



GAO E-FOIA Implementation Report Issued

The General Accounting Office (GAO) has now issued its final report on the implementation of the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) by federal agencies across the executive branch. The detailed results of GAO's study, as expected, provide an excellent basis for all agencies to review, and wherever necessary improve, their compliance with E-FOIA's requirements. See also *FOIA Post*, "Agencies Continue E-FOIA Implementation" (posted 3/14/01).

Below is the text of a Freedom of Information Act guidance memorandum that the Office of Information and Privacy has sent to all agencies, transmitting a printed copy of GAO's recently released report:

MEMORANDUM

TO: Principal FOIA Administrative and Legal Contacts at All Federal Agencies

FROM: Richard L. Huff
Daniel J. Metcalfe
Co-Directors
Office of Information and Privacy

SUBJECT: Further Efforts to Implement E-FOIA Provisions

Within the past week, the General Accounting Office (GAO) completed its final report of its examination of federal agency implementation of the provisions of the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 5 U.S.C. § 552 (as amended), commonly referred

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to as "E-FOIA." This GAO study follows up on the E-FOIA implementation oversight hearing that was held by the House Government Reform Committee's Government Management, Information, and Technology Subcommittee in June 2000. Last summer, GAO selected twenty-five federal agencies for review of their FOIA Web sites and annual FOIA reports, and eight agencies for more extensive interviewing and document exchange, with coordination assistance provided by the Office of Information and Privacy. The Department of Justice has fully supported this important FOIA study.

Now that GAO's report (entitled "Progress in Implementing the 1996 Electronic Freedom of Information Act Amendments") has been issued in final form, we are pleased to be able to attach a printed copy of it for immediate use by every federal agency. This report provides an excellent basis for all agencies -- whether they were among the agencies examined by GAO as part of its study or not -- to review their current state of compliance with E-FOIA's requirements and to make any and all improvements that are needed.

This GAO report finds incomplete E-FOIA compliance in multiple respects, and it provides much useful detail to facilitate further agency attention to several E-FOIA requirements in particular. While it discusses such procedural matters as the mechanics of FOIA processing, the operation of the Act's time limits, and the value of negotiating the scope of a FOIA request with the requester, you should note that it places primary focus on: (1) the E-FOIA requirement to make certain categories of information available to the public electronically, and (2) the quality of the annual FOIA reports that are required to be prepared after the end of each fiscal year by all agencies. These requirements warrant particular attention.

First, the most basic categories of information that all agencies must make available electronically (through their FOIA Web sites, in what may be called "electronic reading rooms") are the following:

- final opinions and orders issued in the adjudication of administrative cases;
- specific agency policy statements;
- administrative staff manuals that affect members of the public;
- records that are "frequently requested" by FOIA requesters, which must be made available in their FOIA-processed form; and

- an index facilitating public access to all such information.

See GAO Report at 21. These statutory requirements are all contained in subsection (a)(2) of the FOIA, as amended by E-FOIA, and they apply to any such record that was created by an agency since November 1, 1996. See 5 U.S.C. § 552(a)(2)(A)-(E). Detailed discussions of these requirements are contained in the "FOIA Reading Rooms" Section of the "Justice Department Guide to the Freedom of Information Act," which also includes citations to all underlying E-FOIA implementation guidance that has been issued by the Department of Justice on this subject.

Another category of information that agencies are required to make available electronically through their FOIA Web sites consists of:

- an index of the agency's "major information systems";
- a description of the agency's "major information systems";
- a description of the agency's "record locator systems"; and
- a handbook for obtaining agency information.

See GAO Report at 22. These statutory requirements are all contained in subsection (g) of the FOIA, 5 U.S.C. § 552(g), and they may be met by an agency in a consolidated fashion under the single heading of a "FOIA Reference Guide," or some similar title. Governmentwide guidance regarding these particular E-FOIA requirements has been issued by the Office of Management and Budget -- see Memorandum From Franklin D. Raines For The Heads Of Executive Agencies (Apr. 23, 1998) -- which should be consulted on any technical question regarding agency compliance with them. See also H.R. Rep. No. 104-795, at 29-30 (1996) (legislative report specifying OMB's guidance role regarding FOIA's subsection (g) requirements). In addition to that, though, the Department of Justice's "FOIA Reference Guide" is available to be used as a model by any agency that needs to improve its compliance in this E-FOIA category.⁽¹⁾

A third set of information items addressed in GAO's report consists of:

- the agency's FOIA regulations;
- information describing the agency's multi-track processing system (if one is used);

- information regarding expedited processing;
- the agency's fee schedule; and
- the agency's annual FOIA reports.

See GAO Report at 20-21. All of these items are closely related. First, the FOIA explicitly requires that each agency publish regulations that govern its individual rules and practices for administering the Act, see 5 U.S.C. § 552(a)(3)(A), and such regulations are a logical component of any agency's FOIA Web site, see FOIA Update, Vol. XIX, No. 3, at 3-4 ("OIP Guidance: Recommendations for FOIA Web Sites"). Further, by the FOIA's terms, as amended by E-FOIA, these regulations must include specific information on expedited processing, see 5 U.S.C. § 552(a)(6)(E)(i), must include information on multi-track processing unless an agency simply makes no use of it, see 5 U.S.C. § 552(a)(6)(D)(i), and must include a "schedule of fees," 5 U.S.C. § 552(a)(4)(A)(i).

Regarding the electronic availability of annual FOIA reports, the provisions of the amended FOIA are likewise very clear: In addition to the centralized electronic access to all agencies' reports that is required to be afforded through the Department of Justice's FOIA Web site, each federal agency is individually required to make its annual FOIA reports available electronically through its own FOIA Web site as well. See 5 U.S.C. § 552(e)(2). This can be a highly effective vehicle through which all agencies can ensure that they meet this entire set of electronic availability requirements, if they simply follow the Department of Justice's recommendation that a copy of the agency's current FOIA regulations be included at the end of each annual FOIA report. See FOIA Update, Vol. XVIII, No. 3, at 7 (guidance issued specifically pursuant to 5 U.S.C. § 552(e)(4)). In short, there is no good reason why any agency might be found not to be in E-FOIA compliance for any of these regulation-related items of information.⁽²⁾

As an immediate step with respect to each of the information categories discussed above, we strongly encourage all agencies to conduct a thorough review of their current compliance with E-FOIA's clear electronic availability requirements. Certainly, if your agency is one of the several agencies that were found by GAO to be deficient in one or more of these respects, then your agency has an unquestionable need for improvement right now. Beyond that, however, the GAO report should be used by all agencies as a roadmap to ensuring full and proper E-FOIA

compliance across the board -- which is something that requires careful vigilance in both the establishment and the augmentation of agency FOIA Web sites with the passage of time. In aid of this process, you may contact members of the Office of Information and Privacy who have particular expertise in the substance of E-FOIA's requirements and in the processes of FOIA Web site maintenance -- Pamela Maida, Laurie A. Day, and Tricia S. Wellman -- if further assistance regarding these electronic availability requirements is needed.

Secondly, GAO's study also focused on the annual FOIA reports that are prepared by all agencies in the relatively new format that was established by E-FOIA as of fiscal year 1998. In doing so, and focusing on fiscal year 1999, GAO found "reporting inconsistencies and data quality problems" with some of the annual reports that it examined. GAO Report at 32. It identified a number of particular concerns with these annual reports. See *id.* at 33-34.

The Department of Justice has been addressing such concerns. As of last year, for the annual reporting period that ended on September 30, 2000, the Office of Information and Privacy initiated a process of reviewing all agency annual reports as they are sent to OIP for centralized access on the Department's FOIA Web site, and then contacting individual agencies to discuss and resolve any identified question or discrepancy. OIP plans to continue to do so in future years, within an even broader framework of scrutiny, in accordance with the GAO report.

As part of this increased focus on the quality of all agencies' annual FOIA reports, OIP also is developing additional annual report guidance that will be based upon the specific findings of GAO's annual report examination.⁽³⁾ This supplemental guidance should be used by all agencies in the preparation of their next annual FOIA reports at the end of 2001, after the close of the current fiscal year. OIP is planning to disseminate this supplemental guidance in the near future, and it will do so through *FOIA Post*, a new Web-based means of FOIA information dissemination that has now been established on the Department of Justice's FOIA Web site.⁽⁴⁾

In conclusion, we urge you to take the findings of this GAO report very seriously and to make effective use of it throughout your agency in order to ensure that your agency both attains and maintains proper compliance with all of E-FOIA's electronic availability requirements. This will warrant continued careful attention during the coming months, and it is a subject that can be expected to be discussed in such forums as Department of

Justice training programs. It also can be expected to be the subject of continuing congressional interest. See, e.g., *FOIA Post*, "Agencies Continue E-FOIA Implementation" (posted 3/14/01) (describing continued basis for E-FOIA interest in 107th Congress). Accordingly, the goal should be nothing less than full E-FOIA compliance. Each agency must ensure that it does whatever is necessary to meet this goal.

Please do not hesitate to contact the Office of Information and Privacy, at (202) 514-3642, regarding any aspect of this important Freedom of Information Act subject at any time.

Attachment

Footnotes:

- 1. The Department of Justice was found by GAO to be in full compliance with E-FOIA's electronic availability requirements in this respect, see GAO Report at 22, as well as with regard to all other categories of information, see *id.* at 20-21. The report also includes a complementary statement about the quality of the E-FOIA implementation guidance that agencies have received from the Justice Department. See *id.* at 31.**
- 2. It should be noted that GAO found proper compliance in the categories of regulations, fee schedules, and annual FOIA reports for all twenty-five of the agencies that it examined. See GAO Report at 20-21. However, it found far less than universal compliance in the multi-track and expedited processing categories. See *id.***
- 3. This guidance will supplement the "Guidelines for Agency Preparation and Submission of Annual FOIA Reports" that were issued by the Department of Justice in 1997. See FOIA Update, Vol. XVIII, No. 3, at 3-7; see also FOIA Update, Vol. XIX, No. 3, at 2 (clarifying that annual FOIA reports should uniformly use "working days" for statistical measurement wherever practicable).**
- 4. As of 2001, *FOIA Post* has replaced the Department of Justice's *FOIA Update* newsletter publication, which was published from 1979-2000 and which is now entirely archived in electronic form for reference purposes on the Department's FOIA Web site. See *FOIA Post*, "Introducing *FOIA Post*" (posted 3/14/01). By this memorandum, we ask that you please pass this information along to all FOIA personnel and any other interested persons**

within your agency, with the suggestion that this new part of the Department's FOIA Web site be electronically "bookmarked" for ready reference purposes. (We are enclosing an information page on *FOIA Post*, which includes its electronic address, to facilitate this.)

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The above memorandum, with an attached copy of the GAO report, was mailed to all federal agencies (to two agency FOIA contacts wherever applicable) on March 23, 2001, as a foundation step in the implementation of the GAO report's findings and recommendations. (*posted 3/23/01*)

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