

To: FOIA Advisory Committee
From: Proactive Disclosure Subcommittee
Re: Proposed recommendation for proactive disclosure criteria
Date: 10/16/17

This proposal outlines a possible recommendation for criteria agencies should use when deciding whether to proactively disclose certain records or categories thereof.

I. Existing Legal Requirements and Guidance

FOIA contains a limited set of proactive disclosure requirements. They fall into two categories. The first category of records that are required to be published in the Federal Register. They include:

- (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
- (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
- (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
- (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
- (E) each amendment, revision, or repeal of the foregoing.

5 U.S.C. § 552(a)(1).

The second category is required to be “made available for public inspection in an electronic format.”

- (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
- (C) administrative staff manuals and instructions to staff that affect a member of the public;
- (D) copies of all records, regardless of form or format--
 - (i) that have been released to any person under paragraph (3); and
 - (ii) (I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

- (II) that have been requested 3 or more times; and
- (E) a general index of the records referred to under subparagraph (D);

5 U.S.C. § 552(a)(2).

In 2009, the day President Obama took office, he issued a memorandum declaring, among other things, that “[t]he presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public.” President Obama then directed the Attorney General to issue guidance to implement the goals outlined in the memo. Barack Obama, Memorandum: Freedom of Information Act, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf> The Department of Justice, in turn, issued those guidelines, announcing that “agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs.” Attorney General, Memorandum: The Freedom of Information Act, <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> Despite the change in administrations, these memoranda remain in effect, and FOIA officers report that those policies remain in practical effect, absent any additional direction.

From both the statutory mandate and the relevant guidance documents, two broad goals of legal requirements for proactive disclosure can be inferred. Broadly stated, those objectives are: (1) to allow access agency documents that memorialize agency actions that affect the public and (2) to preempt the need for FOIA requests to the extent possible.

II. Current Agency Practice

To be sure, agencies undertake proactive disclosure to meet their legal obligations and the policy guidance priorities set out by the executive branch. But despite the narrow two-fold focus of the legal requirements and legal guidance on proactive disclosure, agencies in practice also publish information and records for a much wider array of reasons.

In fact, government has always served as an information disseminator. Indeed, some government agencies as part of their primary mission regularly produce reports aimed simply at providing information for the benefit of researchers, businesses, and members of the public. Examples include:

- United States Census
 - Its website includes information on population, the economy, geography, and various tools for data analysis. <https://www.census.gov/>
 - It conducts research and issues reports on a vast array of topics, such as (to take a random recent sample) “Computer and Internet Use in the United States: 2015,” “Veterans in Rural America,” “The Annual Survey of Entrepreneurs,” “Ready-to-Mix: Horizontal Mergers, Prices, and Productivity.” https://www.census.gov/research/working_papers/
- Bureau of Labor Statistics

- Reports on unemployment, consumer spending, the health of various industries, and the growth or decline in various occupations
- National Weather Service
 - Reports weather forecasts
 - Beyond just forecasts, provides climate data, past weather data, data on weather fatalities
- Centers for Disease Control and Prevention
 - Provides data and statistics about various diseases and conditions <https://www.cdc.gov/DataStatistics/>
 - Provides information about vaccinations and immunizations, <https://www.cdc.gov/vaccines/index.html>
 - Provides information about health risks associated with traveling to particular destinations

These examples demonstrate that government collects and maintains the most diverse and valuable sets of information about the world, for which the public has a strong interest in access.

Another set of agencies undertakes to publish information as a tool in its arsenal to advance its underlying statutory objective. Congress has sometimes even required such an approach, as it did in the Emergency Planning and Community Right to Know Act, Pub L. No. 99-499, s. 313, 100 Stat. 1741 (codified at 42 U.S.C. s. 11023), which created the Toxic Release Inventory, which requires firms to report all environmental releases of toxic substances (without otherwise limiting those releases). The mere reporting of this information, later published by the agency, has been credited with reducing toxic releases. See Michael Hertz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 577 (2009).

Many agencies have published some amount of their enforcement data as a method of encouraging compliance with underlying regulatory structures and providing the public a means of accessing information about companies with whom they may choose to do business. For example, the Department of Labor has provided a search tool for its enforcement data (covering OSHA, MSHA, and WHD), <https://enforcedata.dol.gov/>, and the Animal and Plant Health Inspection Service provides some enforcement data for its administration of the Animal Welfare Act, <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions>.

Thus, efforts at proactive disclosure may take account of broader missions than simply the two statutorily endorsed functions of proactive disclosure. In fact, one recent initiative is illustrative. So-called “release-to-one, release-to-all” programs, in particular, the pilot initiative that DOJ ran, have become one way of beginning to implement broader proactive disclosure. Under these programs, records processed and released to one FOIA requester are then made available to everyone by posting on a publicly available website. But as my own research has demonstrated, the vast majority of requests at many agencies serve purposes other than the narrowly defined goal of understanding government operations. See Kwoka, *FOIA, Inc.*, 65 DUKE L. J. 1361 (2016), Kwoka, *First-Person FOIA*, 127 YALE L. J. – (forthcoming 2018). Thus, release-to-one, release-to-all is highly unlikely to promote the narrow goals of preempting future FOIA requests or allowing the public to access those records that enshrine agency actions that affect the public. Moreover, the DOJ’s own report documents no significant decrease in FOIA requests received at

agencies that implemented the policy. DOJ, Proactive Disclosure Pilot Assessment (June 2016). Nonetheless, it may well have important other goals, and since the transaction costs are relatively low (since records are already processed for release), the value of the program overall is still substantial. *Id.*

Current practice is one way to inform future efforts. As evidenced by the wide array of information agencies push out to the public by way of affirmative disclosure efforts, proactive disclosure goals should include a focus on those records the public wants the most. That can be measured in several different ways, and the proposal below attempts to provide metrics by which to measure public interest in the records.

III. Proposal

In addition to meeting other legal obligations for proactive disclosure, agencies should undertake the following inquiries when considering which categories of records to prioritize for proactive disclosure.

- 1) Records that memorialize agency actions, whether formal or informal and with or without immediate legal effect, taken pursuant to their statutory mandates.
 - a. Agencies should consider whether their routine activities produce memorializations of agency actions, whether or not they are considered to have legal effect and regardless of their formality. For example, these sorts of records might include records regarding enforcement activities such as inspection reports, warning letters, citations, fines and penalties, or other actions.
 - b. Agencies should then consider whether the records can be released in full, or whether redactions would need to be made. Agencies should consider how burdensome any redactions would be. For example, if the redactions would always occur in a particular field of a form, could the redaction be routinized or could the form be designed not to include that field in the releasable version. Or, on the other hand, would each record need individualized review.
 - c. Agencies should consider whether releasing the category of records as a proactive disclosure initiative would benefit the public interest in the following ways:
 - i. Understanding the agency's enforcement activities, choices, policies, and decisions;
 - ii. Exercising their consumer choices to make purchasing and patronage decisions at companies based on full information about the companies' activities; and/or
 - iii. Allowing state and local governments to learn about activities within their jurisdictions.
 - d. Agencies should then weigh the burden of disclosure, including necessary review and redactions, against the benefits to the public and make those records available where the public interest outweighs the burden to the agency.
- 2) Records that provide original government-collected or maintained data that aids in the public's understanding of the world.

- a. Agencies should examine the categories of records routinely submitted to it by private parties. While recognizing that privacy interests and commercial interests pose larger barriers to disclosure of these types of records generally, agencies should look for opportunities where, by their nature, the category of records might pose less of these concerns and release could be made proactively.
 - b. These sorts of records might include records routinely submitted to an agency regarding private parties' compliance with the law, such as routine reports, certifications, or compliance statements, or records concerning scientific data, research results, or academic findings.
 - c. Agencies should endeavor to proactively disclose those categories of records, data, and other submissions that will help the public to understand the world, including the businesses operating in the public sphere, where the public benefit is likely to outweigh the burden on the agency.
- 3) Categories of records that are frequently requested by the public.
- a. Agencies should analyze their FOIA logs at least annually to identify categories of records that are frequently requested. These might be, for example, a certain regulatory form like an inspection report.
 - b. Agencies should then attempt to quantify the percentage of the full number of such records in the category that are, eventually, requested under FOIA.
 - c. Agencies should quantify the percentage of records in the category that are requested under FOIA and are released in full versus released in part or denied.
 - d. Agencies should consider whether, if a larger percentage of the records are released in full or in part, the record could be designed to be created in such a way that it is releasable upon completion.
 - e. Agencies should undertake to publish the whole category of records when a relatively large portion of the category is eventually requested under FOIA and when either
 - i. minimal redactions are necessary or
 - ii. when the agency can redesign the documents in the category on the front end so they are immediately releasable upon creation.

In particular, the FOIA Improvement Act of 2016 amended the Federal Records Act to require agencies to have “procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.” 44 U.S.C. § 3102. The Advisory Committee recommends agencies adopt the foregoing priorities as a minimum compliance with this requirement.