

Recommendation 07: Congress should create new, FOIA-like disclosure laws to ensure public access to records controlled by legislative and judicial branch agencies.

The Committee recommends that Congress create new, FOIA-like disclosure laws to ensure public access to records under the control of administrative agencies outside of the executive branch. As it stands, the FOIA only applies to those parts of the federal government that qualify as “agencies” under the Administrative Procedure Act (“APA”),¹ or which fall within the FOIA’s extension of that definition to include “any executive department, military department, Government corporation, Government controlled corporation, . . . other establishment in the executive branch (including the Executive Office of the President), or . . . independent regulatory agency.”² Entirely missing from the definition—and, thus, from any legally mandated transparency regime—are administrative agencies within the legislative and judicial branches. This gap in transparency impairs public trust, prevents fulsome accountability, and perpetuates a disparity with the level of openness required for administrative agencies in the executive branch.

This recommendation builds on past Committee work. In the Final Report and Recommendations of the 2018-2020 Freedom of Information Act Advisory Committee, the Committee offered the following observation:

*In the spirit of expanding the reach of FOIA, we believe that the next term of the Committee should give due consideration to the possibility of extending some aspects of FOIA to parts of the legislative and judicial branches.*³

The Committee took up this suggestion in part during the 2020–2022 Term and unanimously approved **Recommendation No. 2021-01:**

*We request that the Archivist of the United States propose that Congress adopts rules [or enacts legislation] to establish procedures for effecting public access to legislative branch records in the possession of congressional support offices and agencies modeled after those procedures contained in the Freedom of Information Act. These should include requirements for proactive disclosure of certain information, procedures governing public requests for records, time limits for responding to requests, exemptions to be narrowly applied, and an appeal from any initial decision to deny access.*⁴

The Committee noted that, while public access to records of individual members or congressional committees might be inappropriate, there were compelling policy arguments for disclosing records maintained by “agencies that serve as [a] vital support structure of Congress,” including the Capitol Police, the Architect of the Capitol, the Government Accountability Office, the Congressional

¹ 5 U.S.C. § 551(1) (defining, in relevant part, the term “agency” . . . [as] each authority of the Government of the States, whether or not it is within or subject to review by another agency, but” excluding “(A) the Congress; (B) the courts; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia”).

² *Id.* § 552(f)(1).

³ Nat’l Archives & Records Admin., Final Report and Recommendations of the 2018–2020 Term of the Freedom of Information Act Federal Advisory Committee at 36 (July 9, 2020), *available at* <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf>.

⁴ Nat’l Archives & Records Admin., Final Report and Recommendations of the 2020–2022 Term of the Freedom of Information Act Federal Advisory Committee at 33 (July 5, 2022), *available at* <https://www.archives.gov/files/ogis/documents/final-report-and-recommendations-of-the-2020-2022-foia-advisory-committee-5-july-2022.pdf>.

Budget Office, the Government Printing Office, the Library of Congress, and the Congressional Research Service. The relationship and function of these agencies vis-à-vis Congress is roughly analogous to the relationship and function of Executive Branch agencies to the Office of the President, which, like Congress, is not subject to the FOIA. The 2022–2022 Legislation Subcommittee report, “Increasing Access to Information in the Legislative Branch,” provided a detailed justification for the recommendation,⁵ exploring the treatment of legislative-branch records under state laws,⁶ the current discretionary disclosure practices for certain federal legislative entities,⁷ and developments in the wake of January 6, 2021 to provide greater transparency into the Capitol Police.⁸

The Committee continues to believe that the justification for Recommendation No. 2021–01 is persuasive and, more importantly, that it can be logically extended beyond the legislative branch to agencies that exist within the judicial branch to support the federal courts.

The Federal Records Act (“FRA”) may prove a useful guide for distinguishing whether any given entity within the legislative or judicial branches is an “agency,” as well as what kinds of materials qualify, *at a minimum*, as “agency records” for purposes of any new disclosure law.⁹ Specifically, the records-management requirements of the FRA apply to each “federal agency,” which is defined as “any executive agency or any establishment in the legislative or judicial branch of the Government (except the Supreme Court, the Senate, the House of Representatives, and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol).”¹⁰ Congress could broadly follow the FRA’s exclusion of the constitutionally defined components of each branch—*viz.*, the Supreme Court, the Senate, and the House of Representatives—and limit the reach of any new disclosure statute to those administrative agencies responsible for maintaining (and eventually depositing into the Archives) “federal records.”¹¹ This would mitigate the more contentious separation-of-powers or privilege objections, as well as concerns about the protections afforded by the Speech and Debate Clause.

Of course, there are some limits to following the FRA. The FRA applies to inferior federal courts, including all thirteen Courts of Appeals and ninety-four district courts. Those courts should not be

⁵ Thomas M. Susman, Legislation Subcommittee Report, Increasing Access to Information in the Legislative Branch (June 13, 201), *available at* <https://www.archives.gov/files/ogis/assets/fac-rec-2021-01.pdf>.

⁶ See generally Ryan Mulvey & James Valvo, *Opening the State House Doors: Examining Trends in Public Access to Legislative Records*, 1(2) J. Civic Info. 17, 19, 24, 26 (Dec. 2019), *available at* <https://journals.flvc.org/civic/article/view/119009>.

⁷ See, e.g., 36 C.F.R. pt. 703 subpt. A (“Availability of Library of Congress Records”); see also 4 C.F.R. pt. 81 (“Public Availability of Government Accountability Office Records”).

⁸ See U.S. Capitol Police, “Public Availability of Records Requests for Information” (Jan. 11, 2024), *available at* <https://www.uscp.gov/sites/evo-subsites/www.uscp.gov/files/documents/1.11.2024%20%20Requests%20for%20Information%20-%20Public%20Instructions%20Final%201.11.2024.pdf>.

⁹ This suggestion was made during public comment in past terms by Jason R. Baron, who presently sits as a member of the Committee. See “Public Comments Submitted by Jason R. Baron on March 15, 2021,” *available at* <https://www.archives.gov/ogis/foia-advisory-committee/2020-2022-term/public-comments-2021-03-15-baron>; see also “Public Comments Submitted by Jason R. Baron on Sep 13, 2020,” *available at* <https://www.archives.gov/ogis/foia-advisory-committee/2020-2022-term/public-comments-2020-09-13-baron>.

¹⁰ 44 U.S.C. § 2901(14).

¹¹ Generally speaking, a federal record is any “recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them[.]” *Id.* § 3301(a)(1).

considered judicial agencies for purposes of any new FOIA-like law. More importantly, there is some daylight between what qualifies as a “federal record” and what is treated as an “agency record” for purposes of the FOIA, with the latter category covering a greater range of documentary materials. It would be ill-advised to too narrowly define the types of records held by legislative or judicial agencies that should be subject to disclosure.

At least with the judicial branch, Congress should also carefully craft the contours of any disclosure obligation in light of existing distinctions between the types of records maintained by courts and their administrative support agencies. Judicial records can be classified into three categories:

- (1) Court records: Materials that form an integral part of a case, and which memorialize the arguments of the parties and the judge’s decisions (*e.g.*, docket sheets, case files, pleadings, motions, transcripts, minutes, opinions and orders, *etc.*)
- (2) Judges’ papers: Materials created or obtained by a judge, which are not part of an official file or do not count as an official court record, including personal papers and “chambers papers” (*i.e.*, pre-decisional case-related documents such as clerk memoranda or intra-court correspondence)
- (3) Administrative records: Records that reflect the operation of judicial agencies or the administrative actions of the courts, such as attorney admission records, records of disbarment proceedings, petitions for naturalization, judicial conduct and disability records, personnel files, financial records, training materials, policy documents, *etc.*

Each of these categories implicates a different set of concerns. Court records, for example, are already generally accessible through the Public Access to Court Electronic Records (PACER) platform. Public access to court records is also protected by a common-law right of access,¹² and in more limited situations, the First Amendment.¹³ Codification of a statutory disclosure scheme—even one limited to records controlled by judicial agencies, as opposed to “courts” in the strict sense of the term—might have unintended consequences for existing precedent in these areas. Moreover, insofar as judicial agencies might exercise control over judges’ papers, that situation would present special concerns about the scope of judicial privilege,¹⁴ as well as lurking separation-of-powers objections.¹⁵

As with Recommendation No. 2021-01, the Committee continues to believe that any disclosure regime for the legislative and judicial branch agencies should include requirements for the affirmative disclosure of certain types of information,¹⁶ detailed procedures for the processing of

¹² See generally *Press-Enter. Co. v. Superior Court of Calif.*, 478 U.S. 1 (1986).

¹³ See generally *Nixon v. Warner Comms., Inc.*, 435 U.S. 589 (1978).

¹⁴ See generally Kevin C. Milne, *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting a Privilege for the Federal Judiciary*, 44 Wash. & Lee L. Rev. 212 (Winter 1987).

¹⁵ See generally Justin Walker & Caroline Phelps, *Chilled Chambers: Constitutional Implications of Requiring Federal Judges to Disclose Their Papers Upon Retirement*, Univ. of Louisville L. Sch. Legal Studies Research Paper Series, 47 Univ. of Memphis L. Rev. 1169 (2017); Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. Rev. 1664 (2013).

¹⁶ For example, one draft legislative proposal—the “Judicial Open Records Act”—would impose a judicially-enforceable affirmative disclosure obligation on the Administrative Office of the U.S. Courts. See <https://fixthecourt.com/wp-content/uploads/2026/03/Judicial-Open-Records-Act-2.24.26.pdf>. The proponent of this bill shared it with the Committee as a public comment in March 2026. See <https://www.archives.gov/ogis/foia-advisory-committee/2024-2026-term/public-comments-2026-03-05-roth>.

discrete requests, time limits for agency responses, exemptions to be narrowly applied, an appeals process, and a right to judicial review of any adverse determination.

The Committee offers the following list of entities within the legislative and judicial branches, which may properly be considered “agencies,” as candidates for a new FOIA-like transparency law:

Legislative Agencies

Architect of the Capitol
Government Accountability Office
Congressional Budget Office
Government Publishing Office
Library of Congress
(including the Congressional Research Service)
Capitol Police

Judicial Agencies

Judicial Conference of the United States
Administrative Office of the U.S. Courts
Federal Judicial Center
Circuit Judicial Councils
Judicial Panel on Multidistrict Litigation
U.S. Sentencing Commission
U.S. Probation Office
Federal Public Defenders
Supreme Court Police

Issues for Further Consideration

The Committee notes that, in future terms, further consideration should be given to expanding FOIA to other agency-like entities that exist on the peripheries of the constitutionally defined branches of the federal government, or which fall outside the traditional conceptualization of the federal government yet still play a vital role either in the regulatory process or in providing administrative support to the executive branch’s carrying-out of core government functions. These entities include (1) government-founded and/or operated nonprofit organizations, such as agency foundations; (2) government-sponsored enterprises (*e.g.*, Fannie Mae and Freddie Mac); (3) regional banks of the Federal Reserve; (4) self-regulatory organizations that participate or assist in agency enforcement proceedings or rulemaking (*e.g.*, Financial Industry Regulatory Authority (FINRA), Horseracing Integrity and Safety Authority, *etc.*); or (5) other consensus standards bodies, insofar as they are involved in the development of regulations.

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