

# THEMATIC COMPILATION OF RELEVANT INFORMATION SUBMITTED BY THE UNITED STATES

## ARTICLE 10 UNCAC

### PUBLIC REPORTING

#### UNITED STATES (SIXTH MEETING)

In relation to public reporting, States parties and signatories may wish to cite and describe measures that:

- *Put in place a system of transparency for the public administration including obligation to proactively publish information on the risks of corruption;*

The United States has a long-standing system of transparency. Since 1967, the United States

has afforded the public with a statutory right of access to federal government records under the Freedom of Information Act (FOIA). The FOIA is often described as “a means for citizens to know 'what their Government is up to.’” *NARA v. Favish*, 541 U.S. 157, 171-72 (2004) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

As President Obama has declared, “[a] democracy requires accountability, and accountability

requires transparency.” [Presidential Memorandum for Heads of Executive Departments and](#)

[Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 4683 (Jan. 21, 2009). The FOIA “encourages accountability through transparency.” *Id.*

As Congress, the Supreme Court, and the President have all recognized, the FOIA is a vital part of our United States democracy. The FOIA requires federal agencies to proactively disclose certain categories of records and provides the public the right to request access to records from any federal agency. Federal agencies are required to disclose any information requested under the FOIA unless it falls under one of the statute’s nine exemptions, which protect interests such as personal privacy, national security, and law enforcement. The U.S. Supreme Court has recognized that in enacting the FOIA “Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government’” to protect certain information. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423)). Even if an exemption applies, however, agencies are encouraged to discretionarily release information when there is no foreseeable harm in doing so and disclosure is not otherwise prohibited by law.

On his first full day in office, January 21, 2009, President Obama issued a [memorandum](#) to the heads of all departments and agencies on the FOIA. The President directed that FOIA “should be administered with a clear presumption: In the face of doubt, openness

prevails." Moreover, the President instructed agencies that information should not be withheld merely because "public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Agencies were directed to respond to requests "promptly and in a spirit of cooperation."  
The

President also called on agencies to "adopt a presumption in favor of disclosure" and to apply

that presumption "to all decisions involving [the] FOIA." This presumption of disclosure includes taking "affirmative steps to make information public," and using "modern technology to inform citizens about what is known and done by their Government."

The President directed the Attorney General to issue [FOIA Guidelines](#) for the heads of executive departments and agencies "reaffirming the commitment to accountability and transparency." On March 19, 2009, Attorney General Eric Holder issued those Guidelines. The Attorney General highlighted that the FOIA "reflects our nation's fundamental commitment to open government" and that his Guidelines are "meant to underscore that commitment and to ensure that it is realized in practice."

The FOIA Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. This presumption means that information should not be

withheld "simply because [an agency] may do so legally." Moreover, the Attorney General has directed that whenever full disclosure of a record is not possible, agencies "must consider

whether [they] can make partial disclosure." The Attorney General also "strongly encourage[s] agencies to make discretionary disclosures of information," and to "readily and systematically post information online in advance of any public request." The U.S. Department of Justice, through its Office of Information Policy (OIP) is responsible for encouraging agency compliance with the FOIA and for ensuring that the [President's FOIA Memorandum](#) and the [Attorney General's FOIA Guidelines](#) are fully implemented across the

government. OIP develops and issues [policy guidance](#) to all agencies on proper implementation of the FOIA. OIP also publishes the [United States Department of Justice Guide to the Freedom of Information Act](#), which is a comprehensive legal treatise addressing all aspects of the FOIA. OIP provides individualized guidance to agencies on questions relating to the application of the FOIA, regularly conducts training programs for FOIA personnel across the government, including specialized agency programs, and provides general advice to the public on use of the FOIA.

In addition to its policy functions, OIP oversees agency compliance with the FOIA. All agencies are required by law to [report](#) to the Department of Justice on their FOIA compliance through submission of Annual FOIA Reports and Chief FOIA Officer Reports. These reports, which are posted [online](#), inform the public about agency compliance with the FOIA, President Obama's FOIA Memorandum, and Attorney General Holder's FOIA Guidelines, and they serve as yearly benchmarks for agencies as

they continually refine their administration of the FOIA. OIP develops guidelines for those reports, issues guidance and provides training to agencies to help them complete the reports, and reviews and compiles summaries of both agency Annual FOIA Reports and Chief FOIA Officer Reports.

- *Provide for members of the public to have the right and opportunity to access information on the organization, functioning and decision-making processes of the public administration, as well as their decisions and legal acts;*

The FOIA has two distinct provisions that require agencies to "automatically" disclose certain categories of information about their organization, and function, and decision making.

Subsection (a)(1) of the FOIA requires disclosure through publication in the Federal Register of general agency information such as descriptions of agency organization, functions, rules of procedure; substantive agency rules; and statements of general agency policy. Publication of these four categories of information in the Federal Register is intended "to enable the public 'readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies.'" Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 4 (June 1967) [hereinafter 1967 Attorney General's Memorandum] (quoting S. Rep. No. 1219 at 3 (1964)).

Such publication serves as a "guide [to] the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests." *Id.* at 5.

Subsection (a)(2) of the FOIA requires that certain other types of records—final agency opinions and orders rendered in the adjudication of cases, specific policy statements, certain administrative staff manuals and instructions to staff, and records previously processed for disclosure under the FOIA that are likely to be requested again—be routinely made "available for public inspection and copying." This provision generally requires agencies to post that material publicly on their agency websites. The basic purpose behind the requirement to make this operational information available proactively is "to afford the private citizen the essential information to enable him to deal effectively and knowledgably with the Federal agencies." 1967 Attorney General's Memorandum 14 (quoting S. Rep. No. 1219 at 12).

- *Facilitate public access to the competent decision-making authorities.*

The United States Supreme Court has explained that "[t]he basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v.*

*Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

The FOIA facilitates public access to decision-making authorities in two ways: through proactive disclosures and access requests. The proactive disclosure provisions of the FOIA require agencies to affirmatively post information about their operations on their websites or in the Federal Register. These proactive disclosures allow the public ready access to such information which allows them to deal effectively with agencies. Beyond these required disclosures, the FOIA affords the public, regardless of citizenship, with a statutory right to request access to any agency records. Records can be sought for any reason, and there is no requirement that the requester state why they want access to the records. When an agency receives a proper FOIA request for records, it must make the records "promptly available" unless the records or portions of the records are exempt from mandatory disclosure under the law. The FOIA requires agencies to conduct reasonable searches for requested records and to provide the requester with the requested records in the form or format sought. By affording a statutory right to access records created and held by federal agencies, the FOIA facilitates public engagement with the government and ensures accountability and transparency.

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