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Congress and the Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA, 5 U.S.C. §552) is often referred to as the embodiment of “the people’s right to know” about the activities and operations of government. It established a statutory presumption of public access to information held by executive branch agencies. Enacted in 1966, FOIA generally allows any person—individual or corporate, U.S. citizen or not—to request and obtain, without explanation or justification, a large swath of records and information held by the federal government.

FOIA does not provide public access to legislative branch records. However, FOIA still raises significant questions for Congress, namely: (1) whether certain congressional records may nonetheless be subject to release under FOIA if, for example, they are in an agency’s possession; and (2) how FOIA impacts individual Members’ ability to conduct oversight. This In Focus discusses the extent to which documents prepared in response to congressional requests may be disclosed in response to a FOIA request and how the disclosure statute affects congressional access to executive branch records.

Origins and Scope of FOIA

FOIA was enacted in response to Congress’s perception of improper secrecy in the executive branch. Congress sought to eliminate the burden of proof that had existed under the public information section of the Administrative Procedure Act, which required requesters to establish a justification or a need for information being sought (P.L. 79-404, §3 [1946]). Under FOIA, in contrast, public access is presumed, and federal agencies must justify *denying* access to requested information. Covered agencies may withhold records only if those records either fall under any of FOIA’s nine exemptions or are covered by FOIA’s exclusion of three categories of law enforcement records (5 U.S.C. §552(b)(1)-(9), (c)(1)-(3)). Presidential Administrations have interpreted FOIA’s presumed access requirements and the scope of the statute’s exemptions differently. As a result, some have maintained that Congress should closely monitor the act’s implementation and use.

Are Congressional Records Subject to FOIA?

FOIA compels “agencies” to disclose covered records. Under the act, an “agency” is “each authority of the Government of the United States, whether or not it is within or subject to review by another agency.” The term *agency* includes “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency” (5 U.S.C. §§551(1), 552(f)(1)). The Supreme Court, however, has held that FOIA does not reach “the President’s

immediate personal staff” or those Executive Office of the President units “whose sole function is to advise and assist the President” (*Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 ([1980])).

FOIA expressly excludes Congress from the definition of *agency* (5 U.S.C. §551(1)(A)). Therefore, neither Congress nor its Members and components are subject to FOIA’s requirements.

Are Congressional Communications with Agencies Subject to FOIA?

Congress’s exemption from FOIA may also extend to some records held by an executive agency. Materials an agency received from Congress or prepared in response to a congressional request may qualify as “congressional records” exempt from FOIA if “Congress manifested a clear intent to control the document” (*ACLU v. CIA*, 823 F.3d 655, 662-63 [D.C. Cir. 2016]).

Congress can manifest its intent to control a document either when it distributes the document to an agency or when the document is created (*ACLU*, 823 F.3d at 666). However, expressions of intent to control must not be “too general and sweeping” (*Paisley v. CIA*, 712 F.2d 686, 694 [D.C. Cir. 1983]). “[P]ost-hoc objections” to disclosure after the creation of the materials and the initiation of a FOIA lawsuit do not demonstrate congressional intent to maintain control of a document (*United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 602 [D.C. Cir. 2004]).

Case law, accordingly, suggests that if Congress does not want the agency to disclose legislative materials under FOIA, it should clearly express that intent when requesting materials from agencies or sending materials to agencies.

Applying FOIA to Congress

While some have criticized Congress for exempting itself from FOIA, applying FOIA to Congress may alter the functioning of the legislative process and implicate certain constitutional provisions, including the Journal Clause (art. I, §5, cl. 3) and the Speech or Debate Clause (art. I, §6, cl. 1). Moreover, extending FOIA to congressional documents may raise questions about one Congress’s ability to statutorily compel future lawmakers to publicly disclose information that is constitutionally privileged.

As a practical matter, congressional office recordkeeping is decentralized. Therefore, subjecting the legislative branch to FOIA’s disclosure mandate may impose significant administrative burdens on either chamber of Congress, individual Members, congressional committees, or congressional support agencies. For more information on balancing values with access to government information,

see CRS Report R47058, *Access to Government Information: An Overview*, by Meghan M. Stuessy.

Does Congress Have to Use FOIA to Access Agency Information?

Individual Members and staff may request agency records through FOIA. However, Members and staff may have alternative means to access agency information and are not necessarily required to use FOIA.

FOIA's text and legislative history make clear that it was not intended to affect Congress's pre-existing rights to access executive branch information. Congress's rights of access to executive branch information, as well as the breadth of those rights, flow from other sources of authority, such as the Constitution. FOIA also explicitly acknowledges congressional requests as distinct from public requests for information in its special access rule. Congress, the courts, and the executive branch, however, have varying interpretations on how the special access rule applies to individual Member requests.

FOIA's Special Access Rule

FOIA's special access rule (5 U.S.C. §552(d)) states that FOIA "is not authority to withhold information from Congress" (emphasis added). Under this provision, an agency may not withhold information from Congress on the basis that such information is exempt under FOIA. The legislative history underlying the original act explains that this provision is intended to clarify that, because FOIA "only refers to the public's right to know, it cannot ... be backhandedly construed as authorizing the withholding of information from the Congress" (S.Rept. 89-813, at 10 (1965)). The House report accompanying the original act similarly states that "a law controlling public access to Government information has absolutely no effect upon congressional access to information" (H.Rept. 89-1497, at 11 [1966]).

FOIA's "Special Access Rule"

5 U.S.C. §552(d)

The Freedom of Information Act "is not authority to withhold information from Congress."

Murphy v. Department of the Army

The scope of the special access rule has been the subject of debate between the executive and legislative branches, but the D.C. Circuit has held that it applies to both congressional committees and individual Members alike. In *Murphy v. Dep't of the Army*, 613 F.2d 1151 (D.C. Cir. 1979), the D.C. Circuit interpreted the special access rule to cover not only Congress as a whole but also committees and individual Members acting in their official capacities. The *Murphy* decision, similarly, does not make a distinction among requests for information from committee chairs, ranking members, or individual Members.

Regarding individual Members, the D.C. Circuit wrote that it would be an inappropriate intrusion into the legislative sphere to decide "without congressional direction" which Member is the "official voice of Congress for the purpose

of receiving [executive branch] information" (*Murphy*, 613 F.2d at 1157).

Members of Congress from both major political parties have cited *Murphy* in support of individual Members' right to access information from the executive branch.

Further, *Murphy* describes the difficulty in distinguishing among the purposes by which an individual Member might seek agency information. The court noted that neither the statute itself nor public policy provided a reason to distinguish between information requests from a congressional committee and a single Member acting in an official capacity. The court further explained that because each Member participates in the lawmaking process, each member is "entitled to request ... information from the executive ... to carry out the responsibilities of a legislator."

Department of Justice Interpretation

The Department of Justice (DOJ) has long maintained that the special access rule does not extend to individual Members in most cases. DOJ maintains that Congress's constitutional right to access government information does not extend to individual Members (see DOJ, *FOIA Update, Congressional Access Under FOIA* [1984]). DOJ also claims that its position finds support in the portion of the original House report discussing the special access rule. The House report states that "Members of Congress have all of the rights of access guaranteed to 'any person' by [FOIA], and the Congress has additional rights of access to all Government information which it deems necessary to carry out its functions" (DOJ, *FOIA Update, Congressional Access Under FOIA* (1984); H.Rept. 89-1497, at 11-12 [1966]).

Under DOJ's interpretation, requests from chambers or committees are subject to the special access rule, but requests from individual Members are generally not. DOJ has asserted that a request by an individual Member benefits from the special access rule only if it is from the chair of a committee or subcommittee or authorized by a committee or subcommittee.

Although DOJ takes the position that individual Member requests are not exercises of Congress's constitutional oversight authority, and therefore do not benefit from FOIA's special access rule, DOJ has advised executive branch agencies to treat individual Member requests with "due weight" and "sympathetic consideration" (DOJ, *Requests by Individual Members of Congress for Executive Branch Information* [2019]).

The difference between *Murphy* and DOJ's subsequent interpretation has not generated significant litigation. This may be because many conflicts are worked out through negotiation and accommodation or through a committee chair asking on behalf of a Member.

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