



## OIP Gives FOIA Implementation Advice to Other Nations

Since the time of its establishment in 1981, the Office of Information and Privacy has been visited by representatives of many other nations interested in the development, implementation, or improved administration of their own statutory counterparts to the Freedom of Information Act. See, e.g., [Department of Justice Annual FOIA Report for Calendar Year 2001](#) at 96, subsection (f).

As it is United States government policy to encourage the adoption and successful implementation of openness-in-government (or "transparency in government," as it often is referred to overseas) throughout the world, OIP has provided background briefings and advice to increasing numbers of foreign visitors over the years. To date, more than 45 other nations have enacted their own Freedom of Information Act counterparts, with many more considering such legislation, and OIP has met with representatives of more than six dozen nations.

Most recently, the nations of Japan, Mexico, and the United Kingdom have enacted major freedom of information legislation, the implementation of which is of great concern to those countries, and OIP has been actively supportive of those efforts. Japan's "transparency" law took effect on April 1, 2000, Mexico's takes effect on June 10, 2003, and the UK's is now scheduled to take effect on January 1, 2005.

The following is an outline of a presentation that was made by a Co-Director of OIP at a conference recently held in London, in coordination with the British Lord Chancellor's Department, on the prospective implementation of the UK's Freedom of Information law. The advice provided is applicable to other nations as well.

### Background

- **The United States Freedom of Information Act (commonly referred to as "the FOIA"), 5 U.S.C. § 552 (2000), has been in operation for more than thirty-five years.**
- **The FOIA was enacted in 1966, after more than ten years of legislative consideration and debate.**
- **It took effect on July 4, 1967 ("Independence Day" in the U.S.), after exactly one year of implementation preparation.**
- **It was heavily amended in 1974, in 1986, and in 1996.**

### **Basic Provisions**

- **The FOIA authorizes "any person" (which it very broadly defines) to request access to any record or information that is maintained within the control of a federal agency.**
- **A FOIA requester must (a) reasonably describe the record or information sought; (b) agree to pay any applicable fee (for record search, record duplication, and possibly record review); and (c) follow agency regulations regarding the manner and place for the making of FOIA requests.**
- **An agency must make available any record, or reasonably segregable portion of a record, that does not fall within one or more of the FOIA's nine basic exemptions or its three special exclusions.**
- **The FOIA's exemptions protect a wide range of institutional, commercial, and individual interests -- such as national security, business confidentiality, law enforcement effectiveness, and deliberative-process secrecy; its exclusions provide special protection for especially sensitive law enforcement, foreign intelligence, counterintelligence, and international terrorism information.**
- **An agency is required to comply with a FOIA request within twenty working days of its receipt, with certain exceptions made as a matter of both law and practicality.**
- **A FOIA requester may specifically request expedited processing, based upon both statutory and regulatory standards; agencies must decide whether to expedite within ten calendar days of receipt of such specific request.**
- **A FOIA requester may claim a categorical entitlement to certain limitations on fees, based upon the requester's status (e.g., "representative of the news media"), and/or a waiver of any applicable fee for particular records**

on a "public interest" basis.

- Any dissatisfied FOIA requester may obtain a second-level review of any adverse FOIA action through an administrative appeal to a higher authority within the agency; beyond that, a FOIA requester may bring a lawsuit in the federal courts.

### Applicability

- The FOIA applies at the national level of government (the U.S. federal government) only.

- All fifty states, as well as the District of Columbia, have their own FOIA counterparts, which in some cases are labeled "Open Records" laws and in some cases are combined with privacy-protection laws.

- The FOIA applies to the federal government's executive branch only; it does not apply to Congress, nor does it apply to the courts.

- Neither does it apply to the President, to his immediate staff, or to his advisors (sometimes collectively known as the "inner White House" for FOIA purposes); this includes, for example, the Office of the Vice President, the National Security Council, and the current Office of Homeland Security (soon to be largely eclipsed by a new Department of Homeland Security).

- The remainder of the Executive Office of the President (e.g., the Office of the United States Trade Representative) is subject to the FOIA.

- Some particular governmental entities (e.g., the Library of Congress's Copyright Office) are specifically subject to the FOIA; some (e.g., the Smithsonian Institution) are specifically not.

- All told, the FOIA applies to a total of eighty-six federal agencies, including fourteen Cabinet Departments.

- The FOIA vests the Attorney General (Cabinet Minister for the Department of Justice) with the responsibility of promoting uniform compliance with the Act throughout the executive branch; since 1981, this governmentwide policy responsibility has been carried out by the Department of Justice's Office of Information and Privacy.

### Statistics

- When the FOIA was enacted in 1966, Congress estimated that there would be only a few thousand FOIA requests filed each year, largely by news

media requesters, and that the annual cost of administering the law across the federal government would be no more than \$80,000.

- By the time that the first major FOIA amendments were made in 1974, however, it was recognized that all initial estimates were very far off the mark; yet Congress in 1974 again grossly underestimated the total additional cost for all agencies to implement the broadened provisions of the 1974 FOIA amendments as only \$50,000 to \$100,000 per year.

- In 1975, the total cost to one agency of handling just one particularly onerous FOIA request alone exceeded \$400,000.

- The total number of FOIA requests received during the most recent fiscal year for which statistics have been compiled, fiscal year 2001, was 2,246,212.

- In fiscal year 2001, the total cost of administering the FOIA across the federal government was \$287,792,041.08.

- To date, more than 5000 FOIA disputes have proceeded to litigation in court; nearly three dozen have reached the United States Supreme Court, including one that is presently pending.

### Governmentwide FOIA Administration

- The FOIA is administered by each agency of the federal government individually, in accordance with its own implementing regulations.

- Within all federal departments, and the larger federal agencies as well, the FOIA is administered on a decentralized basis -- with major sub-agencies and components of agencies handling the FOIA requests that they individually receive.

- For example, the Department of Justice consists of forty components, such as its Criminal Division and the Federal Bureau of Investigation, each of which has its own FOIA staff to handle its FOIA requests at the initial decisionmaking level.

- Administrative appeals are handled on a centralized basis within each agency, through a delegation of authority by each agency head; for example, the Office of Information and Privacy handles the 4000-5000 administrative appeals that are generated each year from the more than 200,000 FOIA requests that are acted upon by the Department of Justice's forty components.

- Additionally, to promote uniformity of practice and proper administration throughout the executive branch, the Department of Justice provides leadership, policy guidance, advice, and extensive training for all agency FOIA officers governmentwide.

### Recommended Focus Points

Based upon the U.S. experience with implementing and administering the FOIA over the past thirty-five years, and consistent with the advice provided by the Office of Information and Privacy to dozens of other nations during the past twenty-one years, the following ten focus points for Freedom of Information implementation within the UK are recommended:

#### 1. *Clarity of requirements*

- The clarity of anything new is essential to its understanding and acceptance; the clearer the new legal obligations that are being placed on agencies and their employees, including record custodians, the better.
- Ideally, any statutory ambiguity can be identified and clarified in governmentwide implementation guidance -- the clearer, the better.
- Any agency-specific ambiguity can be addressed in individual agency guidelines and/or regulations as well.
- It also is to the government's advantage to ensure that the rules and regulations governing requester obligations are as clear to the requesters as possible; this will minimize disputes, increase efficiency, and promote good morale all around.
- Uniformity of practice, from one agency to the next, is likewise beneficial to both employee and requester morale.

#### 2. *Recognition of "culture change"*

- Adoption of openness in government is a major culture change for government agencies and their employees, at both the institutional and personal levels, and it should be explicitly recognized as such.
- At the personal level, it is natural to fear change and it is only human nature to resist parting with anything (even government records) that previously was held close; it is a true loss of "control."
- This aspect of human nature applies at the institutional level as well, where bureaucracies operate as a macrocosm of individuality; agencies,

by their nature, will be resistant to change and to loss of control as well.

- This resistance can best be overcome, in time, by recognizing it for what it is (i.e., as understandably natural, rather than as perniciously obdurate), and meeting it head on.

- The government's implementation memoranda and training materials should explicitly incorporate this concept.

### ***3. High-level institutional commitment within each agency***

- The commitment of the head of each agency to the goal of faithful implementation is absolutely essential; it should be timely, credible, and unequivocal.

- All agency employees, not just those most directly involved in the new law's implementation, must be told (and must accept) that compliance with it is now a legitimate part of the agency's mission.

- A valuable technique is for governmentwide guidance to be distributed within each agency under cover of an agency-specific memorandum from each agency head.

### ***4. Centralized government leadership***

- There is no substitute for a single point of contact within the government that can provide leadership, guidance, exhortation, etc., in support of both short-term implementation and long-term statutory administration; ideally, it would be one that is highly placed and explicitly supported by the government's chief executive, through the vehicle of a governmentwide policy memorandum that speaks to the importance of its mission.

- Without such an entity -- one that is fully funded, politically supported, and staffed with credible expertise -- neither agencies nor requesters will take the new regime as seriously as they ought to.

- Only centralized leadership on what is essentially a generic governmental function can promote implementation uniformity and efficiency.

### ***5. Realistic funding***

- The single-most significant indicator of true government commitment to any enterprise is its funding; if government openness is not seen to be adequately funded, from the very outset of its implementation,

then it risks being perceived as a lip-service-laden lark at best or, at worst, as an unrealistic sham.

- Agency personnel, in particular, will tend to view funding as their most important signal of the seriousness with which they should embrace their new responsibilities; simply put, they will seize upon any lack of funding as an excuse for (or, worse, as a valid rationale for) intransigence.

- To the extent that an agency's funding of this new enterprise is unrealistic, any expectation of proper agency implementation will be unrealistic as well.

#### ***6. Involvement with FOIA-requester groups***

- Especially at the outset, public interest groups and media organizations -- the traditional openness-in-government constituencies -- most likely will be watching all of the government's implementation efforts with a jaundiced eye, just primed to criticize.

- If such requester-community groups can be brought into the implementation process in a meaningful way (which is not necessarily to say "co-opted"), with the knowledge that their views and initial complaints are being heard, it could prove well worth it all around.

#### ***7. Dialogue with individual requesters***

- By the same token, on the micro level, agencies can assuage individual requesters just by speaking with them; a personal touch can go a surprisingly long way.

- Though one might think that taking the time to "ring up" and speak with FOIA requesters can be quite time-consuming and therefore inefficient for agencies, actually the opposite is the case; overall, it can be more efficient to do so.

- Agency-requester dialogues can reduce many types of misunderstandings and disputes between agencies and requesters that otherwise would lead to further requests, administrative appeals, and even litigation.

- They also can facilitate the efficient narrowing of the scope of a request to begin with, to the requester's and the agency's mutual advantage; there often is much room for this, simply because (a) requesters are generally ignorant of the particular records and records systems that an agency maintains, and (b) requesters tend to make their requests overinclusive,

acting simply out of fear of not encompassing something that might exist and might be of interest to them (in other words, with basic human nature at play again).

#### ***8. Governmentwide implementation training***

- A strong implementation training program, across the full breadth of government, is a must.

- Essentially, proper implementation and long-term administration require the development of a new cadre of government professionals -- "FOIA Officers," as known in the U.S., or "access professionals."

- While there always will be implementation variations from agency to agency according to the particular types of records, records-maintenance practices, and institutional cultures that they have, a solid program of governmentwide training is absolutely necessary for efficiency, uniformity, and policy conformity.

#### ***9. In-house, specialized training***

- Governmentwide training alone, however, ordinarily is not sufficient; agencies must supplement it with their own individualized training programs, even if they are so small that they of necessity join together with similarly small agencies for joint training.

- In time, even the smallest of agencies should have some form of in-house, specialized training to support long-term administration given the inevitable turnover and rotation of personnel; larger agencies should consider holding agency-wide conferences on the subject every year or two.

- At the initial implementation stage, there should be a strong connection between in-house training and the development of each agency's own forms, practices, manuals, and regulations; the blending of the two actually is preferable.

#### ***10. Interim assessment/sharing of best practices***

- A second stage of implementation should involve interim assessments (after, say, six months to a year) of all agencies' implementation experiences up to that point.

- This enterprise can serve as a focal point for any adjustments, clarifications, problem-solving, etc., that should be undertaken within each agency before the passage of too much time.



- Most importantly, it also can serve as a mechanism for the exchange of information among agencies, for the identification of best practices, and for the sharing of those practices (under the guidance of the government's central policy office) for the benefit of agencies.

- Although parts of this process would best be kept confidential (lest the candor of agency self-assessment be impaired), it could present a useful occasion for involvement of the requester community as well.

### U.S. Resource References

- [Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act \(the Freedom of Information Act\)](#), June 1967.

- [Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act](#), February 1975.

- [Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act](#), December 1987.

- [Presidential Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act](#), October 4, 1993.

- [Attorney General's Memorandum for Heads of All Departments and Agencies Regarding the Freedom of Information Act](#), October 12, 2001.

- [White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security](#) (with accompanying memorandum from Department of Justice's Office of Information and Privacy and National Archives and Records Administration's Information Security Oversight Office), March 19, 2002.

- United States Department of Justice's Freedom of Information Act Web Site (<http://www.usdoj.gov/oip/index.html>) containing such basic references as:

- [FOIA Post](#) (2001 to date); [FOIA Update](#) (archived from 1979-2001); ["Justice Department Guide to the Freedom of Information Act"](#) (May 2002); and [Freedom of Information Case List](#) (2002 ed.).

- [Department of Justice's Freedom of Information Act and Privacy Act Regulations](#), 28 C.F.R. Part 16 (2002); [Your Right to Federal Records](#) (2002); and [Department of Justice Freedom of Information Act Reference](#)

**Guide (2002).**

- **Summaries of annual Freedom of Information Act reports prepared by all federal agencies. See, e.g., *FOIA Post*, "[Summary of Annual FOIA Reports for Fiscal Year 2001](#)" (posted 10/17/02).**

- **Summaries of all Freedom of Information Act decisions received by the Office of Information and Privacy, prepared on a quarterly basis, and also compiled on a retrospective basis as well. See *FOIA Post*, "[Compilations of FOIA Decisions Now Reach Back Five Years](#)" (posted 8/30/02). (*posted 12/12/02*)**

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