Proactive Disclosures

Proactive disclosures -- where agencies make their records publicly available without waiting for specific requests from the public -- are an integral part of the Freedom of Information Act. All federal agencies are required to affirmatively and continuously disclose records proactively by subsection (a)(2) of the FOIA.[1] Although this "proactive disclosure provision" has always served a vital role in achieving an "informed citizenry" -- the central purpose of the FOIA,[2] now, proactive disclosures are in the spotlight like never before. The President and the Attorney General have issued memoranda to all agencies emphasizing that the FOIA reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure."[3] (For a discussion of these memoranda, see Procedural Requirements, President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines, below.) Notably, the President has directed agencies to "take affirmative steps to make information public" without waiting for specific requests, and, to "use modern technology to inform citizens about what is known and done by their Government."[4] This directive, echoed by the Attorney General,[5] is both a reaffirmation

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[1] 5 U.S.C. § 552(a)(2)(2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see Jordan v. DOJ, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc) (observing that subsection (a)(2) records must be made "automatically available for public inspection; no demand is necessary").

[2] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); see also NARA v. Favish, 541 U.S. 157, 171-72 (2004) (explaining that the FOIA is a means for "citizens to know 'what their government is up to'" (quoting DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989))).

[3] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum]; accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; see *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[4] President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683; accord Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009. pdf.

[5] See Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/ (continued...)

of, and an expansion upon, the long-standing proactive disclosure provision of the FOIA.[6]

That provision, subsection (a)(2) of the FOIA, requires agencies to proactively identify records falling within its scope and to make those records "available for public inspection and copying."[7] Agencies should also exercise their discretion to make a broader range of records available beyond the minimum required by the statute.[8] All proactively disclosed records should, to the extent practicable, be posted online on agency websites.[9] By doing so, agencies will ensure efficient[10] and ongoing compliance with the FOIA's proactive disclosure provision

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[5](...continued)
foia-memo-march2009.pdf.

[6] See 5 U.S.C. § 552(a)(2).

[7] Id.; see, e.g., Jordan, 591 F.2d at 756 (observing that subsection (a)(2) records must be made "automatically available for public inspection; no demand is necessary"); see also President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683; Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[8] See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (stating that agencies should automatically disclose information about "what is known and done by . . . Government"); Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (calling for an increase in the systematic online posting of information in advance of FOIA requests); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (advising that making more information public is a "key area where agencies should strive for significant improvement").

[9] See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (directing agencies to "use modern technology" in disclosing information); Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009) [hereinafter President Obama's Transparency Memorandum] (calling on agencies to "harness new technologies" in putting information online); Attorney General Holder's FOIA Guidelines, available at http:// www.usdoj.gov/ag/foia-memo-march2009.pdf (emphasizing online availability of proactive disclosures); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (same).

[10] See Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (noting that posting more information online reduces the need for individual information requests and may help reduce agency backlogs); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (advising that "the more information that is made available on agency websites, the greater the potential to reduce the number of individual requests for records"); FOIA Update, Vol. XVI, No. 1, at 1-2 (discussing affirmative information disclosure as a means to meet public demand); see also
(continued...)

and with the President's and the Attorney General's mandate for the expanded use of proactive disclosures to create "an unprecedented level of openness."[11]

Proactive disclosures are an efficient means to make records publicly available that otherwise might be sought through less efficient FOIA requests.[12] In some circumstances, however, it may be appropriate for agencies to "withhold" (i.e., not make available) a record, or portion of a record, which is otherwise designated for proactive disclosure if it falls within a FOIA exemption, just as is done in response to FOIA requests.[13] As with FOIA requests, agencies should consider making a discretionary release of information, which is permissable

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[10](...continued)
FOIA Update, Vol. XVIII, No. 3, at 1-2 (describing efficiency of making records available to the public through the internet).

[11] President Obama's Transparency Memorandum, 74 Fed. Reg. at 4685; see President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683; Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; see also *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[12] See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (directing that agencies "should take affirmative steps to make information public" and "should not wait for specific requests" to do so); see also President Obama's Transparency Memorandum, 74 Fed. Reg. at 4685 (requiring agencies to "disclose information rapidly"); see, e.g., FOIA Update, Vol. XVI, No. 1, at 1-2 (promoting "affirmative" agency disclosure practices through subsection (a)(2) access, among other means); see also *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (emphasizing that bringing any pre-existing proactive disclosures to "FOIA requesters' attention . . . could be a basis for resolving their requests most efficiently").

[13] See, e.g., Fed. Open Market Comm. v. Merrill, 443 U.S. 340, 360 n.23 (1979) (applying commercial privilege to subsection (a)(1) record and recognizing that subsection (a)(2) records likewise may be protected by FOIA exemptions in determining that an (a)(2) document could still be withheld pursuant to the work-product privilege); Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 n.21 (1975) (acknowledging that subsection (a)(2) records may be protected by FOIA exemptions); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 160 (1975) (finding it unnecessary to decide whether documents were subsection (a)(2) records, because attorney work-product privilege protected them in any event); Sladek v. Bensinger, 605 F.2d 899, 901 (5th Cir. 1979) (applying Exemption 2 to portions of subsection (a)(2)(C) record); Peter S. Herrick's Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., No. 04-0377, 2006 WL 1826185, at *3 n.2 (D.D.C. June 30, 2006) (recognizing that contents of subsection (a)(2)(C) documents can be withheld pursuant to FOIA exemptions), summary affirmance granted, No. 06-5427 (D.C. Cir. May 24, 2007); Tax Analysts v. IRS, No. 94-923, 1996 WL 134587, at *6-7 (D.D.C. Mar. 15, 1996) (applying attorney work-product privilege to subsection (a)(2)(B) records); see also FOIA Update, Vol. XIII, No. 3, at 4 (advising that "an agency may withhold any record or record portion falling within subsection (a)(2) . . . if it is of such sensitivity as to fall within a FOIA exemption").

under a number of FOIA exemptions, whenever appropriate.[14]

Subsection (a)(2): Making Records Available for Public Inspection

Subsection (a)(2) of the FOIA applies to four categories of agency records that, while not automatically published under subsection (a)(1) of the FOIA,[15] must routinely be made "available for public inspection and copying."[16] This "public inspection" requirement is satisfied by providing the public with access to the designated documents automatically and without waiting for a FOIA request.[17] The proactive disclosure provision of the FOIA imposes an affirmative disclosure obligation that requires agencies to not only maintain, but also to continuously update, the records in each of the four categories designated by subsection (a)(2) of the FOIA.[18] While agencies historically satisfied the disclosure requirements of this provision by making the four categories of records available to the public in paper-based collections known as "Reading Rooms," thereby compelling citizens to visit an agency's records collection in person, agencies now typically make these records available

[14] See *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (describing exemptions where discretionary release is not appropriate due to existence of other statutes which provide protection for information, and also describing those exemptions where discretionary release is possible); FOIA Update, Vol. XVIII, No. 1, at 3 (cautioning that any personal information about an individual or business information that would not be disclosed to a third-party FOIA requester, such as information protected by Privacy Act of 1974, 5 U.S.C. § 552a (2006), or Trade Secrets Act, 18 U.S.C. § 1905 (2006), would not be appropriate for automatic public disclosure under "frequently requested" records category); id. at 5 (cautioning agencies to guard against possibility that proactive disclosure of record generated by outside party might be regarded as copyright infringement by that party). See generally Doe v. U.S. Dep't of Labor, 451 F. Supp. 2d. 156, 176 (D.D.C. 2006) (finding that agency's proactive disclosure of subsection (a)(2)(A) decisions without redacting claimants' names violated Privacy Act of 1974) (vacated pursuant to settlement Mar. 22, 2007).

[15] 5 U.S.C. § 552(a)(1) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (providing for Federal Register publication of very basic agency information, as discussed under Introduction, above).

[16] 5 U.S.C. § 552(a)(2); see, e.g. Jordan v. DOJ, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc) (recognizing "automatic availability" of subsection (a)(2) records).

[17] See 5 U.S.C. § 552(a)(2); see also *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008); FOIA Update, Vol. XIII, No. 3, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)").

[18] See *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008); see also FOIA Update, Vol. XVII, No. 4, at 1-2 (describing proactive disclosure requirements under Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048).

electronically by posting them on agency websites.[19] Indeed, to the extent possible, agencies should strive to provide these records entirely on their websites.[20]

In an exception to the FOIA's proactive disclosure requirement, records that are published and offered for sale by an agency, either directly or indirectly,[21] are not required to be proactively disclosed under subsection (a)(2).[22] Finally, with the exception of records that

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[19] See 5 U.S.C. § 552(a)(2) (requiring proactively disclosed records created after November 1, 1996, to be made available by "electronic means"); see also *FOIA Post*, "GAO E-FOIA Implementation Report Issued" (posted 3/23/01) (describing GAO report's emphasis on agency compliance with electronic availability obligations); *FOIA Post*, "Agencies Continue E-FOIA Implementation" (posted 3/14/01) (advising of growing attention being paid to agencies' electronic disclosure of records). See generally *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008) (citing use of "electronic Reading Rooms" in making records available by electronic means); FOIA Update, Vol. XVIII, No. 1 (addressing use of electronic and conventional "Reading Rooms" as a means of proactive disclosure).

[20] See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum] (emphasizing role of technology in improving information dissemination); Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009) [hereinafter President Obama's Transparency Memorandum] (same); Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; (emphasizing online availability of proactive disclosures); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (same).

[21] See, e.g., *FOIA Post*, "NTIS: An Available Means of Record Disclosure" (posted 8/30/02) (describing operation of National Technical Information Service (commonly known as "NTIS") in governmentwide process of record dissemination); Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,018 (1987) (recognizing NTIS as "statutor[il]y-based" government record distribution program).

[22] See 5 U.S.C. § 552(a)(2); Jackson v. Heckler, 580 F. Supp. 1077, 1081 (E.D. Pa. 1984) (holding that Social Security Ruling relied on by administrative law judge need not be made "available for inspection and copying" pursuant to subsection (a)(2)(B) because it was "published for sale"); see also *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008) (noting that records which are published and offered for sale are "excluded from the definition of [subsection (a)(2)] records" and need not be proactively disclosed even if doing so would otherwise be required); FOIA Update, Vol. XVII, No. 4, at 1 (noting that Reading Room obligation does not apply to any records that "are promptly published and [are] offered for sale" (quoting 5 U.S.C. § 552(a)(2))); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 15 (June 1967) 15 (noting that the exclusion of records which are published and

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are proactively disclosed because they have been frequently requested under the FOIA,[23] records required to be made publicly available under subsection (a)(2) are not required to be processed in response to regular FOIA requests.[24] If an agency receives a request for records that it posted on its website, but which do not technically fall within subsection (a)(2), though, those records should generally be provided to the requester if he or she prefers access that way, provided the records are "readily reproducible" in the format requested.[25]

Categories of Records Required to be Disclosed Proactively

As noted above, there are four categories of records that agencies are required by

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[22](...continued)
offered for sale from the proactive disclosure obligation "is to afford the agency 'an alternative means of making these materials available through publication'" (quoting S. Rep. No. 89-813, at 7 (1966))).

[23] See FOIA Update, Vol. XVIII, No. 1, at 3 (advising that Congress made clear that records falling within subsection (a)(2)(D) (i.e., the "fourth" category of subsection (a)(2) records, those which are "frequently requested") are exception to general rule and are subject to regular FOIA requests as well).

[24] See 5 U.S.C. § 552(a)(3)(A) (excluding from subsection (a)(3) those records which are "made available" under subsections (a)(1) or (a)(2)); see also DOJ v. Tax Analysts, 492 U.S. 136, 152 (1989) ("Under subsection (a)(3) . . . an agency need not make available those materials that have already been disclosed under subsections (a)(1) and (a)(2)."); Schwarz v. U.S. Patent & Trademark Office, 80 F.3d 558, 558 (D.C. Cir. 1996) (unpublished table decision) (finding that agency was not required to disclose records from patent files in response to a subsection (a)(3) request because patent files are available for public inspection and copying under subsection (a)(2)); Crews v. IRS, No. 99-8388, 2000 U.S. Dist. LEXIS 21077, at *16 (C.D. Cal. Apr. 26, 2000) (declaring that policy statements and administrative staff manuals made available under subsection (a)(2) are not required to be made available in response to subsection (a)(3) requests); cf. Reeves v. United States, No. 94-1291, 1994 WL 782235, at *1-2 (E.D. Cal. Nov. 16, 1994) (dismissing lawsuit because FOIA requests sought publicly available agency regulations).

[25] 5 U.S.C. § 552(a)(3)(B) (requiring that records disclosed pursuant to FOIA requests be provided in any "readily reproducible" form or format chosen by a requester); see President Obama's Transparency Memorandum, 74 Fed. Reg. at 4685 (directing that agency disclosures should be made "in forms that the public can readily find and use"); President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (reminding agencies that disclosures should be made in a "spirit of cooperation"); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (advising agencies to ensure that the process of requesting records is "easy"); see also FOIA Update, Vol. XVI, No. 1, at 2 (stating that voluntary disclosure does not preclude a record from subsection (a)(3) access); FOIA Update, Vol. XII, No. 2, at 5 (advising that FOIA requesters may not be deprived of subsection (a)(3) access rights through voluntary disclosure).

statute to proactively disclose[26] -- (1) "final opinions [and] . . . orders" rendered in the adjudication of administrative cases,[27] (2) specific agency policy statements,[28] (3) certain administrative staff manuals "that affect a member of the public,"[29] and (4) records which have

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[26] See *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008) (describing four categories of records required to be proactively disclosed under subsection (a)(2)); FOIA Update, Vol. XIII, No. 3, at 4 (same).

[27] 5 U.S.C. § 552(a)(2)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 155-59 (1975) (holding that NLRB "advice and appeals" memorandum deciding not to file unfair labor complaint was "final opinion" when decision not to file effectively put an end to formal complaint procedure); Rockwell Int'l Corp. v. DOJ, 235 F.3d 598, 603 (D.C. Cir. 2001) (finding that agency report of voluntarily conducted internal investigation into propriety of Rocky Flats prosecution was not "final opinion" because determination of propriety of prosecution was neither "case" nor "adjudication"); Nat'l Prison Project v. Sigler, 390 F. Supp. 789, 792-93 (D.D.C. 1975) (determining that parole board decisions denying inmate applications for parole were subsection (a)(2) records).

[28] 5 U.S.C. § 552(a)(2)(B); see, e.g., Bailey v. Sullivan, 885 F.2d 52, 62 (3d Cir. 1977) (noting that Social Security Ruling providing examples of medical conditions to be treated as "per se nonsevere" fell under subsection (a)(2)(B)); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *90 (W.D. Pa. Feb. 7, 2001) (holding that HHS documents that advised regional offices of agency's view on policy matters pertaining to certain welfare programs were "interpretations adopted by the agency"); Tax Analysts v. IRS, No. 94-923, 1996 WL 134587, at *3 (D.D.C. Mar. 15, 1996) (holding that IRS Field Service Advice Memoranda, even though not binding on IRS personnel, were "statements of policy"), aff'd on other grounds, 117 F.3d 607 (D.C. Cir. 1997); Pub. Citizen v. Office of U.S. Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (concluding that agency submissions to a trade panel containing an agency's interpretation of U.S.'s international legal obligations were "statements of policy and interpretations adopted by the [agency]"); see also Vietnam Veterans of Am. v. Dep't of the Navy, 876 F.2d 164, 165 (D.C. Cir. 1989) (finding that opinions in which Judge Advocates General of Army and Navy have authority only to dispense legal advice -- rendered in subject areas for which those officials do not have authority to act on behalf of agency -- were not "statements of policy or interpretations adopted by" those agencies and were not required to be published or made available for public inspection).

[29] 5 U.S.C. § 552(a)(2)(C); see, e.g., Sladek v. Bensinger, 605 F.2d 899, 901 (5th Cir. 1979) (finding DEA agents' manual concerning treatment of confidential informants and search warrant procedures to be subsection (a)(2)(C) record); Stokes v. Brennan, 476 F.2d 699, 701 (5th Cir. 1973) (determining that "Training Course for Compliance Safety and Health Officers," including all instructor and student manuals, training slides, films, and visual aids, must be made available for public inspection and copying); Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359, 1364-65 (N.D. Ohio 1976) (ruling that memoranda approved by Office of Standards Enforcement, which set forth agency's policy regarding sampling plans that office must follow when tire fails lab test under Federal Motor Vehicle Safety Standards, were subsection (a)(2) records); see also Stanley v. DOD, No. 98-CV-4116, slip op. at 9-10 (S.D. Ill.

(continued...)

been released under subsection (a)(3) (i.e., by way of a specific request) that "the agency determines have become, or are likely to become, the subject of subsequent requests for substantially the same records."[30]

During the first thirty years of the FOIA's implementation, only the first three of these categories (i.e., final opinions and orders, policy statements, and staff manuals) were required to be made available by agencies. The Supreme Court has observed that routine public access to such records serves to guard against the development of agency "secret law" known to agency personnel but not to members of the public who deal with agencies.[31] Consequently, records in these categories that have no precedential value and do not constitute the working law of the agency are not required to be made available under this part of the Act.[32] The

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[29](...continued)
June 22, 1999) (finding that administrative staff manuals pertaining to military hospital procedures did not "affect the public" and were not required to be proactively disclosed).

[30] 5 U.S.C. § 552(a)(2)(D).

[31] See Sears, 421 U.S. at 153-54 (observing that the proactive disclosure provision "represents a strong congressional aversion to 'secret [agency] law,' . . . and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law'" (quoting H.R. Rep. No. 89-1497, at 7 (1966))).

[32] See Sears, 421 U.S. at 153-54; Skelton v. USPS, 678 F.2d 35, 41 (5th Cir. 1982) ("That [proactive disclosure] requirement was designed to help the citizen find agency statements 'having precedential significance' when he becomes involved in 'a controversy with an agency.'" (quoting H.R. Rep. No. 89-1497, at 8)); Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 19 (Feb. 1975) (explaining that the "primary purpose of subsection (a)(2) was to compel disclosure of what has been called 'secret law,' or as the 1966 House Report put it, agency materials which have 'the force and effect of law in most cases'" (quoting H.R. Rep. No. 89-1497, at 7)); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 15 (June 1967) (advising that keeping "orders available . . . [that] have no precedential value, often would be impracticable and would serve no useful purpose"); see also Smith v. NTSB, 981 F.2d 1326, 1328 (D.C. Cir. 1993) (stating that the purpose of this "requirement is obviously to give the public notice of what the law is so that each individual can act accordingly"); Vietnam Veterans of Am., 876 F.2d at 165 (rejecting argument that legal opinions issued by Judge Advocates General of Army and Navy must be proactively disclosed, because those opinions are not statements of policy that "operate as law"); Pa. Dep't of Pub. Welfare, 2001 U.S. Dist. LEXIS 3492, at *78 (holding that a FOIA subsection (a)(2) index "must include those matters that the agency considers to be of precedential value"); Stanley, No. 98-CV-4116, slip op. at 9-10 (S.D. Ill. June 22, 1999) (holding that administrative staff manuals that do not have any "precedential significance" and would not assist members of the public in "tailor[ing] their behavior to the law" are not required to be made publicly available). But see Nat'l Prison Project, 390 F. Supp. at 793 (ruling otherwise prior to Supreme Court's decision in Sears, which focused on legislative history of subsection (a)(2)); Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298, 1303 (D.D.C. 1973) (same), modified & remanded on other grounds, 505 F.2d 350 (D.C. Cir. 1974). See generally Doe v. U.S. Dep't of Labor, 451 F. Supp. 2d 156, 175 (D.D.C. 2006) (finding (continued...)

proactive disclosure provision's fourth category of records -- also known as the "frequently requested" records category[33] -- was established pursuant to the Electronic Freedom of Information Act Amendments of 1996[34] which, as discussed in detail below, also introduced a requirement for the electronic availability of proactively disclosed records. The "frequently requested" records category encompasses any records processed and disclosed in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."[35] Under this provision, when records are disclosed in response to a FOIA request, an agency is required to determine whether they have been the subject of multiple FOIA requests (i.e., two or more additional ones) or, in the agency's best judgment based upon the nature of the records and the types of requests regularly received, are likely to be the subject of multiple requests in the future.[36] Because public interest in the "frequently requested" records category may wane with time, agencies may exercise judgment as to the length of time that these records should be maintained on their websites.[37]

Inasmuch as this requirement by definition begins with the processing of records disclosed in response to a FOIA request, and then is met by multiple other such "requests,"[38] it is either the receipt or the anticipation of the third such request that triggers it.[39] If either

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[32](...continued)
that Employee Compensation Appeals Board decisions "form an essential corpus of administrative precedent" and are properly disclosed under subsection (a)(2) of the FOIA) (vacated pursuant to settlement Mar. 22, 2007).

[33] See, e.g., *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008); FOIA Update, Vol. XVII, No. 4, at 1 (describing obligations for "frequently requested" records); FOIA Update, Vol. XVIII, No. 1, at 3-4 (same).

[34] Pub. L. No. 104-231, 110 Stat. 3048.

[35] 5 U.S.C. § 552(a)(2)(D).

[36] See FOIA Update, Vol. XVIII, No. 1, at 3-4 (providing advice on exercise of agency judgment under fourth subsection (a)(2) category).

[37] See FOIA Update, Vol. XIX, No. 1, at 3 (advising that agencies "should use their judgment as to the length of time that records determined to fall within the new ["frequently requested" records] category should continue to be [made available]); FOIA Update, Vol. XVIII, No. 1, at 4 (advising that agencies may determine that records no longer fall within fourth subsection (a)(2) category after passage of time); see also *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (advising that agencies "certainly can consider the absence of predicted FOIA requests as a factor in determining whether the continued maintenance of a record as a 'frequently requested' record is warranted").

[38] 5 U.S.C. § 552(a)(2)(D) (speaking of "requests" in plural form, above and beyond FOIA request already received).

[39] See *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (continued...)

is the case,[40] then those records in their FOIA-processed form must be made available to the public,[41] generally on the agency's website, so that they are readily available to all potential future FOIA requesters.[42] Ideally, this availability will satisfy much of the future public demand for those processed records in a more efficient fashion.[43] Nevertheless, any subsequent FOIA request received for such records has to be responded to in the regular way as well, if the requester so chooses.[44]

Disclosing Records Proactively to Achieve Transparency

The President has stressed that agencies should take "affirmative"[45] and "innovative"[46] steps in achieving transparency. The Attorney General likewise directed agencies to "post

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[39](...continued)
(explaining the "rule of three" that is employed to determine the applicability of the proactive disclosure obligation for "frequently requested" records); see also FOIA Update, Vol. XVII, No. 4, at 1 (describing obligations for "frequently requested" records); FOIA Update, Vol. XVIII, No. 1, at 3-4 (same).

[40] See *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (discussing proactive disclosure of records based upon the "frequently requested" records standard).

[41] See id. (reminding that "an agency's [proactively disclosure] obligation arises with respect to any FOIA-processed record that is disclosed at least in some part").

[42] See id.; see also FOIA Update, Vol. XVII, No. 4, at 1-2 (discussing operation of proactive disclosure provision); FOIA Update, Vol. XIX, No. 1, at 3-4 (compilation of OIP policy guidance regarding subsection (a)(2) matters); cf. Tax Analysts v. IRS, No. 94-923, 1998 WL 419755, at *4, 6 (D.D.C. May 1, 1998) (requiring agency to publish exceptionally large volume of FOIA-processed records on weekly basis, as they are processed, rather than all at once at conclusion of lengthy processing period).

[43] See FOIA Update, Vol. XVIII, No. 2, at 2 (citing H.R. Rep. No. 104-795, at 21 (1996)); see also *FOIA Post*, "FOIA Counselor Q&A: 'Frequently Requested' Records" (posted 7/25/03) (discussing underlying purpose of fourth subsection (a)(2) category); FOIA Update, Vol. XVII, No. 4, at 1 (emphasizing connection between fourth subsection (a)(2) category and electronic availability requirement in meeting public access demands).

[44] See FOIA Update, Vol. XVIII, No. 1, at 3 (advising that while ordinary rule is that records proactively disclosed under subsection (a)(2) cannot be subject of regular FOIA request, Congress made clear that such rule does not apply to "frequently requested" records (citing H.R. Rep. No. 104-795, at 21 (1996))).

[45] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum].

[46] Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009).

information online in advance of any public request."[47] Thus, in addition to the proactive disclosure requirements mandated by the FOIA, agencies should actively seek out and identify records which, while not falling into one of the four subsection (a)(2) categories discussed above, are nonetheless of sufficient public interest to warrant automatic disclosure on an agency's website.[48] Such additional proactive disclosures are an efficient way to inform the public about the government's operations,[49] and are essential to the ongoing commitment to the principles of open government embodied in the FOIA.[50]

As a result of the President's FOIA Memorandum and the Attorney General's FOIA Guidelines, agencies should implement systems and establish procedures by which records of interest to the public are routinely identified and systematically posted.[51] By increasing the

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[47] Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009) [hereinafter Attorney General Holder's FOIA Guidelines], available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

[48] See *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

[49] See, e.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); see also NARA v. Favish, 541 U.S. 157, 171-72 (2004) (explaining that the FOIA is a means for "citizens to know 'what their government is up to'" (quoting DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989))); accord Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (noting that posting more information online reduces the need for individual information requests and may help reduce agency backlogs); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (observing that discretionary releases have great potential to reduce the number of individual records requests agencies receive); OMB Circular A-130, "Management of Federal Information Resources" (November 28, 2000), available at http://www.whitehouse.gov/omb/assets/omb/circulars/a130/a130trans4.pdf (advising that "agencies have a responsibility to provide information to the public consistent with their missions" and directing agencies to disseminate information, in addition to that which is required to be provided under the FOIA, "as is necessary or appropriate for the proper performance of agency functions").

[50] See President Obama's FOIA Memorandum, 74 Fed. Reg. at 4683 (directing agencies to automatically disclose information about "what is known and done by . . . Government"); Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (stating that "open government requires agencies to work proactively"); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (advising that making more information public is a "key area where agencies should strive for significant improvement").

[51] See Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (calling for an increase in the systematic online posting of (continued...)

amount of information which is disclosed automatically, agencies will likely reduce the number of individual records requests they receive, while making great strides toward achieving greater transparency.[52]

Electronic Availability of Proactive Disclosures

In directing agencies to use "modern technology" in FOIA implementation, President Obama has recognized the critical role of the internet in enhancing information dissemination.[53] The use of technology in the proactive disclosure of information under the FOIA was first recognized in a key provision of the Electronic FOIA amendments, that required agencies to make records created on or after November 1, 1996, in all four categories of the FOIA's proactive disclosure provision, available to the public by "electronic means."[54]

Agencies often accomplish this electronic availability requirement through the use of "virtual" records collections, sometimes, but not exclusively, described as "electronic Reading

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[51](...continued)
information in advance of FOIA requests); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09); see also OMB Circular A-130, section 8, available at http://www.whitehouse.gov/omb/assets/omb /circulars/a130/a130trans4.pdf (discussing federal dissemination policies for public information).

[52] See Attorney General Holder's FOIA Guidelines, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf (noting that posting information proactively online may reduce number of individual requests an agency receives and may also reduce FOIA backlogs); *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09) (observing that the more information that an agency identifies and posts online, the greater the potential to reduce the number of FOIA requests the agency will receive).

[53] See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum] (directing agencies to "use modern technology" in disclosing information and requiring agencies to "act promptly" and to "timely" inform citizens about government operations without waiting for requests for information); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009) [hereinafter President Obama's Transparency Memorandum] (calling on agencies to "harness new technologies" in putting information online and requiring agencies to "rapidly" disclose information that the public "can readily find and use").

[54] See 5 U.S.C. § 552(a)(2) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008) (discussing electronic availability requirements for records created after November 1, 1996, and providing guidance on the treatment of paper copies of records created before that time).

Rooms," on their FOIA websites, but should first and foremost consider the needs of the community of individuals and entities that visit and use their websites in determining the most effective means by which to make these records available electronically.[55]

Indexing Proactive Disclosures

Subsection (a)(2) of the FOIA creates two separate but overlapping indexing requirements. First, agencies must index or otherwise organize the records they proactively disclose in order to facilitate the public's convenient access to them.[56] Second, agencies are specifically required by the FOIA to maintain a general index of the FOIA-processed records in the proactive disclosure provision's fourth category (i.e., "frequently requested" records) and to make that index available on their websites.[57] This indexing requirement is generally

[55] See *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008) (instructing agencies to organize their records "from a citizen-centered perspective" in a way that allows for efficient and easy location of specific documents, and suggesting that agencies list the records under separate links or headings on their websites); OMB Memorandum M-06-02, "Improving Public Access to and Dissemination of Government Information and Using the Federal Enterprise Architecture Data Reference Model" (Dec. 16, 2005), available at http://www.whitehouse.gov/omb/memoranda/fy 2006/m06-02.pdf (requiring agencies to organize and categorize information intended for public access, in order to "promote a more citizen-centered government"); see also OMB Memorandum M-05-04, "Policies for Federal Agency Public Websites" (Dec. 17, 2004), available at http://www.whitehouse.gov/omb/assets/omb/memoranda/fy2005/m05-04.pdf (directing agencies to ensure information quality); FOIA Update, Vol. XIX, No. 2, at 2 (emphasizing importance of keeping websites accurate and up-to-date); FOIA Update, Vol. XIX, No. 3, at 4 (recommending that agencies check both accuracy and viability of their FOIA websites links and text content of their FOIA websites on regular basis); FOIA Update, Vol. XIX, No. 3, at 3 (advising that "[c]larity to the website user is essential to the effectiveness of the site"); FOIA Update, Vol. XIX, No. 4, at 5 (observing that "an agency's FOIA website has become an essential means by which its FOIA obligations are satisfied," so FOIA website support "should be a primary mission of each agency's IT staff").

[56] See 5 U.S.C. § 552(a)(2) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Church of Scientology v. IRS, 792 F.2d 153, 159 (D.C. Cir. 1986) (noting that the FOIA requires an agency's subsection (a)(2) records to be reflected in a "current index" for public distribution); Irons & Sears v. Dann, 606 F.2d 1215, 1223 (D.C. Cir. 1979) (requiring agency to provide "reasonable index" of requested decisions); Taxation With Representation Fund v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 81,028, at 81,080 (D.D.C. Apr. 22, 1980) (recognizing agency's "continuing duty" to make subsection (a)(2) records and indices available); Pa. Dep't of Pub. Welfare v. United States, No. 99-175, 2001 U.S. Dist. LEXIS 3492, at *82 (W.D. Pa. Feb. 7, 2001) (finding agency in violation of indexing requirement because index was incomplete and it was "nearly impossible" to distinguish precedential material from obsolete material).

[57] 5 U.S.C. § 552(a)(2)(E); see FOIA Update, Vol. XVII, No. 4, at 2 (discussing this statutory indexing requirement for "frequently requested" records).

satisfied by simply providing a distinct "link" to each document in this category.[58]

In complying with the FOIA's indexing requirements, agencies should establish an organizational system which enables a member of the public to readily locate desired materials.[59]

[58] *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2008); see FOIA Update, Vol. XIX, No. 3, at 4 (recommending use of "visible links" for electronic indexing purposes).

[59] See *FOIA Post*, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements" (posted 6/27/2000) (instructing agencies to organize their records "from a citizen-centered perspective" in a way that allows for efficient and easy location of specific documents, and suggesting that agencies list records under separate links or headings on their websites); OMB Memorandum M-06-02, "Improving Public Access to and Dissemination of Government Information and Using the Federal Enterprise Architecture Data Reference Model" (Dec. 16, 2005), available at http://www.whitehouse.gov/omb/assets/omb/memoranda/fy2006/m06-02.pdf (requiring agencies to organize and categorize information intended for public access, in order to "promote a more citizen-centered government"); OMB Circular A-130, "Management of Federal Information Resources" (November 28, 2000), available at http://www.whitehouse.gov/omb/assets/omb circulars/a130/ a130trans4.pdf (directing agencies to "help the public locate" information they disseminate to the public); OMB Memorandum M-05-04, "Policies for Federal Agency Public Websites" (Dec. 17, 2004), available at http://www.whitehouse.gov/omb/assets/omb/memoranda/fy2005/m05-04.pdf (requiring, for clarity, that agencies establish and enforce agency-wide policies for linking to other web pages); FOIA Update, Vol. XVIII, No. 1, at 4 (advising that agencies with separate websites for separate components "should ensure that [they] are linked together electronically so as to facilitate efficient user access"); see also FOIA Update, Vol. XVIII, No. 2, at 2 (advising agencies on practical treatment of written signatures on adjudicatory orders for proactive disclosure purposes).