

# **History of the Freedom of Information Act The Curious Origins of the Idea and Ideals of Open Government**

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# Introduction

- John Moss, a Congressman from California first proposed legislation in 1955.
- Cold War had led to concern over government transparency.
- Moss found support from media group and journalists when he first proposed legislation in 1955, but struggled to find co-sponsor.



# A Curious Alliance

- Ultimately co-sponsored by a young Donald Rumsfeld, who enthusiastically supported the legislation.
- Signed – reluctantly – by LBJ on July 4, 1966
- Johnson issued a signing statement expressing concerns about national security.
- Was opposed by **all** federal Agencies that commented at time.



## Ford's Veto Consideration

September 25, 1974 Ford's advisor Ken Cole told him:

- "There is little question that the legislation is bad on the merits, the real question is whether opposing it is important enough to face the political consequences. Obviously, there is a significant political disadvantage to vetoing a Freedom of Information bill, especially just before an election, when your Administration's theme is one of openness and candor."
- Ironically, Nixon had considered working with Congressional Conference to pass bill in 1974.

# A Veto

- Concerns over national security, especially *in camera* review led to a veto message to the House.
- Then Department of Justice Office of Legal Counsel head Antonin Scalia had been organizing opposition to bill on separation of powers grounds



Are you pondering what I'm pondering?

## A Veto Overridden

- Scalia needn't have worried; the separation of powers wasn't going anywhere.
- By significant margins, both chambers overrode President Ford's veto.
- Media reaction was supportive: November 23, 1974 article in The Washington Post titled "Information: A Vital Gift" (see next page)

Now that the congress has met it test, it remains to be seen whether the press and the public will meet theirs. A law is only as good as the use to which it is put. In the past, because of the loopholes the new amendments are intended to close, the Freedom of Information Act was used only rarely. When it has been used, the results have often been startling, but it takes time to badger a federal agency for a document. It take time and money to hire a lawyer to pursue the issue in court.

With the new amendments, the time has been shortened, the number of documents available has been increased and, if the courts find a bureaucrat has denied information unlawful, the agency must pay the plaintiff's legal fees. In the end, it is the public and those who inquire of the government in the public behalf who can make the law work. It is up to them to apply Madison's principle of modern-day reality by recognizing that government by the people still depends on the information they process.

-Washington Post

# The Cover-up That Led to Revisions to The Act





# The 1974 Amendments

## Terminology

- *“agency”*
- *“reasonably describe”*
- eliminated the requirement that the records be *“identifiable”*

## Agency Requirement

- promulgate own regulations regarding search and copying fees
- reduce or waive fees if in the public interest
- deadlines of ten working days for processing FOIA requests
- twenty working days for administrative appeals
- “unusual circumstances” one-time extension

# 1974 Amendments Continued

## Annual Report to Congress

- # of decisions to withhold information/reason
- the number of appeals /results
- rules promulgated in relation to the FOIA
- agency fee schedule / total fees collected\
- names of personnel who made denial decisions.

## Attorney General

- # of legal cases arising under the FOIA
- exemptions claimed / disposition /costs / fees / penalties

# 1974 Amendments Continued

## Court Proceeding

- *de novo* review by courts of FOIA appeals through an *in camera* review
- concurrent venue in District of Columbia federal courts;
- Government file responsive pleading within thirty-day timeframe
- provided FOIA complaint precedence over other cases on the dockets of federal courts;
- attorney fees / costs awarded
- court-imposed sanctions for wrongfully withheld information
- authorizing courts to allow agencies more time to examine records

## Government in The Sunshine Act – 1976

- Provided that with specific exceptions (e.g. privacy, national security, investigations, information that is relevant to agency legal proceedings), public meetings be open to the public.
- Also amended Exemption 3.

# Amendment to FOIA Through Anti-Drug Abuse Act of 1986

- Changed requester fee categories
- Allowed for assessment of review costs
- Made minor changes to access of records pertaining to national security



## EFOIA - 1996

- Made clear that electronic records are “records” for purposes of FOIA
- Allowed requesters to ask for information in “any form or format” if the agency can reproduce it in that format (e.g. flash drives)

## EFOIA – 1996 (Continued)

- Doubled time limit for response to 20 days
- Mandated “Electronic Reading Rooms” (later called “FOIA libraries”)
- Clarified that searches of computer databases does not constitute creation of new records.
- Provided for expedited processing of certain requests.

# 2002 Amendment

- Relatively minor, restricted foreign government's access to records about themselves from U.S. intelligence agencies.





## FOIA Now

- President Obama issued a memorandum on his first full day in office, stating that FOIA reflects a “profound national commitment to ensuring an open Government.”
  - Advised that should be administered by Executive Branch such that “with a clear presumption: in the face of doubt, openness prevails.”

## FOIA Now, Continued

- In late 2014 the Department of Commerce promulgated regulations.
  - Final Rule published in Federal Register on Monday, October 20, 2014
    - Requires discretionary release absent foreseeable harm to an interest protected by a FOIA Exemption
    - Provides for notice to a requester when closing records not reasonably described, and clarified that this is an adverse action.

## FOIA, Now (Still)

- Rules state that failure to comply within statutory deadlines constitute exhaustion of administrative remedies.
- Copying fees now mere \$.08 cents per page within Department.



# Conclusion

- The Freedom of Information Act is a bedrock of democracy.
- The balance between accessibility and secrecy has varied in tandem with contemporary events and political incentives over time.

# History of the FOIA Questions?

