrick Leahy, "Leahy: FOIA Ombudsman Belongs At Archives, Not DOJ," press release, February 14, 2008, http://leahy.senate.gov/press/200802/021408a.html; and Citizen Media Law Project, "Bush Refuses to Fund New FOIA Ombudsman, Takes the Heart Out of Open Government Reform Law," weblog, February 7, 2008, at http://www.citmedialaw.org/blog/2008/bush-refuses-fund-new-foia-ombudsman-takes-heart-out-open-government-reform-law.

[82] P.L. 111-8. See also U.S. Congress, House Committee on Appropriations, *Explanatory Statement to Accompany Omnibus Appropriations Act, 2009*, committee print, 111th Cong., 1st sess., p. 988, at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_house_committee_prints&docid=f:47494d.pdf.

[83] For more information on OGIS appropriations, see CRS Report R41340, *Financial Services and General Government (FSGG): FY2011 Appropriations*, coordinated by Garrett Hatch.

OGIS Operations

According to OGIS, it received 565 cases related to information access for review between its September 2009 inception and January 31, 2011. Nearly 80 cases were pending as of June 3, 2011.[84] According to OGIS, most of its caseload involved disputes over the length of time a request was taking, an outright denial of a request, or the fees charged to complete a request. About a quarter of its cases addressed FOIA request denials. OGIS could not resolve 30 FOIA disputes in its caseload to the satisfaction of the complainant. Among the disputes it was unable to resolve was a case in which OGIS recommended that an agency provide the information, which the agency did, and the requester remained unsatisfied. In another case, a federal agency agreed to OGIS remediation, but the requester's attorney advised against such action. OGIS has assisted FOIA requesters in 43 states, the District of Columbia, Puerto Rico, and foreign countries. Most of OGIS's cases came from four cabinet agencies.

- The Department of Justice (34%)
- The Department of Veterans Affairs (9%)
- The Department of Homeland Security (7%)
- The Department of Defense (7%)[85]

In 2010, OGIS worked with the Department of Justice's Office of Information Policy to develop and present three full-day training sessions that applied alternative dispute resolution principles to conflicts involving FOIA requests. OGIS plans to offer four training sessions in 2011.

OGIS is working to design "a more robust framework for reviewing FOIA policies, procedures, and compliance."[86] The office also is assessing its own effectiveness and examining possible collaborative work with willing agencies to review FOIA operations at the agencies themselves.

Releasing Controversial Information

Congress has explicitly exempted certain controversial materials from public release under FOIA. For example, in the 111th Congress, the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83) exempted photographs of the treatment of certain individuals from public disclosure pursuant to FOIA.

Specifically, section 565 of P.L. 111-83 authorizes the Secretary of the Department of Defense to withhold from disclosure any photographic record that "would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."[87] The law requires the photographs to have been taken between September 11, 2001, and January 22, 2009, and be "related to the treatment

[84] Excel spreadsheets of OGIS's caseload are available on the agency's website, National Archives: Office of Government Information Services (OGIS), at http://www.archives.gov/ogis/.

[85] A large number of cases referred to OGIS does not, necessarily, reflect inappropriate application of FOIA's requirements. Agencies with the largest number of cases taken up by OGIS include information on OGIS and its operations in their FOIA response letters. Moreover, these agencies are among those with the highest volume of FOIA requests.

[86] Information provided electronically to the author from OGIS on July 12, 2011.

[87] P.L. 111-83; 125 Stat. 2184-2185.

of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States." Photographs are exempted from public release for three years, and it appears that the Secretary can extend that exemption in three year increments in perpetuity.[88]

Releasing Photographs of Osama bin Laden's Death

The killing of Osama bin Laden in Pakistan has raised new questions about publicly releasing sensitive, but important documentary materials. For example, it is unclear what authority President Obama is employing to protect photographs of bin Laden's death from public release. [89] The photographs of bin Laden's death would have been taken after the dates specified for exemption from public release in P.L. 111-83, described above. The photographs, therefore, do not appear to be eligible for that protection.

As noted earlier in this report, FOIA covers all executive branch agencies. The Navy SEAL unit that killed bin Laden did so as part of an operation by Central Intelligence Agency (CIA) and the Department of Defense (DOD)—both of which are covered by FOIA. It is unclear, however, whether the Executive Office of the President (parts of which are exempt from FOIA), the CIA, or the DOD have legal custody of the photographs of bin Laden's death. The Administration has not clarified which entity or entities have jurisdiction over the photographs.

The Associated Press (AP) reported that it filed a FOIA request with DOD for the photographs on May 2, 2011.[90] The AP reported that it asked for expedited processing of the request.[91] On May 18, 2011, AP reported that DOD rejected its request for expedited processing. DOD's formal rejection of the expedited processing could constitute acknowledgement that the department intends to process AP's FOIA request.[92] Pursuant to FOIA, the federal government has up to 20

[88] P.L. 111-83, Section 565(d)(3).

[89] Craig Whitlock and William Wan, "U.S. cautious on releasing proof of bin Laden's death," *Washington Post*, May 2, 2011, at http://www.washingtonpost.com/national/bin-ladens-secret-sea-burial-adds-to-the-mystery-of-his-life/2011/05/02/AF4uEPZF_story.html?hpid=z3.

[90] Pauline Jelinek, "Only 1 killed in bin Laden raid was armed," *Associated Press* (as published by *Forbes)*, May 5, 2011, at http://www.forbes.com/feeds/ap/2011/05/05/general-us-bin-laden_8451710.html.

[91] According to DOJ, FOIA requests can be expedited if they qualify under any one of the following four circumstances:

- if the lack of expedited treatment could reasonably be expected to pose a threat to someone's life or physical safety;
- if an individual will suffer the loss of substantial due process rights, expedition is appropriate. In this regard, a request will not normally be expedited merely because the requester is facing a court deadline in a judicial proceeding;
- if the request is made by a person primarily engaged in disseminating information to the public and the information is urgently needed to inform the public concerning some actual or alleged federal government activity; or
- if the subject of the request is of widespread and exceptional media interest and the information sought involves possible questions about the government's integrity which affect public confidence. Decisions to expedite under this fourth standard are made by DOJ's Director of Public Affairs.

U.S. Department of Justice, "Freedom of Information Act Reference Guide," at http://www.justice.gov/oip/referenceguide.htm.

[92] Processing the request does not imply that AP will receive what they requested. Processing can include notifying AP that DOD does not have legal custody of the photographs or that DOD is claiming a FOIA exemption and intends not to release the photographs. Moreover, AP reported that it requested additional records related to the killing of bin

(continued...)

days from the date it received the request to determine whether it will respond. AP has not reported whether DOD met that deadline. If the executive branch agencies determine they will not release the photographs by claiming one of FOIA's nine exemptions, the *AP* may choose to accept those determinations, appeal the determinations administratively, or challenge the determinations legally. Executive branch agencies may also classify the information, which could protect it from public release.[93] *The Atlantic Wire* reported that several organizations, in addition to the *AP*, have filed FOIA requests seeking release of the photographs of bin Laden's death.[94] Among those groups reportedly filing requests are two nonprofit organizations (Judicial Watch and Citizen United) and two news organizations (*Fox News* and *Politico)*.

It is unclear whether FOIA requires the release of or protects from release photographs related to the killing of bin Laden. The 112th Congress has the authority to clarify in statute whether such photographs are to be protected from public release. Congress may ascertain that DOD—or other applicable executive branch agencies—should be given the authority to determine whether the photographs could "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government," and, therefore, should not be publicly released—regardless of FOIA. [95] Congress has the authority and may choose to amend section 565 of P.L. 111-83 to extend DOD's—or any other agency's—ability to restrict the release of certain qualifying photographs. Conversely, Congress may decide to enact legislation that requires the executive branch to release photographs associated with bin Laden's death. Or Congress may decide to do nothing, concluding that FOIA provides proper protections for the release of certain documents, and agency and legal interpretations of FOIA should determine whether photographs of bin Laden should be publicly released.

White House Visitor Logs

Another FOIA-related issue that may be of interest to the 112th Congress is the public release of White House Visitor logs maintained by the Secret Service. Debate and litigation surrounding the logs began in 2006, when Citizens for Responsibility and Ethics in Washington (CREW) filed a FOIA request with the Secret Service seeking access to sign-in logs maintained at the White House and the Vice Presidential Residence.[96] The logs track who enters either of the two locations. CREW filed suit in federal district court in 2007, after the Secret Service did not respond to the FOIA request. The suit also challenged the service's policy of deleting certain White House visitor records, claiming such action violated the Federal Records Act[97] and the Administrative Procedure Act.[98]

(...continued)

Laden that were not photographs. DOD may apply FOIA in ways that permit the release of certain records while withholding others. Richard Lardner, "AP Presses For Quick Review of bin Laden Records," May 18, 2011, at http://www.google.com/hostednews/ap/article/ALeqM5hfp9_OWBDq3njEzC1FUfPjvE2qMw?docId=2d3a030c630040f6a0952ec630895140.

[93] For more information on information classification, see CRS Report R41528, *Classified Information Policy and Executive Order 13526*, by Kevin R. Kosar.

[94] John Hudson, "NPR to File bin Laden Death Photo FOIA," *The Atlantic Wire*, May 10, 2011, at http://www.theatlanticwire.com/politics/2011/05/npr-file-bin-laden-death-photo-foia/37553/.

[95] P.L. 111-83; 125 Stat. 2184-2185.

[96] *Citizens for Responsibility and Ethics in Washington v. DHS*, 527 F. Supp. 2d 76 (D.D.C. 2007).

[97] 44 U.S. C. § 3101 *et seq.* (2006).

[98] 5 U.S.C. § 551 *et seq.* (2006).

The district court found that the sign-in logs at the White House and the Vice Presidential Residence are created and controlled by the Secret Service, and, therefore, are "agency records."[99] The court also rejected the Secret Service's claim that disclosure of the records would prompt separation of powers concerns because they could "impede the ability of the President and Vice President to receive full and frank submissions of facts and opinions and to seek confidential information from many sources, both inside and outside the government."[100] The Court of Appeals dismissed the government's appeal for lack of appellate jurisdiction.[101] Despite the court's determination, the White House, under both former President George W. Bush and President Obama, did not release the logs to the public. In June 2009, CREW filed another complaint seeking access to the visitor logs.[102]

CREW terminated the latest complaint in September 2009, when the White House agreed to release the Secret Service visitor logs.[103] Since December 2009, White House visitor records that are at least 90 to 120 days old have been publicly available.[104] Pursuant to the agreed-upon policy, certain fields within the records may be redacted to protect "personal privacy or law enforcement concerns (e.g., dates of birth, social security numbers, and contact phone numbers); records that implicate the personal safety of [Executive Office of the President] staff (their daily arrival and departure); or records whose release would threaten national security interests."[105] Certain other records are also excepted from release, including "purely personal guests of the first and second families," "records related to a small group of particularly sensitive meetings (e.g., visits of potential Supreme Court nominees)," and "visitor information for the Vice President's Residence."[106] Visitor records created between January 20, 2009, and September 15, 2009, also are not included in the Secret Service visitor log release. Instead, the policy states that "the White House will respond voluntarily to individual requests submitted to the Counsel's Office that seek records during that time period, but only if the requests are reasonable, narrow, and specific."[107]

According to an April 2011 report by the Center for Public Integrity, the White House visitor logs "routinely omit or cloud key details about the identity of visitors, who they met with, the nature of the visit, and even includes the names of people who never showed up."[108] Other reports claimed that White House staff were meeting with "lobbyists and political operatives" at a coffee

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[99] *Citizens for Responsibility and Ethics in Washington v. Dep't of Homeland Security*, 527 F. Supp. 2d 76, 98 (D.D.C. 2007) (citing *United States Dep't of Justice v. Tax Analysts*, 492 U.S. at 147).

[100] Ibid. at 98 (citing Def. Mot. Summary Judgment at 30). The court's opinion questioned whether releasing the log books would "impede the President's ability to perform his constitutional duty," saying the threat is not "great enough to justify curtailing the public disclosure aims of FOIA."

[101] *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Homeland Security*, 532 F.3d 860 (D.C. Cir. 2008).

[102] *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Homeland Security*, No. 1:09-cv-01101 (D.D.C. 2009).

[103] The White House, "Visitor Records," at http://www.whitehouse.gov/briefing-room/disclosures/visitor-records.

[104] The White House, "White House Voluntary Disclosure Policy Visitor Access Records," at http://www.whitehouse.gov/VoluntaryDisclosure.

[105] Ibid.

[106] Ibid. The policy does state it will release the number of people who visited the White House who would count toward the "small group of particularly sensitive meetings."

[107] Ibid.

[108] Fred Schulte and Viveca Novak, "White House visitor logs riddled with holes," *iWatchNews.com*, April 13, 2011, at http://www.iwatchnews.org/2011/04/13/4115/white-house-visitor-logs-riddled-holes.

shop near the White House to ensure the meetings were "not subject to disclosure on the visitors' log."[109]

On May 3, 2011, the House Energy and Commerce Committee's Subcommittee on Oversight and Investigations held a hearing entitled "White House Transparency, Visitor Logs, and Lobbyists." In his opening statement, Subcommittee Chairman Cliff Stearns said

> White House staff apparently purposely schedule meetings at the Caribou Coffee around the corner from the White House so that those meetings won't show up on the White House logs. And one executive branch agency even went so far as to require lobbyists to sign confidentiality agreements about their discussions with the administration.[110]

At the hearing, Anne Weisman, chief counsel from Citizens for Responsibility and Ethics in Washington testified that the Secret Service logs were not meant to be used to determine who was meeting with the President and his staff. She said

> Some complain the visitor logs lack critical information, such as who the visitor is meeting with, and that requests for clearance were made by low-level staff in order to conceal the true nature of the visit. These criticisms reflect a fundamental misunderstanding of the nature of these logs and the purpose they serve. The White House visitor logs are not the equivalent of calendars or date books and, as every court to address this issue has found, are the records of the Secret Service, not the President. The Secret Service creates these records in furtherance of its statutory mission to protect the president, vice president, and their families, which necessarily extends to protecting the White House complex….
>
> To be clear, CREW disagrees with the legal position of the White House that these records are presidential and therefore not publicly accessible under the Freedom of Information Act. Nevertheless, we settled our litigation, which began under the Bush administration and continued under the Obama administration, over access to these records when the Obama White House offered to not only provide CREW with its requested records, but to post on the White House's website on an ongoing basis nearly all visitor records, subject to very limited and reasonable exceptions.[111]

Some Policy Options for Congress

Congress has the authority to use its oversight and legislative powers to modify FOIA and affect its implementation. Conversely, Congress may determine that FOIA operations and implementation are currently effective, and decide to take no action. In this section, this report reviews ways in which Congress could use its constitutional powers to modify FOIA's implementation or ensure that FOIA continues to be implemented in accordance with Congress's intentions.

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[109] Eric Lichtblau, "Across From White House, Coffee With Lobbyists," *New York Times*, June 24, 2010, at http://www.nytimes.com/2010/06/25/us/politics/25caribou.html.

[110] U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *White House Transparency, Visitor Logs and Lobbyists*, 112th Cong., 1st sess., May 3, 2011, at http://energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8531.

[111] Ibid., at http://republicans.energycommerce.house.gov/Media/file/Hearings/Oversight/050311/Weismann.pdf.

Monitoring the Expansion of b(3) Exemptions

At hearings in March 2011, the House Committee on Oversight and Government Reform and the Senate Committee on the Judiciary discussed ways to address the growing number of FOIA b(3) exemptions. At these hearings, several Members expressed interest in having a centralized collection of the existing universe of b(3) exemptions as well as having the opportunity to debate the merits and scope of new b(3) exemption proposals. At the House hearing, Rick Blum, coordinator for the Sunshine in Government Initiative, suggested that the committee

> take a hard look at these exemptions when they're proposed and make sure that they're absolutely necessary, that they're narrowly described, that they don't cover additional information, make sure that the drafting is narrow, make sure that they are publicly justified, and make sure that we have a chance to all weigh in.[112]

Giving committees with jurisdiction over FOIA implementation a chance to examine b(3) exemptions before their enactment may prevent the creation of exemptions written more broadly than intended and may permit certain agencies to operate without the public being able to access data and records. Requiring each chamber to refer any legislation with a b(3) exemption to certain committees, however, might require rules changes in each chamber. Such requirements could slow down the legislative process, and, therefore, make it more difficult to enact protections for sensitive information or data.

Consideration of FOIA Culture

Congress may be interested in ensuring that all agencies are implementing the most effective FOIA practices and creating a more transparent operating culture. The Office of Information Policy (OIP) within the Department of Justice, in compliance with federal law (5 U.S.C. § 552(e)(1)), annually compiles a summary of all agency Chief FOIA Officer reports and offers recommendations to improve FOIA compliance. These reports include information on outstanding FOIA requests, FOIA backlog reduction efforts, b(3) exemptions claimed to deny requests, and actions that agencies take to make certain its employees are aware of new or modified transparency policies. According to the annual reports, agencies have taken a variety of steps to influence their internal FOIA culture, including widely distributing the President's FOIA Memorandum and the Attorney General's FOIA Guidelines, creating agency-specific FOIA guidance, attending governmentwide FOIA training, and providing agency-specific FOIA training.[113] Other agencies have voluntarily used Facebook, Twitter, and YouTube to webcast meetings or publicize recent information and records releases.

In OIP's 2010 report, which is the most current one available, the Office recommended that

- agencies require all personnel—FOIA and non-FOIA—to attend training on the Administration's guidelines on FOIA implementation;

[112] U.S. Congress, House Committee on Oversight and Government Reform, *The Freedom of Information Act: Crowd-Sourcing Government Oversight*, 112th Cong., 1st sess., March 17, 2011. The comment was made during the question and answer period and can be seen at http://www.youtube.com/watch?v=lNbMe8StyXw (4:40 mark).

[113] U.S. Department. of Justice, Office of Information Policy, "FOIA Post: Summary of Agency Chief FOIA Officer Reports with Finding and OIP Guidance for Improvement," July 29, 2010, at http://www.justice.gov/oip/foiapost/2010foiapost23.htm.

- agencies add a step in FOIA processing to consider whether additional records can be released as a matter of "administrative discretion";
- chief FOIA officers ensure that their staffs are receiving proper information technology support;
- agencies conduct regular reviews of pending FOIA cases;
- agencies hire more staff; and
- agencies improve customer service.[114]

Congress may require agencies to adopt some, none, or all of OIP's recommendations. Congress may require agencies to change FOIA processing policies that are not addressed in OIP's recommendations, including requiring the use of social media. Additionally, Congress oversees the operations of OGIS. OGIS, like OIP, is required to make recommendations to improve implementation of FOIA. Congress may ignore, require the implementation of, or codify these recommendations.

Status of White House Visitor Logs

The 112th Congress may consider enacting legislation that would determine whether Secret Service logs that contain information on visitors to the White House should be made publicly available or should remain protected records. For example, Congress may create legislation that explicitly states whether the White House visitor logs should be treated as "presidential records."[115] If so, the records would be afforded additional protections that could delay their release by up to 20 years.[116] If the logs were determined not to be "presidential records," they would be subject to public release unless a FOIA exemption applied. Codifying treatment of the logs would require the Secret Service to release the logs regardless of who occupies the White House. As noted earlier in this report, the current practice of releasing the records is the policy only of the current Administration, and would not necessarily carry over to future Administrations. Other legislative options might include (1) amending FOIA to create a specific exemption for the Secret Service logs, which would allow the Secret Service to withhold them from public release; (2) modifying the laws that govern operations of the Secret Service, clarifying whether Secret Service records are governed by FOIA, the Presidential Records Act, or by some other records policies; or (3) determining whether any legislation should be applied retroactively to the records of the previous presidential administrations, or if the policy should apply only to current and future Secret Service logs. Congress may opt to take no action, thereby permitting the continued voluntary and limited release of such records under the Obama Administration.

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[114] Ibid.

[115] If Congress opted to create such legislation, it could do so by amending FOIA (5 U.S.C. § 552), PRA (44 U.S.C. § 2201), or the Secret Service Statute (18 U.S.C. § 3056) to explicitly state the status of the Secret Service logs. For more information on presidential records, see CRS Report R40238, *The Presidential Records Act: Current Policy Issues for Congress*, by Wendy Ginsberg.

[116] Pursuant to the PRA, an outgoing President can restrict access to certain records for up to 12 years (44 U.S.C. § 2204(a). After 12 years, the President's records are then subject to release pursuant to FOIA's provisions. The 20-year protection assumes a record was created in January of a two-term (8-year) President's first term. The 12-year restriction to record access begins at the end of a President's tenure. For more information on the PRA, see CRS Report R40238, *The Presidential Records Act: Current Policy Issues for Congress*, by Wendy Ginsberg.

Releasing Photographs of bin Laden's Death

The 112th Congress may have an interest in clarifying whether photographs related to the death of Osama bin Laden should be released. As noted earlier in this report, Congress could amend the applicable sections of the Department of Homeland Security Appropriations Act, 2010 (P.L. 111-83) to permit the Secretary of DOD to withhold the record from release if it determined the photographs "would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."[117] If Congress chose not to amend P.L. 111-83 or otherwise enact legislation to clarify how the photographs would be treated, the photographs arguably would be subject to FOIA. Congress may require the executive branch to release the photographs. Release of the photographs may prompt violent responses from individuals or groups that supported bin Laden, may bolster support for the American military, or both. Release of the photographs may also have little or no secondary effects.

An Alternative for FOIA Implementation: Centralizing FOIA Processing

Congress also may choose to address the uneven implementation of FOIA across executive branch departments and agencies. As noted earlier in this report, some agencies appear to have dramatically reduced their FOIA backlogs and have taken steps to modify their culture to enhance the processing of FOIA requests, while other agencies appear to have have been less aggressive in making changes to their FOIA implementation. Congress may choose to continue using its oversight powers in an effort to ensure that each agency is implementing FOIA according to congressional intent. Conversely, Congress could relocate FOIA request processing outside of individual agencies and create a new federal entity that would focus exclusively on answering FOIA requests. Congress may also require an existing agency to process all FOIA requests. Employees within the "FOIA processing agency" could determine which federal departments or agencies possesses requested records, and then apply FOIA to determine whether requested records would be released.

Creating a new entity to implement FOIA would likely have certain costs and benefits. For example, a single FOIA processing entity may be able to apply FOIA more consistently across the federal government than the dispersion of FOIA offices currently stationed within each federal department and agency. A centralized FOIA entity, however, may not understand the sensitivity of certain documents held within individual agencies. Departments and agencies would likely be reluctant to relinquish control over the dissemination of their records. Centralizing FOIA implementation may initially increase costs through the hiring and training of staff and securing of office space. The centralized office, however, may decrease long-term costs by eliminating the need for certain FOIA positions that currently are replicated in each federal agency—including multiple FOIA attorneys, administrative assistants, and archival researchers.

If Congress were to create a centralized FOIA agency, there are a number of places it could be housed. For example, Congress might place the agency within the Department of Justice, which currently defends agencies if lawsuits result from FOIA implementation. Congress might place the processing entity within NARA, which houses OGIS—also known as the FOIA ombudsman.

[117] P.L. 111-83; 125 Stat. 2184-2185.

Congress also might establish a "FOIA processing agency" as an independent entity that reports directly to the President and Congress. Congress could elect to give the agency greater independence from the President, as it did with the Social Security Administration and the Office of Special Counsel.[118]

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[118] Mechanisms that establish greater independence include, for example, protection from arbitrary removal by the President. See 5 U.S.C. § 1211 and 42 U.S.C. § 902.