FREEDOM OF INFORMATION ACT (FOIA) ADVISORY COMMITTEE
STATUTORY REFORM SUBCOMMITTEE

PROGRESS REPORT – MARCH 6, 2025

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For the past several months, the **Statutory Reform Subcommittee** and its working groups have endeavored to explore and begin developing concrete recommendations for how Congress might amend the Freedom of Information Act ("FOIA") to improve the requesting experience, address agency processing challenges, and better achieve the goal of open and transparent government in a digital world. This informal progress report provides an update on those efforts to date. Nothing in this report should be considered final work product. The subcommittee has not made any findings, nor has it yet decided upon recommendations to be forwarded to the full advisory committee. This report merely presents a summary of the subcommittee's preliminary work and considerations.

FOIA PROCESSING WORKING GROUP

The **FOIA Processing Working Group** is committed to addressing the challenges surrounding efforts to process FOIA requests, including the impact of litigation on agency resources (*e.g.*, attorney's fees), the administration of requester fees, and the application of statutory exemptions. The group has started to strategically examine these complexities to enhance transparency and accessibility in government information requests.

The FOIA Processing Working Group is currently developing recommendations for how Congress can amend the FOIA regarding the administration of requester fees. The U.S. Department of Justice Office of Information Policy ("OIP") reported that, for Fiscal Year 2023, agencies reported collecting a total of $2,337,097.74 in FOIA fees, which was less than 0.4% of the total estimated cost of the government's FOIA-related activities.[1] While the collection of FOIA processing fees is a small percentage of agencies' FOIA operating costs, statutory fee improvements may provide additional resources to FOIA programs which will improve processing efforts.

The 2014-2016 FOIA Advisory Committee's Fees Subcommittee made several recommendations to update the Office of Management and Budget's ("OMB") fee guidance.[2] In 2020, OMB published final revisions to the government-wide FOIA fee guidelines, but some FOIA fee improvements should still be addressed statutorily.[3] In 2024, the United States Government Accountability Office ("GAO") issued a report to Congress entitled "Additional Guidance and Reliable Data Can Help Address Agency Backlogs."[4] GAO convened focus groups with agency officials and each focus group proposed modifying requirements related to FOIA fees.

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[1] Dep't of Justice, Summary of Annual FOIA Reports for Fiscal Year 2023, at 21.
[2] FOIA Advisory Committee's Fees Subcommittee's Recommendation on Updated Office of Management and Budget Fee Guidance.
[3] Final Revisions to Uniform Freedom of Information Act Fee Schedule and Guidelines, 85 Fed Reg. 81,955 (Dec. 17, 2020) (2020-27707.pdf).
[4] GAO-24-106535, Freedom of Information Act: Additional Guidance and Reliable Data Can Help Address Agency Backlogs.

The FOIA Processing Working Group is evaluating the prior Fees Subcommittee's recommendations and GAO proposals. It is planning to develop the following statutory recommendations:

- **Allow agencies to retain fees and charge a *de minimis* fee to fund their FOIA programs**: Currently, FOIA fees are paid to the General Fund of the Treasury, not to agencies' FOIA offices. Chief FOIA Officers routinely identify the need for additional resources to effectively manage FOIA programs. If agencies are allowed to retain fees this will provide additional resources for FOIA staff and technology.

- **Revise FOIA to allow agencies to charge fees for requests that are backlogged:** Per OIP, the total number of backlogged requests across the government at the end of FY 2023 was 200,843. As agencies experience an increase in the volume and complexity of requests received, FOIA backlogs will also increase. The inability to charge for backlogged requests is a significant loss in the collection of processing fees. Thus, this proposal, in coordination with fees going directly to FOIA programs, would assist agencies in backlog reduction.

- **Assess fees based on electronic file size:** There has been a significant increase in FOIA requests for electronic records and data, and a decrease in requests that are paper only. Electronic data often requires extensive computer programming and data analysis to generate the requested material, and releases are often made electronically with spreadsheets that do not allow for a page count that is equivalent to paper records. As the FOIA does not allow agencies to collect fees for records and data shared electronically—a major revenue loss—the statute should be amended to require OMB to deliver guidelines for the collection of fees for electronic-only records.

The FOIA Processing Working Group intends to continue evaluating statutory recommendations regarding the administration of requester fees.

TRANSPARENCY OBLIGATIONS WORKING GROUP

The **Transparency Obligations Working Group** is exploring possible reforms to substantive obligations regarding materials subject to the FOIA's mandatory disclosure provisions. It is also examining the scope of the statute's nine exemptions and possible modifications thereto that would promote the aims of the FOIA and the scope of affirmative (or proactive) disclosure. Put differently, this group is concerned with *what* is to be disclosed, rather than the mechanics of disclosure or the enforcement of disclosure obligations. In carrying out its charge to study opportunities for modernizing FOIA exemptions, the working group has identified several areas of concern worthy of attention.

I. PROCESS ISSUES

A) Scope of Affirmative Disclosure Obligations

Increased affirmative or proactive disclosure has long been embraced by Congress and executive administrations alike. The Department of Justice, for example, has explored the viability of

a "release-to-one-release-to-all" policy of publication of all records released under FOIA.[5] One goal of such a policy would be to reduce the need to rely on FOIA in the first instance, which would help address backlog concerns. Given the success of proactive disclosure in other settings, expanding the universe of records that agencies must publish without the need for a request deserves serious consideration, with particular focus on datapoints that are habitually the subject of requests. These might include:

- Agency organizational charts
- Largest contracts and grants (with clear guidance as to assessing what qualifies)
- Unclassified information about the budgets of intelligence agencies
- Interagency or intergovernmental agreements or contracts/MOUs
- Unclassified reports, information requests, and testimony provided to Congress
- Materials related to the operations and establishment of FACA committees

B) Enforcement of Affirmative Disclosure Obligations

The FOIA's judicial review provision specifies that a district court has jurisdiction "to enjoin the agency from withholding agency records and to order production of any agency records improperly withheld from the complainant." The Ninth Circuit and Second Circuit have held that this provision empowers a district court to order compliance with affirmative obligations listed in subsections (a)(1) and (a)(2) of the statute.[6] The D.C. Circuit, by contrast, has held that it does not.[7] This circuit split should be resolved in a way that makes affirmative disclosure obligations meaningful.[8]

C) FOIA Alternatives for High-Demand Records

Persistent problems with backlogged requests have been a top-level concern for requesters, policymakers, and agencies. Measures to divert common types of frequent requests out of the FOIA processing stream would benefit all stakeholders. As part of the duty to compile an annual report, agencies could be instructed to identify the most-requested records at their agency. Agencies could also explain either what steps are being taken to create an alternative information-delivery mechanism for these frequently requested records, or why such mechanisms are not feasible. In addition to proactive disclosure, other alternatives might include special portal access for first-person users (such as those needing access to immigration files). Researchers have spotlighted first-person requests as a prime target for meeting the needs of requesters and, at the same time, relieving the pressure on FOIA offices.[9] Some agencies have piloted such efforts, including the Internal Revenue Service for taxpayer records and the Veterans Health Administration for medical records.

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[5] Assessment of DOJ's Proactive Disclosure Pilot with Next Steps Now Available (June 30, 2016), https://www.justice.gov/oip/blog/assessment-dojs-proactive-disclosure-pilot-next-steps-now-available.

[6] *N.Y. Legal Assistance Grp. v. Bd. of Immigration Appeals*, 987 F.3d 207 (2d Cir. 2021); *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858 (9th Cir. 2019).

[7] *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 846 F.3d 1235 (D.C. Cir. 2017).

[8] Potential curative measures have been recommended by the Administrative Conference of the United States. *See generally* ACUS Recommendation 2023-1(7), https://www.acus.gov/sites/default/files/documents/2023-1%20Proactive%20Disclosure%20of%20Agency%20Legal%20Materials.pdf.

[9] Margaret B. Kwoka, Saving the Freedom of Information Act (2021).

D) Duty to Publish FOIA Logs

FOIA logs have proven useful to policymakers, reporters, and academics. Searching these logs can help a requester to make a more precise request or to request records already produced that would be readily available to an agency's FOIA office. Request logs are already maintained by agencies as part of their responsibilities to track requests and meet statutory deadlines, as well as to report aggregate processing statistics to Congress and the Department of Justice. Many agencies post some form of their logs online, albeit not in any standardized form. An affirmative duty to publish logs in standardized and machine-readable format, particularly for agencies with a high volume of requests, would benefit researchers and requesters, while also producing benefits for agencies in the form of minimizing duplicative requests.[10] A standardized disclosure format could incorporate common fields such as the identity of each requester, the subject matter of a request, its current status, the results of the request, exemptions cited, date resolved, fee category assigned, waiver requests and outcome, and any fees assessed.

E) Duration of Exempt Status – "Sunsetting"

Federal law recognizes expiration dates after which many categories of records become presumptively accessible to the public. Exempt status should not be "all-or-nothing." Documents withheld as "deliberative" under Exemption 5, for example, become accessible 25 years after creation.[11] And the withholding provisions of the Presidential Records Act expire after just 12 years, unless extended.[12] Even classified information becomes presumptively public after 10 years, although that period may be extended to 25 years upon a finding of special sensitivity.[13] In recognition that the need for withholding typically diminishes over time, it is worth examining whether *all* exemptions should carry a presumptive expiration date, as well as whether any existing expiration periods are longer than necessary. Additionally, although there is a process by which a requester may obtain expedited declassification of a record prior to the full run of the 10-year (or 25-year) withholding period,[14] no comparable process exists for other categories of records. Creating a form of "declassification review process" for other classes of exempt or confidential records could divert cases out of litigation and facilitate better-quality, individualized assessment of whether the need for any particular record to remain secret has elapsed.

F) Revising the Definition of a "Record" in Section 552(f)(2)

The FOIA provides requesters with access to "records" of federal agencies.[15] "Records," in turn, are defined to include "any information that would be an agency record,"[16] regardless of whether it is maintained in "an electronic format,"[17] or "maintained . . . by an entity under Government

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[10] This recommendation was made by a prior term of the federal FOIA Advisory Committee. *See* Final Report and Recommendations, 2016-2018 FOIA Advisory Committee, https://www.archives.gov/files/final-report-and-recommendations-of-2016-2018-foia-advisory-committee.pdf.
[11] 5 U.S.C. § 552(b)(5).
[12] 44 U.S.C § 2204(a).
[13] Exec. Order 13526, Sec. 1.5 (2009).
[14] Exec. Order 13526, Sec. 3.5(e) (2009).
[15] *See* 5 U.S.C. § 552(a)(3)(A).
[16] *Id.* § 552(f)(2).
[17] *Id.* § 552(f)(2)(A).

contract, for the purposes of records management."[18] Given the circularity of this definition, courts have struggled to give it meaningful effect, even going so far as to suggest "agencies in effect define a 'record' when they undertake the process of identifying records that are responsive to a request."[19] The absence of a relevant definition in the Administrative Procedure Act hardly clarifies the matter.[20]

The lack of a meaningful definition of "record" is arguably problematic, but that can be difficult to appreciate at first glance. The issue only came to a head with the D.C. Circuit's 2016 decision in *American Immigration Lawyers Association v. Executive Office for Immigration Review* ("*AILA*"), which held that agencies can no longer engage in "subject matter scoping," or the practice of withholding portions of records as "non-responsive" to a request.[21] Although the *AILA* court put an end to this practice,[22] it left unresolved the "antecedent question of what constitutes a distinct 'record' for FOIA purposes."[23]

The reception of *AILA* and the question of how agencies should be defining "records" remains unresolved. At times, courts have tolerated the segmentation of otherwise responsive documents into smaller "record" units.[24] In most cases, however, courts have recognized the need to limit the practice.[25] In effort to provide guidance in the post-*AILA* environment, OIP has suggested agencies can properly define "records" while responding to a request and in light of the Privacy Act.[26] Requesters, for their part, have taken issue with OIP's guidance.[27] The FOIA's statutory definition of a "record" could be revised to resolve this issue.

G) Extending the Application of the FOIA to Non-Executive Branch Agencies

The Working Group is considering whether the FOIA should be extended to apply to other types of "agencies" or entities within the federal government. This proposal would build on a previous

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[18] *Id.* § 552(f)(2)(B).

[19] *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 678 (D.C. Cir. 2016).

[20] *See generally* 5 U.S.C. § 551.

[21] *See generally* Dep't of Justice, *FOIA Update: OIP Guidance: Determining the Scope of a FOIA Request*, vol. XVI, no. 3 (1995), *available at* https://www.justice.gov/archives/oip/blog/foia-update-oip-guidance-determining-scope-foia-request.

[22] 830 F.3d at 677; *see id.* ("[N]othing in the statute suggests that the agency may parse a responsive record to redact specific information within it even if none of the statutory exemptions shields that information from disclosure.").

[23] *Id.* at 678.

[24] *See, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, No. 18-0007, 2020 WL 2735570, at *3–5 (D.D.C. May 26, 2020); *see also Gellman v. Dep't of Homeland Sec.*, No. 16-0635, 2020 WL 1323896, at *3–4 (D.D.C. Mar. 20, 2020); *Shapiro v. Cen. Intelligence Agency*, 247 F. Supp. 3d 53, 74–75 (D.D.C. 2017).

[25] *See Am. Oversight v. Dep't of Health & Human Servs.*, 380 F. Supp. 3d 45, 50–51 (D.D.C. 2019) (agency not allowed to segment an email chain into multiple records); *Judge Rotenberg Educ. Ctr., Inc. v. Food & Drug Admin.*, 376 F. Supp. 3d 47, 60–61 (D.D.C. 2019) (agency disallowed "midway through litigation" to redefine "collections of information that had been treated as one agency record as multiple agency records"); *Parker v. Dep't of Justice*, 278 F. Supp. 3d 446, 451–52 (D.D.C. 2017) (agency not permitted to segment a letter from its attachment); *Gatore v. Dep't of Homeland Sec.*, No. 15-0459, 2017 WL 10777326, at *2 (D.D.C. June 27, 2017) (finding "specious the [agency's] assertion that [its] entire FOIA Processing Guide is not itself a 'single discrete record'").

[26] Dep't of Justice, "Definition a "Record' Under the FOIA" (last updated July 23, 2021), *available at* https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia.

[27] *See, e.g.*, *Cause of Action Inst. v. Dep't of Justice*, 999 F.3d 696 (D.C. Cir. 2021).

recommendation to extend FOIA-like laws to Congress, at least for certain types of legislative records. At a minimum, administrative agencies within the legislative (*e.g.*, Congressional Budget Office) and judicial (*e.g.*, Administrative Office of the United States Courts) branches could be included within the scope of the FOIA. Other types of entities under consideration for inclusion within the FOIA's definition of "agency"—some of which have already been judicially determined to fall outside the scope of the current statutory definition—include (1) government-founded and/or operated nonprofit organizations, such as agency foundations; (2) government-sponsored enterprises (*e.g.*, Fannie and Freddie); (3) self-regulatory organizations that participate or assist in agency enforcement proceedings or rulemaking (*e.g.*, FINRA, Horseracing Integrity and Safety Authority, *etc.*); (4) or other consensus standards bodies, insofar as they are involved in the development of regulations.

Closely related to this issue are the distinct questions of whether the FOIA should be amended (1) to clarify when "agency control" extends over records in the physical possession of certain non-government entities—such as self-regulatory organizations or private companies performing government functions by contract (*e.g.*, privately operated prisons or detention centers)—and (2) to ensure public access to legal standards that are incorporated by reference (and therefore deemed published per Section 552(a)(1) of the FOIA), but not otherwise generally accessible.

II. EXEMPTION REFORM

A. Guidance for Applying Exemptions

Disputes over the proper application of exemptions are a persistent source of litigation. Clearer guidance on this issue could avoid needless litigation and facilitate prompter processing. Structurally, the FOIA currently fosters confusion by failing to clearly delimit exemptions that are discretionary ("*may* withhold") versus nondiscretionary ("*must* withhold"), which can lead custodians to treat every exemption as mandatory.

Relatedly, there continues to be confusion over the proper application of the foreseeable-harm standard. [28] The lack of definitions for key terms like "public interest" or "harm" has led to inconsistent application across agencies and courts, which has led agencies to invoke exemptions broadly contrary to the provision's intent. Furthermore, agencies have exercised significant discretion in interpreting exemptions as either mandatory or permissive. The nature of the "harm" that exemptions exist to address requires clarification. This is particularly evident in the Exemption 4 context. Withholding should only be proper when necessary to avoid specific, identified harms—not theoretical ones. The Administrative Conference of the United States has emphasized the need for clearer definitions and consistent application of the foreseeable-harm standard.

B. Examining the Continuing Necessity for Exemptions

The subcommittee should revisit the rationales for the FOIA's nine statutory exemptions. In particular, the Working Group intends to focus on the continuing rationales for Exemptions 2 and 5. On its face, Exemption 2 enables agencies to withhold material "related solely to the internal personnel rules and practices of an agency."[29] As a result of the Supreme Court's 2011 decision in *Milner v.*

[28] 5 U.S.C. § 552(a)(8)(A)(i).
[29] *Id.* § 552(b)(2).

Department of the Navy,[30] which abolished the judge-created "High 2" exemption, what remains of Exemption 2 is arguably redundant of other exemptions. Post-*Milner*, Exemption 2 is understood to apply only to "records relating to issues of employee relations and human resources," as the plain wording of the text suggests.

It is worth questioning whether personnel-related rules should be categorically more secret than, for instance, rules regarding procurement or rules regarding budgeting. It seems unlikely that employees themselves are kept unaware of the rules under which their conduct is regulated, so withholding such records from requesters may achieve no practical purpose. At the state and local level, personnel handbooks and manuals are routinely shared with the public with no apparent harm.[31] And because Exemption 6 enables agencies to withhold information about individuals in "personnel and medical files and similar files" when disclosure "would constitute a clearly unwarranted invasion of personal privacy," it is unclear whether Exemption 2 does any independent work that justifies its continued existence.

Exemption 5 authorizes agencies to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency."[32] The primary rationale for Exemption 5 is recognized to be promoting open, frank discussions on matters of policy between subordinates and superiors.[33] There is little indication that Congress or the courts have ever deeply examined this "candor rationale" beyond assuming that human nature dictates that people will be more honest in secret than they will be in public. But it is not self-evident that government employees commit their advice to writing convinced that the writing will never be disclosed, given that electronic records (in particular) are readily shared or leaked. Nor is it self-evident that advice will be categorically of better quality when insulated from external third-party verification.

Experience demonstrates that much of the FOIA's central purpose—to equip the public with critically valuable information so that citizens can offer informed input on matters of governance—is defeated by broad application of an exemption that enshrouds policymaking from scrutiny. Without access to records that illuminate how agencies reach their decisions, selective leaks can be weaponized to create an illusion of expert consensus that distorts public-policy discourse. It would be beneficial to reassess Exemption 5, with awareness of countervailing considerations that favor disclosing "deliberative" documents, including: (1) the public's ability to assess whether policymakers are, in fact, acting consistently with the guidance of subject-matter experts, and if not, why not; and (2) the public's opportunity to have input into government decisions at their formative stages before an internal consensus has ossified. Further examination would include consideration of the experience of state and local governments, where approximately half of FOIA statutes contain no exclusion for "deliberative" documents.

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[30] 562 U.S. 562 (2011).

[31] *See, e.g.*, Chicago Police Dept., *Rules and Regulations of the Chicago Police Department*, *available at* https://www.chicagopolice.org/wp-content/uploads/legacy/2014/12/rulesandregulations.pdf; L.A. Unif. Sch. Dist., *Personnel Policy Guides*, *available at* https://www.chicagopolice.org/wp-content/uploads/legacy/2014/12/rulesandregulations.pdf.

[32] 5 U.S.C. § 552(b)(5).

[33] Office of Info. Pol'y, U.S. Dep't of Justice, FOIA Guide, 2004 Edition: Exemption 5, https://www.justice.gov/archives/oip/foia-guide-2004-edition-exemption-5.

C. Reexamining Exemption 3 Statutes

Exemption 3 permits agencies to withhold records "specifically exempted from disclosure by statute," if certain conditions are satisfied.[34] Over the decades, more than 250 laws have been identified as mandatory-withholding statutes.[35] Many address niche sets of records in which the need for secrecy is not readily apparent, or records already within the ambit of other exemptions.[36]

Congress took steps to reform Exemption 3 in the Open FOIA Act of 2009 by specifying that no newly enacted statute would be recognized as an Exemption 3 withholding statute unless the law specifically cited Section 552(b)(3)(B). In practice, even this reform has led to confusion. Despite the plain wording of the 2009 amendment, courts are split as to the level of specificity that an "Exemption 3 statute" must contain, with some reading out of the statute the requirement that Section 552(b)(3)(B) be cited. This split should be rectified.

Given the proliferation of hundreds of purported Exemption 3 statutes, many of which have been cited in agencies' FOIA withholding decisions but never yet tested in court, there is value in comprehensively revisiting these statutes. To the extent a non-FOIA statute purports to override FOIA by requiring the withholding of personally identifying information on personal privacy grounds,[37] for example, the application of that statute should be harmonized with the privacy balancing standard recognized in Exemptions 6 and 7.

D. Reassessing the Breadth of Discretionary Exemptions

Judicial interpretations have at times added a broad interpretive gloss to FOIA exemptions. These interpretations can be difficult to reconcile with the fundamental principle that exemptions are to be construed narrowly to maximize access. Whether the judiciary has struck the proper balance is worthy of continuing reassessment, particularly where exemptions are nonmandatory.

It is timely to revisit the effects of the Supreme Court's 2019 decision in *Food Marketing Institute v. Argus Leader*, which broadened the meaning of "confidential" under Exemption 4.[38] The requester community has decried that the effect of *Argus Leader* makes secrecy self-validating. The more that an industry keeps something secret, the more secret it is.[39] The pre-*Argus Leader* approach, which applied only to the subset of government-maintained records that would cause substantial competitive

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[34] 5 U.S.C. § 552(b)(3).

[35] See Gov't Accountability Ofc., Freedom of Information Act: Update on Agencies' Use of Exemption Statutes, GAO-21-148, at 6 (Jan. 2021), https://www.gao.gov/assets/gao-21-148.pdf.

[36] *See, e.g.*, 7 U.S.C. § 608(30(A) ("information on acquisitions, inventories, and dispositions of cranberries and cranberry products"); *id.* § 2619 (information relating to assessments levied on import of potatoes); 10 U.S.C. § 2485(h) (information about operations of Defense Department commissaries if the Secretary determines that release is not in the public interest).

[37] *See, e.g.*, 15 U.S.C. § 2074(c) (declaring that identities of people injured by consumer products, or people treating them, are to be withheld before accident investigation reports are released, without reference to any privacy balancing test).

[38] 588 U.S. 427 (2019).

[39] *See* Daxton "Chip" Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1(1) J. Civic. Info. 1, 18 (2019) (stating that the *Argus Leader* ruling "deals a serious blow to the public's right to access important government information").

harm if disclosed, was widely accepted as being a workable balance, consistent with the principle that records should be withheld only if harm to a legally protected interest is reasonably foreseeable.

It is also worth reassessing the scope of Exemption 7 to ensure it is no broader than necessary to fulfill its intended purpose of protecting sensitive, nonpublic information likely to compromise the integrity of ongoing criminal investigations. Before 1986, Exemption 7 was understood to apply only to a subset of records in the custody of federal law enforcement agencies, namely, those deemed "investigatory." The modern expansion of Exemption 7 to encompass all records compiled for "law enforcement purposes" has, in practice, proven to lead to the categorical withholding of law enforcement-related records, even those with no practical likelihood of interfering with ongoing cases. The broadening of Exemption 7 has been augmented by lowering the threshold of proof for an agency to justify a withholding decision. It is now sufficient to demonstrate that release of a record "could"—as opposed to "would"—"reasonably be expected to interfere with enforcement proceedings." There is no requirement that the "interference" be material, nor that it compromise safety or the interests of a fair trial. The "could" formulation is in tension with the "foreseeable harm" principle of FOIA interpretation that an agency should release records unless "the agency reasonably foresees that disclosure *would* harm an interest protected by one of the nine exemptions."

It is possible to arrive at a narrower exemption protecting core investigatory records. For example, the Arkansas Freedom of Information Act provides that agencies may withhold records of "[u]ndisclosed investigations by law enforcement agencies of suspected criminal activity."[40] The modifier "undisclosed" cabins discretion to withhold records of cases that are already widespread public knowledge, where concealment serves little purpose. Additionally, the personal privacy Exemption 7(F) is routinely cited as a categorical justification for withholding the identities of law enforcement officers, even though their identities might be readily publicly ascertainable through other means, including their testimony in court. The need for broad secrecy encompassing law enforcement activities is worthy of reexamination considering contemporary societal concerns for transparency and accountability in policing and diminishing public trust in the regularity of law enforcement and prosecutorial decisions.

ENFORCEMENT MODELS WORKING GROUP

The **Enforcement Models Working Group** is examining approaches to improving the enforcement of the FOIA beyond the current system of judicial review. That includes exploring independent information commissions, judicial review reform, and other forms of dispute resolution, such as special jurisdiction courts, the Government Accountability Office, and inspectors general. The working group also will attempt to identify opportunities for feasibility studies to unpack the ramifications of different enforcement models.

With respect to the reform of the current model of judicial review provided by Article III courts, the Working Group has compiled the following proposals from various sources and will proceed to explore them further. The first set of proposals concerns the judicial review process, and includes the following matters we plan to study:

- Creating a specialty Article III "FOIA Court" with non-exclusive jurisdiction

[40] Ark. Stat. § 25-19-105(b)(6).

- Requiring agencies to lodge an "administrative record" (*i.e.*, processing notes) after filing an Answer, along with an initial *Vaughn* index
- Clarifying the availability of discovery, and the relevance of the personal-knowledge requirement and hearsay rule
- Limiting deference to declarations, reiterating the *de novo* review standard, and specifying the agency's burden to justify its determinations
- Specifying the remedial authority of a court, including the power to enforce compliance with the Federal Register publication and proactive disclosure/"reading room" provisions of the FOIA, as well as to provide other forms of injunctive relief (*e.g.*, to remedy an unlawful "policy or practice")
- Reforming the employee sanction provision and clarifying the power of a court to directly sanction an agency
- Liberalizing the attorney fee and litigation cost provision of the FOIA, and permitting courts to exercise broader discretion to impose a separate per day penalty whenever an agency has improperly withheld a record

The second set of proposals involves strengthening administrative oversight of agency FOIA operations. These proposals, which we plan to study, include:

- Either strengthening OGIS or creating an independent agency enforcement model such as an information commission.
- Granting such body powers as:
    - Developing and maintaining a national FOIA portal for use by all agencies in handling all stages of requests, responses, and appeals, as well as affirmative disclosure obligations as a way to streamline the experience for the user and create efficiencies through technology advancement for government agencies
    - Holding efficient and low-cost agency adjudications of disputes between requesters and agencies
    - Auditing agency compliance with FOIA by sampling unappealed responses to requests
    - Auditing agency compliance with FOIA's reading room provisions
    - Training agency personnel both within and outside of FOIA offices
    - Engaging in public education about their rights to information, how to invoke them, and the benefits of them
    - Issuing guidance on FOIA administration
    - Sanctioning FOIA non-compliance in appropriate cases

In studying these agency enforcement possibilities, the Working Group has also explored different modes of Executive Branch "self-oversight," or self-enforcement. This has included, for example, looking to how the Office of Special Counsel, different inspectors general, or agencies like the Merit Systems Protection Board or Office of Government Ethics operate. These models may inform our ultimate recommendations for how agency oversight can strengthen government programs.