Statutory Reform Subcommittee
Final Report and Recommendations

Freedom of Information Act
Advisory Committee 2024-2026 Term

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Introduction

The Freedom of Information Act (FOIA) was enacted in 1966 to ensure the public has access to federal records and information for accountability and transparency purposes. Throughout history, Congress has amended FOIA eight times in response to significant historical events, the necessity for improvements in FOIA administration and proactive disclosures, and to address technological advances. Since the 2016 Amendments, the number and complexity of requests have increased, technology has changed how records are created and retrieved, and the volume of litigation has increased as requesters seek to enforce the statute's requirements. The Statutory Reform Subcommittee has identified several areas for potential FOIA reform and proposes specific statutory reforms to address these areas of improvement, though these recommendations are not exhaustive. The Subcommittee's work carries special significance this year, as we mark both the 250th anniversary of our country and the 60th anniversary of FOIA.

FOIA Legislative History	
1966	Congress enacts the FOIA.
1974 FOIA Amendments	Modified judicial review provisions Narrowed some exemptions Restrictions on fees agencies could charge Added time limits for agencies to respond
1976 Government in Sunshine Act	Exemption 3 was amended
1986 Freedom of Information Reform Act	Defined fee categories Addressed the scope of access to law enforcement and national security records
1996 Electronic Freedom of Information Act	Addressed electronic/digital records
2002 Intelligence Authorization Act	Addressed requests to intelligence-community agency from foreign governments.
2007 OPEN Government Act	Enhanced agency accountability and response times Addressed fee issues Created OGIS
2009 OPEN FOIA Act	Modified Exemption 3
2016 FOIA Improvement Act	Added 25-year sunset to Exemption 5 Codified the foreseeable-harm standard Added "Rule of 3" for affirmative disclosures Mandated creation of FOIA.gov Required updates to agency FOIA regulations Expanded the role of OGIS

Statutory Reform Subcommittee
Mission Statement and Methodology

The Subcommittee defined its mission as follows:

> The **Statutory Reform Subcommittee** is developing concrete recommendations for how Congress can amend the FOIA to improve the requesting experience, address agency processing challenges, and better achieve the goal of open and transparent government in a digital world. The subcommittee's efforts are divided between three working groups, each of which focuses on different areas of possible reform. By bringing together legal experts, advocates, and government officials, these working groups aim to propose compelling improvements to the FOIA.

The Subcommittee reviewed recommendations from prior terms; surveyed proposals for statutory reform made by other government bodies—such as the Government Accountability Office (GAO) and Administrative Conference of the United States (ACUS)—previous bills considered by Congress, and reform ideas advanced by civil society groups; drew ideas from the expertise and experience of committee members; and researched disclosure laws of other jurisdictions. From this array of ideas, the Subcommittee developed seven recommendations that address FOIA reform. Working groups also interviewed current and former government employees in the executive and judicial branches to assess the feasibility and impact of these reforms. Specifically, these working groups aimed to address the substantive obligations regarding materials subject to the FOIA's affirmative-disclosure provisions—the "Transparency Obligations" working group—and examine approaches to improving the enforcement of FOIA beyond the current system of judicial review—the "Enforcement Models" working group.

Statutory Reform Subcommittee Members

Co-Chairs
Ryan Mulvey, Americans for Prosperity Foundation
Whitney Frazier-Jenkins, Pension Benefit Guaranty Corporation

Current Government Members
Scott Hodes, Department of Homeland Security
Marianne Manheim, Department of Health and Human Services
Deborah O. Moore, Department of Education

Non-Government Members
David Cuillier, University of Florida, Brechner Center for the Advancement of the First Amendment
Elizabeth Hempowicz, American Oversight
Margaret Kwoka, The Ohio State University Moritz College of Law
Frank LoMonte, Cable News Network (CNN)

Past Members
Kevin Bell, Federal Energy Regulatory Commission
Melissa Pickworth, Department of Health and Human Services

Proposed Recommendations

The Statutory Reform Subcommittee proposed the following seven recommendations, all of which were adopted by the full Committee.

Recommendation SR-1: Congress should make the FOIA Advisory Committee a non-discretionary federal advisory committee.

PASSED UNANIMOUSLY BY THE FULL COMMITTEE (15-0; 1 abstention) – April 2, 2026

Under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. § 1001 *et seq.*, Congress has established a framework for the establishment and operation of "advisory committees." Such committees are "a useful and beneficial means for furnishing expert advice, ideas, and diverse opinions" to the Executive Branch.[1] Specifically, advisory committees bring together federal employees with non-governmental experts, who together consider relevant issues and propose solutions for the improved implementation of federal law and, more generally, the efficient and effective operation of federal agencies.

Some advisory committees are *non-discretionary* or *mandatory*.[2] This usually means they exist by statutory directive.[3] A committee can also be mandatory when created by a presidential directive, such as an Executive Order. Other committees are *discretionary*. These discretionary committees are commonly established by an agency when the agency itself determines that advice from outside the government would strengthen its decision-making or aid in the administration of laws under its jurisdiction.[4] The distinction between mandatory and discretionary advisory committees is most significant in terms of procedural requirements: discretionary committees, for example, are more difficult to establish,[5] but they are relatively easy to disband, either through non-renewal or revocation of a charter.[6]

As it stands, the Federal Freedom of Information Act (FOIA) Advisory Committee ("Committee") is discretionary. The Archivist of the United States, acting as head of the National Archives and Records Administration ("NARA"), first established the Committee in 2014, "in accordance with the U.S. Second Open Government National Action Plan."[7] The Committee continues to help the Office of Information Services "fulfill the directive in the FOIA, 5 U.S.C. § 552(h)(2)(C), . . . [to] 'identify procedures and methods for improving compliance' with the FOIA" government wide.[8]

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[1] 5 U.S.C. § 1002(a).
[2] *Id.* § 1008(a)(1) ("specifically authorized by statute or by the President").
[3] The FACA enumerates several considerations that proposed legislation establishing or authorizing an advisory committee must contain, including, among other things, whether the committee has a "clearly defined purpose," would be "fairly balanced in terms of the points of view represented" among its membership, and provisions addressing staffing, funding, and the avoidance of any inappropriate influence over the agency. *See id.* § 1004(b).
[4] *Id.* § 1008(a)(2) ("determined as a matter of formal record, by the head of the agency . . . with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law").
[5] *See id.* § 1008(c)(1)–(2).
[6] *See id.* § 1013(a)(2), (b).
[7] *Freedom of Information Act (FOIA) Advisory Committee*, NAT'L ARCHIVES & RECORDS ADMIN., https://www.archives.gov/ogis/foia-advisory-committee (last visited Aug. 28, 2025).
[8] *Id.*

The Committee's charter has been renewed for successive two-year periods and was most recently renewed for the 2026–2028 Term.[9]

Although there is no indication that NARA intends to terminate or decline to renew the Committee's charter in the future, the work and focus of the Committee is important enough to warrant Congress's codification of its existence and function into law. The FOIA, 5 U.S.C. § 552, is the natural home for such a statutory directive.

The Advisory Committee serves a necessary function in providing recommendations—and fostering dialogue between federal employees and the interested public, especially civil society organizations that regularly utilize the FOIA—for improved administration of a bedrock statute advancing open government and transparency. As the Supreme Court itself has explained, "[t]he basic purpose of 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."[10] The FOIA is vital mechanism for Americans to find out "what their government is up to,"[11] which is a "structural necessity in a real democracy."[12]

Insofar as the FOIA is a government-wide statute, and agency FOIA obligations do not change from year-to-year, there are always new issues that require careful consideration by the Advisory Committee. In this sense, the Committee's stated objectives are never fully accomplished, but represent ongoing goals that animate and shape every two-year term's agenda. Similarly, because the need for addressing issues in FOIA administration is evergreen, the Advisory Committee can never be "obsolete." In every term since its inception, it has sought to tackle important and sometimes novel issues. Finally, the Advisory Committee is a fine example of inter-agency cooperation, as it draws its agency membership from across the federal government. By bringing together different perspectives from various agencies, along with representatives of NARA and the Department of Justice's Office of Information Policy, as well as members of the public, the Advisory Committee is an excellent source for problem identification and the ideation of solutions that make FOIA more effective, efficient, and consistent with the statute's animating purpose.

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[9] *See generally 2026–2028 FOIA Advisory Committee Charter*, NAT'L ARCHIVES & RECORDS ADMIN., https://www.archives.gov/ogis/foia-advisory-committee/2026-2028-foia-advisory-committee-charter (last visited June 18, 2026).
[10] *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).
[11] *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (cleaned up).
[12] *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

Recommendation SR-2: Congress should require federal agencies to fund their FOIA function at a level sufficient to enable them to fulfill their FOIA requests timely.

PASSED UNANIMOUSLY BY THE FULL COMMITTEE (16-0) – May 7, 2026

In its annual appropriation language to federal agencies, Congress should require federal agencies to fund their FOIA function at a level sufficient to enable them to fulfill their FOIA requests timely. In determining appropriate funding direction it would provide, Congress should consider an agency's average workforce size, including any contract staff; changes in the volume and complexity of its requests over the past five years; its average backlog over the past five years; and its operational structure, among other influencing factors.

Introduction

The Freedom of Information Act (FOIA) is a cornerstone of governmental transparency, promoting accountability and ensuring that citizens have access to public records. In many federal departments and agencies (agencies), however, funding their FOIA function at a level sufficient to address their FOIA demand has historically taken a backseat to funding the agencies' specific mission and other priorities. As a result, many federal FOIA offices face challenges stemming from this inadequate funding, leading to delays in providing requested records, inefficiencies in processing requests due to outdated technology tools, and costly litigation.

Proposal

This recommendation addresses this persistent problem by proposing that Congress, in its annual appropriations language, adopt a funding model that directs federal agencies to resource their FOIA operations at a level that enables them to respond to their FOIA requests timely. Funding direction to agencies would be based on a consideration of the size of the workforce served by each of their FOIA offices with adjustments to account for several influencing factors. In determining the appropriate funding level to be outlined in each agency's appropriation language, Congress would consider the average of the past five years of the agency's personnel allocation. Then, it would take a fixed percentage of that number as a starting point, creating a baseline funding figure. It would then adjust that number up or down to address, at a minimum, the following considerations:

- Use of contract staff: Agencies relying on a large number of contract staff, whose records are also subject to FOIA, could need their baseline funding figure increased;
- Request workload: Trends in agency request volume and complexity should be evaluated and reflected in the funding figure;
- Backlog: The size of each agency's backlog over the past five years should impact the baseline funding figure, up or down; and
- Operational structure: How an agency manages its FOIA work, through a centralized or decentralized structure, might also need to be accounted for in the baseline funding figure.

In addition to these considerations, Congress should evaluate an agency's overall FOIA performance against prior years' funding levels to ensure continued appropriate funding for high performing agencies where resources are well balanced against workload and to identify any developing trends that need to be addressed. Further, Congress should establish a minimum required funding threshold for every agency, including those with smaller personnel allocations and low backlogs, so their FOIA operations continue to function properly.

Funding for agency FOIA offices would include resources for full-time equivalent staff (FTE), training for FOIA professionals and agency record custodians, technology upgrades, and other FOIA-related requirements, as identified by the agency.

Rationale for the Funding Model

Ensuring Adequate Resources

Congress annually must allocate scarce resources to multiple competing priorities within agencies. However, it is important to note that not all agency functions are nondiscretionary duties imposed by statute with enforceable consequences for noncompliance, as is fulfillment of the FOIA. This recommendation seeks to ensure that agency FOIA operations are funded sufficiently to ensure this statutorily required business function is consistently met. Just as agencies must ensure human capital and information technology services are reliably provided for, agencies must adequately support their FOIA obligations. By making FOIA a required element of agencies' operating budget, Congress would enable FOIA offices across the federal government to keep pace with an ever-increasing workload.

Improving Efficiency and Responsiveness

With increased and consistent funding, FOIA offices can hire additional staff, invest in training, and implement advanced technologies to streamline request processing. This will lead to improved efficiency, reduced backlogs, and more timely responses to FOIA requests, thus enhancing public trust and satisfaction. In addition, adequate funding of agencies' FOIA function will result in agency cost avoidance as it will reduce the necessity to expend limited agency resources on costly litigation due to untimely responses.

Adjusting to Fluctuations

The model accounts for inevitable fluctuations in an organization's size and FOIA workload by annually assessing performance and need. Basing the initial funding figure on the five-year average of agency personnel allocations and then adjusting that figure, in consideration of influencing factors, such as existing backlog and changes in request volume and complexity enables Congress to tailor its funding direction appropriately. This built-in rightsizing will enable FOIA offices to address shifts in workload, ideally before large backlogs develop and impede agencies' timely response to FOIA requests.

Conclusion

As highlighted in the final report of the FOIA Funding Working Group of the Legislative Subcommittee of the FOIA Advisory Committee's 2018-2020 Term and its Recommendation 20, "The single most consistent challenge agencies encounter when attempting to properly implement FOIA derives from limited resources." Congress has an opportunity to directly address the challenge of chronic underfunding of agencies' FOIA operations by taking legislative action to build sufficient, recurrent, and adequate funding into agency budgets. This approach ensures that agencies direct adequate resources towards fulfilling their FOIA obligations, promotes timely responses to public records requests, and ultimately strengthens the transparency and accountability of government operations.

Recommendation SR-3: Congress should amend FOIA to mandate regular publication of agency FOIA logs.

PASSED UNANIMOUSLY BY THE FULL COMMITTEE (13-0; 3 abstentions) – April 2, 2026

Congress should amend FOIA to mandate regular publication of agency FOIA logs to contain, at a minimum, 13 fields generally maintained in agency FOIA tracking systems, including:

1) the tracking number of the request,
2) the date of the request,
3) the name of the requester, unless the requester is a first-person requester seeking access to their own information,
4) the organizational affiliation of the requester, if identified in the request,
5) the subject matter of the request,
6) the status of the request,
7) the result of the request (if closed),
8) exemptions cited, if any,
9), the date on which the request was resolved,
10) the fee category assigned to the request,
11) whether a fee waiver was requested,
12) if a fee waiver was requested, whether it was granted, and
13) fees charged to the requester, if any.

FOIA's affirmative disclosure provisions should mandate the ongoing publication of agency FOIA logs on at least a quarterly basis, unless the agency receives fewer than 100 requests per year in which case it could publish them semi-annually.

The logs should be posted in machine-readable format and transmitted to DOJ for additional posting on foia.gov.

Congress should consider an appropriate effective date for this requirement that allows agencies reasonable time for implementation including interim milestones while not unduly delaying compliance.

Explanation

FOIA logs have proven useful to government policymakers, reporters, and academics alike. Sometimes the use is one that promotes FOIA efficiency: searching the logs can help a requester make a more precise request or request records already produced that would be readily available to the FOIA office. In other instances, the logs have promoted improvements to FOIA administration. The logs are maintained by the agency as part of their responsibilities to track requests and meet statutory deadlines, as well as to report aggregate processing statistics to Congress and the DOJ each year. And most agencies post some form of the logs already, albeit not a standardized one.

On the basis of the prior research supporting these conclusions, it seems entirely feasible for agencies to publish logs on an ongoing basis in a standardized form.

This recommendation reflects work done in earlier terms of the FOIA Advisory Committee. In its final report, the 2016-2018 Committee suggested that the Office of Government Information Services (OGIS) publish and promote best practices for agencies to implement, including publishing FOIA logs. *See* 2016-2018 FOIA Advisory Committee Final Report and Recommendations. The 2020-2022 Committee went a step further, recommending that agencies proactively publish FOIA logs at least quarterly and include 14 fields of data. *See* Recommendation 2022-10.

Congress should establish a firm and enforceable effective date for this requirement—one that provides agencies sufficient, but limited, time to implement necessary changes. To prevent further delay, the provision should include clear interim milestones, mandatory progress reporting, and defined consequences for noncompliance ensuring agencies cannot continue to defer action indefinitely.

Recommendation SR-4: Congress should create a new "FOIA Court" with specialized jurisdiction over FOIA claims.[13]

PASSED UNANIMOUSLY BY THE FULL COMMITTEE (14-0; 2 abstentions) – June 11, 2026

The volume of FOIA litigation steadily increases every year. In Fiscal Year 2024, requesters filed 889 FOIA suits.[14] Although this number was quite small relative to the total number of new civil cases,[15] a disproportionate share was brought in the U.S. District Court for the District of Columbia ("DDC"). Indeed, according to data obtained through PACER, 680 of those 889 FOIA cases were filed in the DDC, representing roughly 76.5% of all new litigation reported by the Department of Justice's Office of Information Policy. The concentration of FOIA suits in the DDC has hardly changed in the past year. Data available from the Federal Judicial Center indicates that, in calendar year 2025, 65% of all new FOIA suits—*i.e.*, 649 out of 997—were still brought in the DDC.[16] The next most popular jurisdictions were the Southern District of New York (6%) and the Northern District of California (3%), which is consistent with historical trends.

The fact that most FOIA cases are (and will likely continue to be) filed in the DDC has not gone unnoticed by that court's members. Judge Trevor McFadden, in *American Center for Law & Justice v. Department of Homeland Security*, voiced real frustration about the impact FOIA litigation and its monopolization of the time and attention of DDC judges, who already face crushing dockets. Judge McFadden underscored how "[c]ourt dockets in this district overflow with [FOIA] matters. . . . Judges in this district currently have 991 active FOIA cases, which represent almost a quarter of the district's entire civil docket. And many of those take years to resolve."[17]

Others have remarked on the impact of FOIA litigation, too:

> The volume of FOIA litigation nationwide has outpaced the ability of federal courts to deal with those cases in a timely manner. And most FOIA litigators and DOJ attorneys would agree that, quite apart from the increased volume of lawsuits, FOIA cases are often given the least attention of any on a district judge's docket. To be sure, there are always exceptions; but few judges appear to enjoy, let alone dedicate much of their time and attention to FOIA questions.[18]

To alleviate the pressure on district courts—especially the DDC—and to ensure that the judges who hear FOIA claims are able to bring their interest and expertise to bear, Congress should create

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[13] 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.

[14] Dep't of Justice Office of Info. Pol'y, 2024 Freedom of Information Act Litigation and Compliance Report at 20 (Mar. 7, 2025), *available at* https://www.justice.gov/oip/media/1392641/dl?inline.

[15] *See* U.S. Courts, "Federal Judicial Caseload Statistics 2024," https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024 (listing 347,991 new "civil cases" for the 12-month period ending on March 31, 2024).

[16] This data can be access at the Federal Judicial Center's Integrated Database: https://www.fjc.gov/research/idb.

[17] 573 F. Supp. 3d 78, 79, 83 (D.D.C. 2021).

[18] Ryan P. Mulvey & James Valvo, "Creating a Freedom of Information court," Ams. for Prosperity, Mar. 14, 2022, https://americansforprosperity.org/blog/creating-a-freedom-of-information-court/.

a new, specialized Article III court[19] that only hears FOIA claims.[20] This specialty court should be staffed by newly appointed judges who are noted experts in public-access law and related topics, ensuring that cases are given adequate attention so as to improve the quality of the litigants' experience and ensure consistency in the resulting decisions.[21] Appeals from this specialty court could be directed to the D.C. Circuit, which is already known for its expertise in FOIA law. In short, a new federal-transparency tribunal, housed within the judicial branch, could help improve the timely and expert adjudication of open-government claims, while leaving traditional district courts of general jurisdiction to manage the rest of the civil and criminal dockets. Again, in the long term, this would have the added benefit of creating a uniform body of case law, leading to predictability and stability in FOIA jurisprudence, which benefits agencies and requesters alike.

A "FOIA Court" would not be unprecedented in the sense that Congress has already created a number of Article III specialty courts, including the Court of International Trade[22] and Foreign Intelligence Surveillance Court.[23] It also has created the Judicial Panel on Multidistrict Litigation.[24] And there are various Article I tribunals with specialty jurisdiction, including the Court of Federal Claims,[25] bankruptcy courts,[26] the Tax Court,[27] and the Patent and Trademark Trial and Appeal Boards, among others. A specialized court staffed with judges committed to

[19] *Id.* Congress may, in the alternative, consider creating an Article I tribunal to hear these claims. Any such court, however, would need to be subject to the same robust procedural and evidentiary rules as an Article III court, have mechanisms in place to protect the independence of the tribunal's judges, and ensure a right of appeal to an Article III court of appeals. All things being equal, we think it makes better sense for Congress to place a specialized FOIA Court within the existing Article III structure.

[20] Congress may also consider giving the FOIA Court jurisdiction to hear claims arising under the Privacy Act, 5 U.S.C. § 552a *et seq.*, which is a federal statute that governs the collection, maintenance, use and dissemination of information about individuals maintained in any "system of records"—a technical phrase that refers to a grouping of records from which information can be retrieved by the name of an individual or an identifier (*e.g.*, number) assigned to him or her.

[21] Importantly, Congress would need to decide whether the FOIA Court's jurisdiction is *exclusive*—meaning all FOIA claims must be brought there—or *concurrent*, which would leave in place the venue options now set out in Section 552(a)(4)(B). The Committee has considered both approaches and cannot agree upon the best course of action. On the one hand, exclusive jurisdiction would likely maximize judicial efficiency and uniformity in FOIA case law—both of which are reasons why a specialty court is desirable. Concurrent jurisdiction, on the other hand, would accommodate requesters who desire to seek judicial review but do not have the resources to avail themselves of a specialty court outside of their home venue. Additionally, concurrent jurisdiction would avoid the complex questions that arise vis-à-vis complainants who file lawsuits containing both FOIA claims *and* other causes of action. Under an exclusive-jurisdiction model, these lawsuits would either no longer be possible, or Congress would need to give the FOIA Court ancillary jurisdiction to adjudicate non-FOIA claims in such rare instances. Alternatively, Congress could create some kind of statutory exception to ensure subject-matter jurisdiction in a regular district court.

[22] *See* 28 U.S.C. § 251.

[23] *See* 50 U.S.C. § 1803.

[24] *See* 28 U.S.C. § 1407.

[25] *See id.* § 171.

[26] *See id.* § 151.

[27] *See* 26 U.S.C. § 7441.

proper application of the FOIA, and who are not otherwise obliged to prioritize other criminal or civil matters,[28] could go a long way to changing how quickly FOIA disputes are resolved.[29]

[28] District courts were previously obliged to prioritize FOIA lawsuits under the 1974 statute. *See* 5 U.S.C. § 552(a)(4)(D) ("Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."). Congress repealed that requirement in 1984. Pub. L. No. 98-620, title IV, § 402(2), 98 Stat. 3335, 3357 (Nov. 8, 1984).

[29] As part of the preparation of this recommendation, members of the Statutory Reform Subcommittee conducted limited interviews with members of the judicial branch, including two judges and an employee with the Administrative Office of the U.S. Courts. They also spoke with current or former Executive Branch officials involved with FOIA litigation. All these stakeholders expressed great enthusiasm for a specialized FOIA Court.

Recommendation SR-5: Congress should amend FOIA's judicial-review provision.[30]

PASSED UNANIMOUSLY BY THE FULL COMMITTEE (11-0; 5 abstentions) – June 11, 2026

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

1) ***To reaffirm the statute's de novo standard; and***
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.***

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.[31] 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,[32] which are further limited by a foreseeable-harm standard.[33] The courts, for their part, have long claimed to enforce the "strong presumption in favor of disclosure" implied by FOIA's purpose,[34] just as they have recognized the necessity of "narrowly constru[ing]" FOIA's "explicitly . . . exclusive" exemptions.[35] 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.[36]

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."[37] 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."[38] That has proven particularly true in cases involving national security[39] and law enforcement interests.[40]

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[30] 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.
[31] 5 U.S.C. § 552(a)(4)(B).
[32] *Id.* § 552(b)(1)–(9).
[33] *Id.* § 552(a)(8)(A)(i)(I)–(II).
[34] *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (cleaned up).
[35] *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (cleaned up).
[36] *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 19–20 (1974).
[37] 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).
[38] 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).
[39] *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).
[40] *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. 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,

These and other doctrines contribute to what many scholars have acknowledged as one-sided agency win-rates,[41] 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."[42] 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.[43] 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.[44] 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*.[45]

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 confusion has potentially significant effects on the incentives that agencies have to

(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[.]").

[41] 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)).

[42] 5 U.S.C. § 552(a)(1), (a)(2).

[43] *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).

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

[45] *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*).

> 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."[46]

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[47]—perhaps as a means of providing notice to the agency about its lack of compliance—the statute lacks the same detailed procedures 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.[48]

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[46] 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.

[47] 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[.]").

[48] *See* DISCLOSURE OF AGENCY LEGAL MATERIALS, *supra* note 46, 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.").

Recommendation SR-6: Congress should allocate funding to commission a feasibility study to examine the costs and benefits of improving the FOIA support infrastructure to better serve taxpayers, records requesters, and public agencies.[49]

PASSED UNANIMOUSLY BY THE FULL COMMITTEE (11-0; 5 abstentions) – June 11, 2026

In 2022, the FOIA Advisory Committee recommended (Recommendation No. 2022-19[50]) that the Archivist of the United States commission a feasibility study to explore the costs and benefits of several recommended actions related to improving the FOIA process, specifically to empower the Office of Government Information Services (OGIS) or another entity with the authority and resources to mediate and settle disputes,[51] similar to models employed by some states and more than 80 other nations.[52] Since that recommendation passed, OGIS has attempted to acquire the funds needed for the feasibility study, but has been unsuccessful. We urge Congress to provide the allocation to explore new systems that could have far-reaching savings and efficiencies for federal agencies and the public.

Currently, a variety of functions intended to facilitate the FOIA process are performed—either discretionarily or under statutory obligation—in part and to varying levels of success by the Office of Information Policy, Government Services Administration, Government Accountability Office, the Office of Government Information Services, and the federal courts. The GAO is tasked with audits, but they are infrequent and lack a consistent schedule and strategy. The OIP is tasked with training and some technological assistance, but as an office within the Department of Justice—the government's law firm—it lacks perceived neutrality by requesters. The GSA provides technological assistance, but lacks the day-to-day workings within FOIA, among custodians and requesters to devise and update a truly effective single platform to efficiently receive requests, track them, process them (with AI and other technologies), and report out. The DOJ and OMB are tasked with providing such a platform, but have yet to create a complete infrastructure, across all agencies, from a record request's entire life cycle. The OGIS provides assistance for about 6,000 requesters annually, but with just 10 staff members cannot educate the other 343 million Americans in their essential information rights.

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[49] 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.

[50] *See* https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2022-07-05.pdf#page=31.

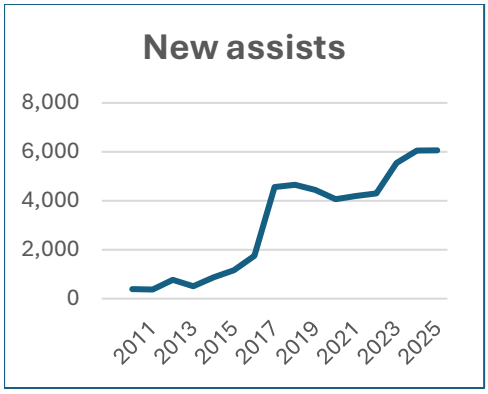
[51] OGIS 2.0: Reimagining FOIA Oversight, https://www.archives.gov/files/ogis/assets/reimagining-ogis-recommendations-03-30-2022.pdf

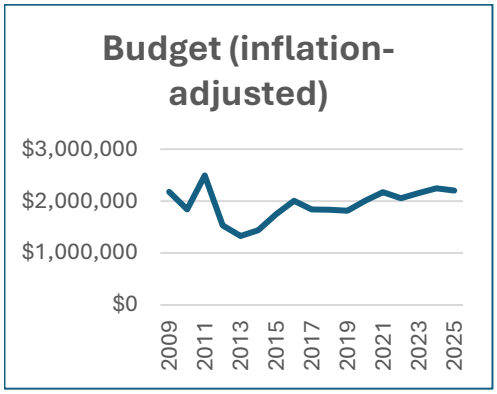
[52] *See* Michael Karanicolas & Margaret B. Kwoka, *Overseeing Oversight*, 54 CONN. L. REV. 655 (2022) (documenting that more than eighty countries have an independent oversight bodies that assist the public records process); Mark Fenster, The Informational Ombudsman: Fixing Open Government by Institutional Design, 6 Int'l J. Open Gov't 275 (2015) (examining models in Connecticut and New Jersey); Margaret B. Kwoka, *Transparency Guardians,* 57 GEO. WASH. INT'L L. REV. 409 (2025), and Mitch McKenney, *Just $25 to File, No Lawyer Required: Assessing an Alternative Public Record Complaint Procedure,* 7 J. CIVIC INFO. 4, 1 (2025). (The court costs 8 cents per Ohio resident per year.)

At the same time, backlogs and delays continue to increase as agencies face more requests with fewer resources.[53] Agencies are tasked with establishing and maintaining their own FOIA case management systems, causing inefficiencies and confusion through a patchwork of platforms, some with questionable performance and security capabilities, which frustrate custodians and requesters alike. Litigation continues to cost agencies, and therefore taxpayers, about $50 million per year,[54] and bogs down the federal courts. Research continues to show the growing frustration of requesters to acquire government information, and agencies in providing it.[55] The system needs help.

The 2020-22 committee term had recommended that OGIS be empowered and appropriately funded to take on additional duties, including the power to review records in camera, make binding decisions, and return OGIS as a direct report to the Archivist of the United States. Those recommendations remain in limbo, waiting for further study. We continue to support exploration of those recommendations, as well as additional activities outlined below, and we call upon Congress to act to support a study necessary to find new and better avenues for accomplishing these tasks.[56]

OGIS 2009-2025: Number of people assisted up while budget remains flat





[53] Examining 2025 FOIA report data at FOIA.gov data portal indicates that on average, federal agencies had their FOIA staffs cut 14%, with Education cut by 54%, Treasury 39% and Veterans Affairs 36%. As a result, backlogs increased 27%, on average, with Education backlogs up 84% and Veterans Affairs up 130%. Average time to complete simple requests increased 14% across the government, from 53 days to 61 days. The total number of requests increased from 1.5 million to 1.7 million in fiscal year 2025, up 13%.

[54] According to FOIA.gov, total FOIA litigation costs for fiscal year 2025 were $50.7 million.

[55] See A. Jay Wagner and David Cuillier, *Tale of Two Requesters: How Public Records Law Experiences Differ by Requester Types,* 26 JOURNALISM 2, 325 (2025), DOI: 10.1177/14648849241242988, and from a custodian's perspective, Michele Bush Kimball, *Public Records Professionals' Perceptions of Nuisance Requests for Access,* 5 UB J. MEDIA L. & ETHICS ½ (2016), https://www.k-state.edu/media-communication/research/journal/Vol.%205%20No.1-2%20Complete.pdf.

[56] *See generally* Margaret B. Kwoka, *Transparency Guardians,* 57 GEO. WASH. INT'L L. REV. 409 (2025), and an analysis of lessons learned, Gregory Michener, Fernando Nieto Morales, Margaret Kwoka and Maria del Carmen Nava Polina, *Lessons from the Dissolution of Mexico's Information Commission,* 38 GOVERNANCE 3 (2025), https://doi.org/10.1111/gove.70031.

Who should complete this study? We leave it to Congress to decide. Perhaps it would be ACUS, OMB or the GAO. Or, perhaps, even a respected, neutral entity outside the government. Regardless of what entity conducts the feasibility study, we would encourage the scope of the study to focus on the committee's previous recommendations from 2022, in addition to the following activities that could aid the system, for agencies and requesters:

1. Creation and maintenance of a National Transparency Portal, which could be based on, as a starting point, FOIA.gov, to enhance agencies' technical capabilities. While the OMB and the DOJ are tasked by statute to create a consolidated online request portal for submitting requests, the system is not holistic in shepherding requests through the entire process, and agencies are still left to fend for themselves in creating a records request management system. This places a burden on agencies to acquire and manage portal software and creates a confusing patchwork for requesters. One agency should be tasked (and funded) to create a well-functioning request system, similar to what other nations and many states and local jurisdictions have created, through which:
    - requesters can file a request to any agency;
    - agencies can track, refer, and respond to requests;
    - requesters can appeal a response;
    - requesters can see all of their requests, deadlines, responses, and appeals in a single log-in;
    - agencies post their materials required to be made proactively available;
    - agency responses to requests are posted, with the exception of PII released to first-person requesters;
    - the public can search previously released material and proactive disclosed records; and
    - statistics on FOIA compliance are readily available.

2. Lead the development of other technological solutions to FOIA processing, including the use of artificial intelligence to find records, and make those technologies available to all FOIA offices governmentwide. While General Services Administration provides governmentwide technology services, they typically are not specific to the FOIA process.

3. Audit agency compliance with FOIA obligations, including identifying priority agencies for such auditing through the data collected by the National Transparency Portal. While the GAO provides audits occasionally, they are infrequent and inconsistent when it comes to FOIA. Consistent audits would improve the system by:
    - inspecting a sample of unappealed FOIA responses to determine legal compliance, including reviewing unreleased records in camera;
    - inspecting systems of records to ensure agencies are performing adequate searches;
    - auditing agency compliance with proactive disclosure requirements.

4. Develop and provide agency training on FOIA compliance for:
    - FOIA officers throughout the government;
    - a designated FOIA liaison from within each program unit at every agency who is tasked with ensuring the program unit cooperates fully with the FOIA office in responding to requests.

5. Engage in public education about FOIA and transparency values, including advertising, civic engagement, attending community events, supporting public education, and other activities designed to further public knowledge about their rights under FOIA and the value of transparency in a democratic society. While OGIS staff currently educate requesters who seek assistance, no government agency provides education about FOIA to the entire nation.

6. Offer services to members of the public wishing to exercise their rights under FOIA by, for example, assisting members of the public in:
    - directing, submitting, and framing their requests;
    - searching for already available records;
    - creating an account in the online portal;
    - ensuring accessibility of FOIA processes, systems, and records for members of the public with disabilities;
    - facilitating access to FOIA for disadvantaged or marginalized populations;
    - providing translation services for members of the public unable to access their rights under FOIA in English.

7. Accept petitions from agencies to intervene in requests deemed unduly burdensome or frequent in nature, thereby relieving the agency of the duty to respond to requests in extreme cases. An entity could be empowered to set up a petition process and be delegated express authority for establishing exacting standards for when such relief would be granted, similar to the Connecticut Freedom of Information Commission, the United Kingdom Information Commission Commissioner's Office, and other arbiters of such disputes.

This non-exhaustive list of authorities and competencies would go a long way to complementing a newly established FOIA Court, as addressed in this Committee's separate recommendation, to create a comprehensive FOIA administration and enforcement scheme, aiding both requesters and agencies. The feasibility study could study potential costs, savings, and unintended positive and negative consequences of these approaches. Much can be learned from state commission models as well as the dozens of nations that have adopted independent commissions with binding authority. Key issues to be addressed by the study, for example, include:

- How to provide the delegated agency(ies) sufficient independence to avoid political capture or undue executive influence.

- The necessary level of staffing and funding to adequately resources to perform both existing mandates and all new mandates as outlined above.

- The role of guidance provided by OGIS or another entity vis a vis guidance provided to agencies by OIP. While OIP provides essential legal guidance and training to government agencies, and should continue to do so, its mission is to protect and defend the government, which does not create a fair playing field, at least from the requester's perspective.

We believe these issues can be addressed in such a feasibility study, and that the United States can build a structure that improves efficiencies for agencies and requesters, saves tax dollars, and fulfills the democracy mandate Congress launched nearly 60 years ago through passage of FOIA.

Recommendation SR-7: Congress should ensure public access to records controlled by legislative and judicial branch agencies.

PASSED UNANIMOUSLY BY THE FULL COMMITTEE (14-0; 1 abstention) – May 7, 2026

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"),[57] 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."[58] 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.*[59]

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.*[60]

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[57] 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").

[58] *Id.* § 552(f)(1).

[59] 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 ().

[60] 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*

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 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,[61] exploring the treatment of legislative-branch records under state laws,[62] the current discretionary disclosure practices for certain federal legislative entities,[63] and developments in the wake of January 6, 2021 to provide greater transparency into the Capitol Police.[64]

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.[65] 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)."[66] 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

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https://www.archives.gov/files/ogis/documents/final-report-and-recommendations-of-the-2020-2022-foia-advisory-committee-5-july-2022.pdf.

[61] 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.

[62] *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.

[63] *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").

[64] *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.

[65] 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.

[66] 44 U.S.C. § 2901(14).

(and eventually depositing into the Archives) "federal records."[67] 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 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,[68] and in more limited situations, the First Amendment.[69] 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

[67] 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).

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

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

would present special concerns about the scope of judicial privilege,[70] as well as lurking separation-of-powers objections.[71]

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,[72] detailed procedures for the processing of 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	***Judicial Agencies***
Architect of the Capitol	Judicial Conference of the United States
Government Accountability Office	Administrative Office of the U.S. Courts
Congressional Budget Office	Federal Judicial Center
Government Printing Office	Circuit Judicial Councils
Library of Congress	Judicial Panel on Multidistrict Litigation
Congressional Research Service	U.S. Sentencing Commission
Capitol Police	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 Fac); (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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[70] *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).

[71] *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).

[72] 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.

Conclusion and Thoughts for Future Advisory Committees

The Subcommittee believes that future terms of the Advisory Committee should consider proposed recommendations holistically rather than addressing FOIA reform piecemeal. These future recommendations could examine the way in which the various shortcomings of FOIA interact with one another. As set forth below, the Subcommittee has identified various specific topics that future terms should consider when addressing changes to the statutory provisions of FOIA. This list of topics reflects areas of priority concern identified by individual committee members, not all of which reflect the settled consensus of the Subcommittee as a whole. Importantly, we take no position on how Congress should address the concerns identified below. These topics are identified here merely to highlight the need for additional study and workshopping.

1. **Affirmative Disclosure Categories and Practices**

FOIA currently requires agencies to proactively disclose adjudicative opinions, policy statements, staff manuals, frequently requested records, and indexes. However, this framework may not reflect modern expectations around fiscal transparency, intergovernmental coordination, congressional oversight, or public participation. Future committees may wish to consider what additional categories of information, if any, should be added to 5 U.S.C. § 552(a)(2) to ensure that agencies are proactively disclosing records of high value to the public.

Such categories may include records already generated by agencies and frequently requested, but often inconsistently disclosed or accessible across agencies, making meaningful comparisons challenging. Or records such as budget documents, agency organizational charts, significant agency contracts, memoranda of understanding between agencies concerning delegation or sharing of operations, inspector general reports, agency submissions to Congress, and records disposition schedules.

Future committees may also wish to consider how to require searchable indexing of all affirmatively disclosed records. Codifying these categories may increase compliance, reduce FOIA burdens, and ensure public access to information essential to evaluating agency performance, spending, and oversight. Increasing consistency across agencies in affirmative disclosure practices should make information more useful to the public.

2. **Alternatives to FOIA Requests**

Increased affirmative or proactive disclosure has long been a policy objective embraced by Congress and executive administrations alike. One goal of these policies has been to reduce the need to rely on FOIA. Some agencies have begun such efforts, including, for example, the Internal Revenue Service for taxpayer information, the Veterans Health Administration for medical records, and the Executive Office for Immigration Review at DOJ for records of proceedings in immigration court.

Future committees should consider if and how to incentivize agencies—through reporting mechanisms or otherwise—to consider appropriate alternatives to FOIA and justify any decision not to pursue them. This suggestion builds on a recommendation by a prior term of the federal FOIA Advisory Committee. *See* Final Report and Recommendations, 2016-2018 FOIA Advisory Committee.

3. Assisting Agencies with 508 Compliance

Section 508 of the Rehabilitation Act requires federal agencies to ensure members of the public with disabilities have comparable access to publicly available information unless doing so would impose an undue burden on the agency. Remediating documents to be fully accessible can, however, be a costly and time-consuming task for agencies and can be a barrier to agencies seeking to increase affirmative disclosure of records in FOIA reading rooms. Previous terms of the Committee have made recommendations seeking to accommodate this tension by both investing in greater technological solutions to 508 compliance and by allowing agencies to provide alternative methods for individuals with disabilities to access reading room records.[73] OGIS's 2020 Annual Report similarly recommended to Congress that it pass legislation to provide additional resources for 508 compliance.[74] Future committees should consider statutory reform to assist agencies with 508 compliance.

4. Empowering Agency Officials

It has long been recognized, including in past recommendations, that FOIA offices are overtaxed, leading directly to the persistent backlog problem that, as of FY 2025, had reached a record 339,671, a 27% increase from the number of backlogged requests reported at the end of FY 2024.[75] The recent decline in the federal workforce has diminished the number of personnel dedicated to FOIA processing. It is essential to find new ways to expedite FOIA compliance and, where feasible, distribute the workload to relieve overburdened FOIA staff.

Future committees may wish to consider statutory mandates that ensure FOIA is the responsibility of everyone, not just FOIA professionals. These considerations could include, but are not limited to, mandatory FOIA training for all agency employees and contractors, including FOIA responsibilities as part of non-FOIA employee performance evaluations, and increasing the authority of the FOIA office.

5. Clarifying the Definition of a Record

FOIA provides requesters with access to "records" of federal agencies. "Records," in turn, are defined to include "any information that would be an agency record," regardless of whether it is

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[73] *See* Federal Advisory Committee Recommendation, 2018-04 (recommending OGIS launch interagency efforts to address challenges with 508 compliance through technological solutions); Federal Advisory Committee Recommendation, 2018-06 (recommending that Congress pass legislation to provide additional resources for 508 compliance); Federal Advisory Committee Recommendation, 2022-09 (recommending that Chief FOIA Officers Council establish a working group to study challenges with 508 compliance).

[74] OGIS, 2021 Report for Fiscal Year 2020 at 10-11.

[75] Fiscal Year 2025 Backlogs of FOIA Requests and Administrative Appeals, FOIA.gov - Freedom of Information Act

maintained in "an electronic format," or "maintained . . . by an entity under Government contract, for the purposes of records management." Given the arguable 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." The absence of a relevant definition in the Administrative Procedure Act hardly clarifies the matter.

The lack of a meaningful definition of "record" was the subject of the D.C. Circuit's 2016 decision in *American Immigration Lawyers Association v. Executive Office for Immigration Review* ("*AILA*"), which set forth what agencies should consider records subject to a FOIA request in a certain situation. *AILA* left unresolved the "antecedent question of what constitutes a distinct 'record' for FOIA purposes."

The application of *AILA* and the question of how agencies should define "records" remains unresolved. Future committees should consider whether there is value to amending FOIA's definition of a "record" to resolve this issue.

6. Adding a Presumptive Expiration Date to FOIA Exemptions

Federal law recognizes expiration dates after which many categories of records become presumptively accessible to the public. In the minds of many, especially in the requester community, exempt status should not be "all-or-nothing." Documents withheld as "deliberative" under Exemption 5, for example, become accessible 25 years after creation. And the withholding provisions of the Presidential Records Act expire after just 12 years, unless extended. Even classified information becomes presumptively public after 10 years, although that period may be extended to 25 years upon a finding of special sensitivity. In recognition that the need for withholding typically diminishes over time, it may be 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, no comparable process exists for other categories of records. Congress may need to explore whether 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.

7. Clarifying the Foreseeable-Harm Standard

The current foreseeable-harm standard, codified as part of the FOIA Improvement Act of 2016, has been understood as Congress's attempt to curb reflexive over-withholding. Although the standard has made a difference in some cases, members of the requester community often perceive that agencies continue to broadly apply exemptions while failing to meaningfully apply the foreseeable-harm standard, particularly when a determination letter does not articulate rigorously why disclosure would cause actual harm. Government-wide, nearly three-quarters of all requests are denied in part or in full. Congress may consider whether requiring agencies to identify a specific identifiable harm, rather than a merely foreseeable one, would raise the evidentiary threshold for withholding. Congress may also wish to consider whether narrowing the prohibition

by "law" language to prohibition by "statute," which would arguably close a gap that has allowed agencies to cite executive branch guidance or common law doctrines, rather than clear congressional mandates, as justification for non-disclosure.

Further, Congress should resolve existing confusion concerning which exemptions are subject to a foreseeable-harm analysis, a threshold question that turns on whether exemptions are "permissive" or "mandatory." As a general matter, agencies and reviewing courts may desire a clear textual anchor for enforcing the presumption of openness, and greater specificity in how the standard ought to applied in practice.

8. Reforming the Deliberative-Process Privilege

In light of FOIA's recognized imperative to maximize disclosure and minimize withholding, members from the requester community of the Subcommittee believe Congress should revisit the structure and function of Exemption 5 ("inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"), particularly as to the deliberative-process privilege as applied to pre-decisional "deliberative" documents.

The primary rationale for the deliberative-process privilege is promoting open, frank discussions on matters of policy between subordinates and superiors within agencies. But 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. For requesters, it is not self-evident that government employees routinely 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. Without access to records illuminating the give-and-take of agency decision-making, selective leaks can be weaponized to create an illusion of expert consensus that distorts public-policy discourse.

It may be beneficial to reassess Exemption 5 in light of countervailing considerations that weigh in favor of broader access to "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. Given the well-documented backlog issues afflicting FOIA fulfillment, removing or narrowing Exemption 5 could potentially reduce the workload on overtaxed agency employees called upon to make subjective document-by-document judgment calls.

9. Reassessing Exemption 4 and Competitive Harm

Members of the Subcommittee, other than the government members, believe it would be timely to revisit the effects of the Supreme Court's 2019 decision in *Food Marketing Institute v. Argus Leader*, which adopted a broadened construction of the definition of "confidential" for purposes of Exemption 4, 5 U.S.C. § 552(b)(4). The requester community argues that *Argus Leader* makes secrecy self-validating: The more that an industry keeps something secret, the more secret it is.

The pre-*Argus Leader* approach—which applied only to the subset of government-maintained records that would cause substantial competitive 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. Given the benefit of a body of caselaw applying *Argus Leader* (especially vis-à-vis its interaction with the foreseeable-harm standard), and the opportunity to examine what information is being lost to the public as a result, the breadth of Exemption 4 should be revisited.

10. Clarifying Exemption 3's Application

Exemption 3, 5 U.S.C. § 552(b)(3), permits agencies to withhold records that are "specifically exempted from disclosure by statute" if certain conditions are satisfied. Over the decades, a dense thicket of more than 250 laws has been identified as mandating withholding. Many such laws address niche sets of records for which the need for secrecy is not readily apparent, or which already fall within the ambit of other exemptions.

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, 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, and the very constitutionality of Congress's reform, with some reading out of the statute the requirement that Section 552(b)(3)(B) be cited. It is important to members from the requester community of the Subcommittee that this split should be rectified.

Given the proliferation of hundreds of purported (b)(3) statutes, many of which have never yet been tested in court, it could be valuable to comprehensively revisit these statutes and harmonize them with other exemptions that might apply, such as (b)(4) (trade secrets) or (b)(6)/(b)(7)(C) (personal privacy).

11. Limiting Exemption 7 to Promote Transparency in Law Enforcement

Some members of the Subcommittee believe Congress should reassess the scope of Exemption 7, 5 U.S.C. § 552(b)(7)(A), 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: Those deemed "investigatory." The modern expansion of Exemption 7's threshold requirement to encompass all records compiled for "law enforcement purposes" has, in practice proven to lead to the categorical withholding of law enforcement-related records under Exemption 7(A), even those with no practical likelihood of interfering with ongoing cases. The broadening of Exemption 7 is arguably exacerbated by the relatively low threshold of proof for an agency to justify a decision to withhold; it is 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 ostensibly 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 may be possible to arrive at a narrower exemption that protects core investigatory records. For example, the Arkansas Freedom of Information Act, Ark. Stat. § 25-19-105(b)(6), provides that agencies may withhold records of "[u]ndisclosed investigations by law enforcement agencies of suspected criminal activity." The modifier "undisclosed" cabins discretion to withhold records of cases that are already widespread public knowledge, where concealment serves little purpose. Additionally, Exemption 7(C) is routinely cited as a categorical justification for withholding the identities of law enforcement officers on personal privacy grounds, even though their identities might be readily publicly ascertainable through other means, including their testimony in court. Especially for requesters, the presumed need for broad secrecy encompassing law enforcement activities is worthy of reexamination in light of contemporary societal concerns for transparency and accountability in policing and diminishing public trust in the regularity of law enforcement and prosecutorial decisions. At the same time, further exploration of agency views on these policy issues needs to be undertaken.

12. Amending FOIA's Statutory Response Deadlines

Future terms of the Committee should consider the impact of changing the statutory deadlines for agency responses to FOIA requests. Currently, agencies have 20 working days to respond to a FOIA request. An agency may have a 10-day extension if unusual circumstances apply. However, federal agencies across the government are routinely unable to meet this statutory deadline leading to an increase in litigation costs and requester frustration with the FOIA process. In FY 2025, agencies across the government reported 339,671 backlogged requests, which was a 27% increase from the number of backlogged requests reported at the end of FY 2024.[76] The cost of litigation-related activities is substantial, as evidenced by agencies reporting spending $50,724,642 on litigation.[77] That increase in litigation then requires limited FOIA resources to be focused on requests subject to court-ordered deadlines, which further exacerbates the backlog issue. To assist with backlog reduction, decrease litigation, and improve the efficacy and quality of responses, future terms of the Committee should consider the value in amending FOIA's statutory deadlines. This evaluation should evaluate adjustments to the deadlines based on request complexity and possibly the volume of requests received by an agency.

13. Reinforcing, for purposes of FOIA claims, that a complainant's injury-in-fact-stems from an agency's failure to comply with the statute.

One 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. For some members of the Subcommittee, this is a concerning development.

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[76] *Id.*

[77] Fiscal Year 2025 FOIA Costs and Fees Collected for Processing Requests, FOIA.gov - Freedom of Information Act

Federal court jurisdiction is limited to resolving "Cases" and "Controversies,"[78] 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.[79] An injury-in-fact must not only invade a "legally protected interest," but be "concrete and particularized," as well as "actual or imminent."[80] Although this may seem rather academic, the purpose of these prerequisites is simple: Courts need to make sure that a plaintiff has a legitimate grievance and that resolution of a case will resolve a real-world dispute.

For decades, it has been incontrovertible that intangible injuries, such as the denial of access to information to which a plaintiff is legally entitled, are sufficient to establish standing.[81] Some agencies, however, have starting arguing the *TransUnion* decision changes the status quo and now requires a demonstration of concrete harm *beyond* a "bare procedural violation."[82] The success of that line of argument has been limited at the district-court level,[83] and it has yet to gain much traction in the appellate level.[84] But one judge has indicated she believes *TransUnion* requires a heightened showing at least for "reading room" claims under subsection (a)(2) of the FOIA.[85]

Future terms of the Committee may evaluate whether Congress should amend FOIA to reinforce that a complainant raising a FOIA claim needs only to show how an agency has denied the requester access, in a discrete instance, to records to which that requester is legally entitled. That kind of concrete procedural violation should be adequate to establish Article III standing. Requiring anything further arguably stands in tension with the Supreme Court's well-established rule that, with limited exceptions, requesters need not demonstrate *why* they seek records.[86]

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[78] U.S. CONST. ART. III, SEC. 2.
[79] *See Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 559–62 (1992).
[80] *Id.*; *see Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–41 (2016) (discussing particularization and concreteness).
[81] *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.").
[82] 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.
[83] *See, e.g.*, *S. Envtl. Law Ctr. v. Tenn. Valley Auth.*, No. 24-0095, 2025 WL 1791128, at *1 (E.D. Tenn. June 27, 2025).
[84] *Nat'l Sec. Archive v. Cent. Intelligence Agency*, 104 F.4th 267, 272 n.1 (D.C. Cir. 2024) ("We are bound by Supreme Court precedent, but *TransUnion* does not expressly overrule *Public Citizen*."); *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).
[85] *Campaign for Accountability v. Dep't of Justice*, 155 F.4th 724, 741 (D.C. Cir. 2025) (Rao, J., concurring) ("To establish standing for an alleged reading room violation, [the requester] was required to demonstrate a particularized injury and some downstream, adverse impact from the agency's nondisclosure. . . . [The requester] merely raised [here] a generalized grievance that [the agency] is violating the law and only vaguely gestured at organizational injuries."); *cf. Prisology, Inc. v. Fed. Bureau of Prisons*, 852 F.3d 1114 (D.C. Cir. 2017).
[86] *E.g.*, *Nat'l Archives & records Admin. v. Favish*, 541 U.S. 157, 172 (2004).