

# CRS Report for Congress

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## Access to Government Information In the United States

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### Summary

The Constitution of the United States makes no specific allowance for any one of the co-equal branches to have access to information held by the others and contains no provision expressly establishing a procedure for, or a right of, public access to government information. Nonetheless, Congress has legislated various public access laws. These include two records access statutes — the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a) — and two meetings access statutes — the Federal Advisory Committee Act (5 U.S.C. App.) and the Government in the Sunshine Act (5 U.S.C. 552b). Moreover, due to the American separation of powers model of government, interbranch conflicts over the accessibility of information are neither unexpected nor necessarily destructive. The federal courts, historically, have been reluctant to review and resolve “political questions” involving information disputes between Congress and the executive branch. Although there is considerable interbranch cooperation, such conflicts probably will continue to occur on occasion.

### History and Background

Throughout the first 150 years of the federal government, access to government information does not appear to have been a major issue among the three branches or for the citizenry. There were a few instances during this period when the President, for reasons of maintaining the constitutional independence and equality of his branch, vigorously resisted attempts by Congress and the courts to obtain executive records. Furthermore, during this same era, an active federal public printing program was established and effectively developed.

Following World War II, however, information came to be of limited availability from federal departments and agencies. Conditioned by information restrictions prompted by recent global hostilities, fearful of Cold War spies, intimidated by zealous loyalty investigators within and outside of government, and anxious about various efforts at reducing the executive workforce during the postwar reconversion, the federal

bureaucracy generally was not eager to have its activities and operations disclosed to the public, the press, or other governmental entities. Prevailing law tolerated this state of affairs, offering citizens no clear avenue of access to agency information. The public availability of records held by the executive branch was limited by artful interpretation of the housekeeping statute of 1789 authorizing the heads of departments to prescribe regulations regarding the custody, use, and preservation of the records, papers, and property of their entity. Moreover, a provision of the Administrative Procedure Act of 1946 indicated that matters of official record should be available to the public, but added that an agency could restrict access to its documents “for good cause found” or “in the public interest.” These discretionary authorities were relied upon to restrict the accessibility of unpublished agency records and documents.

Such conditions also contributed to the increasing difficulties of congressional committees and subcommittees in gaining access to both records and officials of federal departments and agencies during the 1950s. In response, some congressional panels began examining these information access issues and seeking responsive legislative solutions.

**Public Access Laws.** Apart from interbranch information access dilemmas, Congress, in 1966, undertook fashioning various statutory arrangements for realizing public access to executive branch information. This focus resulted because legislators felt that Congress adequately made its deliberations and proceedings subject to public observation, largely published its records, and otherwise was constitutionally authorized to engage in information restriction. For example, the Constitution explicitly permitted each House of Congress a discretion to keep portions of its journal of proceedings secret and disallowed the questioning of Members of Congress “in any other Place” regarding official speech or debate. Legislators also were satisfied with the openness of federal court files and hearing rooms. Thus, the departments and agencies were the principal object of government information access reform laws. Executive branch officials, however, were not supportive of these measures and, initially, did not always promote or pursue their faithful administration. The current major federal laws facilitating public access to government information are briefly described below; the full text of each statute may be consulted by using the appropriate United States Code reference provided.

- Freedom of Information Act (5 U.S.C. 552)

Initially enacted in 1966 and subsequently amended, the Freedom of Information (FOI) Act establishes for any person — corporate or individual, regardless of nationality — presumptive access to existing, unpublished agency records on any topic. The law specifies nine categories of information that may be permissibly exempted from the rule of disclosure. Agencies within the federal intelligence community are prohibited from making any record available to a foreign government or a representative of same pursuant to a FOI Act request. Disputes over the accessibility of requested records may be settled, according to the provisions of the act, in federal court. Fees for search, review, or copying of materials may be imposed; also, for some types of requesters, fees may be reduced or waived. The FOI Act was amended in 1996 to provide for public access to information in an electronic form or format.

- Federal Advisory Committee Act (5 U.S.C. App.)

A 1972 statute, the Federal Advisory Committee Act (FACA), in part, presumptively requires that the meetings of all federal advisory committees serving executive branch entities be open to public observation. The statute specifies nine categories of information — similar to those of the FOI Act — that may be permissively relied upon to close advisory committee deliberations when such matters are under discussion. Disputes over the proper public notice for a committee meeting or the closing of a session may be pursued in federal court.

- Privacy Act (5 U.S.C. 552a)

Legislated in 1974, the Privacy Act, in part, establishes for individuals who are United States citizens or permanent resident aliens, presumptive access to personally identifiable files on themselves held by most federal agencies (generally, however, not law enforcement and intelligence entities). The statute specifies seven types of information that may permissively be exempted from the rule of access. Where a file subject contends that a record contains inaccurate information about that individual, the act allows correction through emendation. Disputes over the accessibility of personally identifiable files may be pursued in federal court.

- Government in the Sunshine Act (5 U.S.C. 552b)

Enacted in 1976, the Sunshine Act presumptively opens the policymaking deliberations of collegially headed federal agencies — such as boards, commissions, or councils — to public scrutiny unless closed in accordance with any of nine exemptions to the rule of openness. Disputes over proper public notice of such meetings or the propriety of closing a deliberation may be pursued in federal court.

**Interbranch Access.** No statutory arrangements have been created to facilitate access by one branch of the federal government to records and information holdings of the other two branches. Both Congress and the judiciary have subpoena powers which can be exercised to compel the production of materials by another branch, but even these demands have sometimes been resisted. Occasionally, but rarely, the courts have ruled on these disputes. In 1974, for example, a Special Prosecutor sought certain tape recordings that President Richard Nixon, on a claim of constitutional privilege, initially refused to provide. The Supreme Court, in *United States v. Nixon* (418 U.S. 683), disallowed the President’s claim of privilege, finding it too general and overbroad and the needs of the Special Prosecutor to pursue criminal prosecutions more compelling.

In general, interbranch disputes over access to information are political conflicts of the highest order. The federal courts, historically, have been reluctant to review and resolve such “political questions.” Resolution is often reached through negotiation — reduction of the quantity of records initially sought, substitution of other information, alternative delivery mechanisms, or limitation of the number of individuals who will examine materials provided by another branch. Sometimes appeals to public opinion will pressure an information access deadlock to settlement. Congress can use its “power of the purse” to leverage its information access demands; federal courts rely upon a spirit of justice and fair play to sustain their orders for the production of information by another branch. In view of the American separation of powers model of government, such

conflicts are neither unexpected nor necessarily destructive. Furthermore, they probably will continue to occur.

## **Selected References**

U.S. Congress. House Committee on Government Reform. *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*. 108<sup>th</sup> Congress, 1<sup>st</sup> session. H.Rept. 108-172. Washington: GPO, 2003.

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