Recommendation SR-5[1]

Congress should amend FOIA's judicial-review provision in three ways:

1) **To reaffirm the statute's *de novo* standard;**
2) **To specify the remedial authority of the courts, including the power to order an agency to comply with its affirmative-disclosure obligations, provided that a requester has exhausted administrative remedies prior to filing suit; and**
3) **To reinforce that, for purposes of FOIA claims, a complainant's injury-in-fact stems from an agency's failure to comply with the statute.**

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When Congress designed FOIA, it included a relatively powerful provision for judicial review—it vested federal courts with jurisdiction to resolve all disputes over the improper withholding of agency records.[2] On its face, this judicial-review provision appears favorable toward requesters. Among other things, it provides that review should be *de novo*; it clarifies there are no limits to a court's power to review records *in camera*; and it delimits an agency's grounds for withholding to nine exemptions,[3] which are further limited by a foreseeable-harm standard.[4] The courts, for their part, have long claimed to enforce the "strong presumption in favor of disclosure" implied by FOIA's purpose,[5] just as they have recognized the necessity of "narrowly construe[ing]" FOIA's "explicitly . . . exclusive" exemptions.[6] Finally, courts have determined that FOIA imposes no limit on their inherent equitable power to fashion relief to fulfill the law's promise of openness.[7]

Yet many experts argue courts are no longer policing the statute as Congress intended. As one scholar has suggested, "courts have simply not proven to be a bulwark against secrecy when an agency is willing to defend in court its refusal to disclose information under the statute."[8] Courts have tended, for example, to find ways to "defer to agencies without formally abrogating Congress's imposition of de novo review," whether through deference to "agency affidavits" or though "adopt[ion] [of] pro-government statutory and procedural interpretations."[9] That has proven particularly true in cases involving national security[10] and law enforcement interests.[11]

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[1] This recommendation was crafted by the Enforcement Working Group (David Cuillier, Margaret Kwoka, and Ryan Mulvey) within the Statutory Reform Subcommittee of the 2024-2026 term of the FOIA Advisory Committee.
[2] 5 U.S.C. § 552(a)(4)(B).
[3] *Id.* § 552(b)(1)–(9).
[4] *Id.* § 552(a)(8)(A)(i)(I)–(II).
[5] *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (cleaned up).
[6] *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (cleaned up).
[7] *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 19–20 (1974).
[8] Mark Fenster, "FOIA as an Administrative Law," *Troubling Transparency: The History and Future of Freedom of Information* 35 (David E. Pozen & Michael Schudson, eds., 2018).
[9] John C. Brinkerhoff, Jr. & Daniel B. Listwa, *Deference Conservation—FOIA's Lessons for a* Chevron*-less World*, 71 Stan. L. Rev. Online 146, 149 (2018); *see generally* Margaret Kwoka, *Deferring to Secrecy* 54 Boston College L. Rev. 185, 204–211 (2013).
[10] *See, e.g.*, *King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987) ("[T]he court owes substantial weight to detailed agency explanations in the national security context."); *accord Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61, 76 (2d Cir. 2012) (same); *Maynard v. Cent. Intelligence Agency*, 986 F.2d 547, 555–56 (1st 1993).
[11] *See, e.g.*, *Tax Analysts v. Internal Revenue Serv.*, 294 F.3d 71, 77 (D.C. Cir. 2002) ("[C]ourts apply a more deferential standard to a claim that information was compiled for law enforcement purposes[.]"); *see also Jordan v.*

These and other doctrines contribute to what many scholars have acknowledged as one-sided agency win-rates,[12] which appear to be inconsistent with a *de novo* review standard. We do believe that the statute's *de novo* review standard on legal and factual matters should be expressly reaffirmed. This would go a long way in indicating Congress's displeasure with judicial doctrines that undercut *de novo* review.

Remedial Authority and Affirmative Disclosure

FOIA imposes affirmative-disclosure obligations on agencies. Under subsection (a)(1), an agency must publish certain records in the *Federal Register*, and under subsection (a)(2), it must proactively post others in an electronic "reading room."[13] Courts agree a requester can file a lawsuit challenging an agency's compliance with these affirmative-disclosure obligations, but there is a troubling jurisdictional split about what sort of relief any court can actually provide to a requester.

On the one hand, with respect to subsection (a)(2), the Ninth Circuit and Second Circuit agree that a court can issue a mandatory injunction requiring an agency to post records in its online reading room.[14] The D.C. Circuit, on the other hand, has held a court *cannot* provide relief beyond an individual complaint, although it still might grant individualized relief, such as an order to provide a specific requester with records that ought to be affirmative disclosed, even on an indefinite ongoing basis.[15] This circuit split has created uncertainty in the enforceability of FOIA's affirmative disclosure obligations, and, at least in the D.C. Circuit, it has the potential to lead to more litigation against agencies, as each requester must seek its own relief so long as an agency fails to comply with the reading-room requirement. Relatedly, the D.C. Circuit has altogether declined to provide any remedy for an agency's failure to publish records in the *Federal Register*.[16]

If district courts lack the power to order compliance with FOIA's affirmative-disclosure obligations, those obligations are merely hortatory. For affirmative disclosure obligations to be meaningful, judicial review must entail common sense mechanisms of enforcement. As one group of scholars explained in their report for the Administrative Conference of the United States's Recommendation 2023-1, Proactive Disclosure of Agency Legal Materials:

> [C]onfusion and disagreement in the courts concerning the power of the district courts to order compliance with FOIA's proactive disclosure obligations[] represents a significant source of ambiguity and confusion in the law. This

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Dep't of Justice, 668 F.3d 1188, 1193 (10th Cir. 2011) (cleaned up); *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, (D.C. Cir. 2003) ("Just as we have deferred to the executive . . . [with] Exemptions 1 and 3, we owe the same deference under Exemption 7(A) in appropriate cases[.]").

[12] Brinkerhoff & Listwa*, supra*, at 147 ("[T]he government wins 90% of the time[.]") (citing Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 Wm. & Mary L. Rev. 679, 719, 730 (2002), and 1 James. T. O'Reilly, *Federal Information Disclosure* 227 (2015)).

[13] 5 U.S.C. § 552(a)(1), (a)(2).

[14] *N.Y. Legal Assistance Grp. v. Bd. of Immigration Appeals*, 987 F.3d 207, 209 (2d Cir. 2024); *Animal Legal Def. Fund. v. Dep't of Agric.*, 935 F.3d 858, 875–76 (9th Cir. 2019).

[15] *Cf. Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 846 F.3d 1235, 1243 (D.C. Cir. 2017).

[16] *Kennecott Utah Copper Corp. v. Dep't of the Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996) (holding courts may order the "production" of agency records, but not the "publication" of documents in the *Federal Register*).

> confusion has potentially significant effects on the incentives that agencies have to fulfill their obligations to disclose agency lateral materials fully and accessibly. As the Ninth Circuit noted, without a vehicle for enforcement, (a)(2) obligations are either "precatory" or even "a dead letter."[17]

Accordingly, we recommend that Congress amend FOIA to clarify that district courts do have remedial authority to order an agency to comply with the statute's affirmative-disclosure obligations—either by publishing records in the *Federal Register* or making them available for public inspection in an electronic format—and that it may require such disclosure on a continuing basis. The benefit of this relief need not be restricted to a named complainant.

We also recommend that Congress clarify the exhaustion requirements for requesters who seek to enforce subsections (a)(1) and (a)(2). Although FOIA expressly contemplates some sort of request-like process for affirmative disclosure[18]—perhaps as a means of providing notice to the agency about its lack of compliance—the statute lacks any detailed procedures as it provides for reactive-disclosure requests under subsection (a)(3). This should be changed. Any person seeking to raise an affirmative-disclosure claim should be required to notify the agency about the absence of records in the *Federal Register* or the agency's online records library. The agency must be given an opportunity to voluntarily remediate its noncompliance. And the requester should be afforded a means to appeal an adverse determination prior to initiating suit in federal court.[19]

Reinforcing Standing Through Informational Injury

One final, troubling, albeit seemingly arcane, issue that has started to creep into courts is whether, or to what extent, the Supreme Court's decision in *TransUnion LLC. v. Ramirez* overturns earlier precedent and now requires FOIA complainants to demonstrate injury beyond a mere denial of access to records to establish standing.

Federal court jurisdiction, of course, is limited to resolving "Cases" and "Controversies,"[20] and that constitutional limitation, in turn, requires every plaintiff to show standing through an injury-in-fact that is "fairly traceable to the challenged conduct of the defendant," and which is also redressable.[21] An injury-in-fact must not only invade a "legally protected interest," but be "concrete and particularized," as well as "actual or imminent."[22]

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[17] BERNARD W. BELL, ET AL., REPORT FOR THE ADMIN. CONFERENCE OF THE U.S.: DISCLOSURE OF AGENCY LEGAL MATERIALS at 131 (June 2023), *available at* https://www.acus.gov/sites/default/files/documents/Disclosure-of-Agency-Legal-Materials-Final-Report-5.30.23.pdf .

[18] 5 U.S.C. § 552(a)(6)(A) ("Each agency, upon any request for records made under paragraph (1), (2), or (3) . . .); *id.* § 552(a)(6)(C)(i) ("Any person making a request . . . under paragraph (1), (2), or (3) . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions[.]").

[19] *See* DISCLOSURE OF AGENCY LEGAL MATERIALS, *supra* note 20, at 132 ("This approach balances the need to provide full incentives for agencies to meet their affirmative disclosure obligations with the need for agencies to have ample opportunity to rectify any shortcomings that come to their attention prior to facing any litigation.").

[20] U.S. CONST. ART. III, SEC. 2.

[21] *See Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 559–62 (1992).

[22] *Id.*; *see Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–41 (2016) (discussing particularization and concreteness).

For decades, it was incontrovertible that intangible injuries, such as the denial of access to information to which a plaintiff is legally entitled, were sufficient to establish standing.[23] But some agencies have starting arguing the *TransUnion* decision changes the status quo, and now requires a demonstration of concrete harm *beyond* a "bare procedural violation."[24] Thus far, these attempts have not gained traction in the appellate courts,[25] but there are exceptions in the district courts.[26]

We believe that Congress should reinforce that a complainant raising a FOIA claim need only show how the requester has been denied access to records to which the requester is legally entitled. This procedural violation should be adequate to establish standing for FOIA claims. Requiring anything further stands in tension with the well-established rule that, with limited exceptions, requesters need not demonstrate *why* they seek records.[27]

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[23] *See, e.g.*, *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989) ("[A]n agency den[ying] [a] request[] for information under the Freedom of Information Act . . . constitutes a sufficiently distinct injury to provide standing to sue."); *see generally Fed. Election Comm'n v. Akins*, 542 U.S. 11, 21 (1998) ("[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."); *id.* at 30–31 (Scalia, J., dissenting) ("A person . . . demanding compliance with the Freedom of Information Act . . . can reasonably be described as being 'aggrieved' by the agency's refusal to provide it.").

[24] 594 U.S. 413, 440 (2021). No matter that the *TransUnion* court expressly disclaimed calling into question standing precedent as it applies to "public-disclosure or sunshine laws." *Id.* at 441.

[25] *See Nat'l Sec. Archive v. Cent. Intelligence Agency*, 104 F.4th 267, 272 n.1 (D.C. Cir. 2024); *accord Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 170–71 (4th Cir. 2023); *Kelly V. RealPage, Inc.*, 47 F.4th 202, 212 (3d Cir. 2022).

[26] *See, e.g.*, *S. Envtl. Law Ctr. v. Tenn. Valley Auth.*, No. 24-0095, 2025 WL 1791128, at *1 (E.D. Tenn. 2025).

[27] *E.g.*, *Nat'l Archives & records Admin. v. Favish*, 541 U.S. 157, 172 (2004).