

Increasing Access to Information in the Legislative Branch

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“When the FOIA was on the House floor, right before the vote, Members lined up before the bill’s manager, John Moss. Each in turn asked ‘John, is this going to apply to us?’ When Moss replied ‘Absolutely not,’ the Member responded: ‘Well, then I’ll vote for it.’”¹

“If it’s good for the Executive branch agencies, why isn’t it good enough for the Congress?”²

By its express terms, the Freedom of Information Act (FOIA) applies only to “agencies,” defined in the Administrative Procedure Act as “each authority of the Government of the United States . . . but does not include—(A) the Congress.”³ The Final Report and Recommendations of the 2018-2020 Freedom of Information Act Advisory Committee’s Report to the Archivist of the United States proposed:

In the spirit of expanding the reach of FOIA, we believe that the next term of the Committee should give due consideration to the possibility of extending some aspects of FOIA to parts of the legislative and judicial branches.⁴

This memorandum reflects the conclusions following “due consideration” given to this issue, as to the legislative branch, by the Legislation Subcommittee of the 2020-2022 FOIA Advisory Committee. The Subcommittee’s consideration included a public presentation to the full Committee on March 3, 2021, from experts on access to both legislative and judicial branch

¹ As told by Rep. John Moss’s staff counsel, Bennie Kass, at the New York University program “FOIA @ 50,” available at <https://www.youtube.com/watch?app=desktop&v=71D6z2YQzIM> (panel presentation at 3:49).

² “Agency employees frustrated by oversight demands of lawmakers have often wondered why the public disclosure obligations under the 50-year-old Freedom of Information Act do not apply to Congress itself.” Charles Clark, “Why FOIA Obligations Don’t Apply to Congress,” Government Executive (Nov. 30, 2020). Even an Obama White House spokesperson asserted that Congress should subject itself to FOIA: “Those who are interested in advocating for transparency in government should advocate for Congress being subject to those kinds of transparency measures,” [White House Press Secretary Josh] Earnest told reporters.” Jordan Fabian, “White House: FOIA should apply to Congress,” The Hill (June 2, 2015).

³ 5 U.S.C. § 551(1); *see also* § 552(f); *ACLU v. CIA*, 823 F.3d655, 662 (D.C. Cir. 2016) (“because it is undisputed that Congress is not an agency, it is also undisputed that ‘congressional documents’ are not subject to FOIA’s disclosure requirements”).

⁴ [The Final Report and Recommendations of the 2018-2020 Freedom of Information Act Advisory Committee](#) at 36 (July 9, 2020).

records. Our proposal is that, pursuant to the previous Advisory Committee’s conclusion, the Archivist of the United States should recommend to Congress the following:

Congress should adopt rules or enact legislation to establish procedures for effecting public access to legislative branch records in the possession of congressional support offices and agencies modeled after those procedures contained in the Freedom of Information Act. These should include requirements for proactive disclosure of certain information, procedures governing public requests for records, time limits for responding to requests, exemptions to be narrowly applied, and an appeal from any initial decision to deny access.

Political Considerations

The starting point for any consideration of applying any law to Congress is what the attitude of members of Congress would likely be to any proposal to increase transparency in the legislative branch. History, not just of the FOIA, but of efforts to apply other executive branch laws to Congress, demonstrates that Congress does not embrace applying executive branch legal requirements to its members or legislative branch entities.⁵ Although Congress begrudgingly applied principles of occupational safety and health statutes to itself, it did so with reservations and limitations. And experience does not suggest that these efforts were successful.⁶

At the same time, Congress has, in many ways, historically been the most transparent of the branches and in recent decades has taken additional steps to increase public access to its work. In addition to constitutional requirements that floor proceedings be published in a Journal of Proceedings,⁷ Congress enacted the 1976 Government in the Sunshine Act, one of the post-Watergate reforms, which required not only government agencies, but also congressional committees, to conduct their meetings in public.⁸ Shortly thereafter, televised floor debates were approved, and today most hearings and committee meetings, as well as House and Senate floor debates, are streamed by congressional websites and broadcast to the public live by such organizations as C-SPAN.⁹

⁵ See Theodor Meyer, “Do As We Say, Congress Says, Then Does What It Wants,” ProPublica (Jan. 31, 2013), available at <https://www.propublica.org/article/do-as-we-say-congress-says-then-does-what-it-wants> (listing, in addition to FOIA, whistleblower protections, subpoenas for health and safety probes, keeping workplace records, prosecution for retaliating against employees, posting notices of workers’ rights, and anti-discrimination and anti-retaliation training).

⁶ See, e.g., <https://firstbranchforecast.com/2020/11/30/why-isnt-the-office-of-congressional-workplace-rights-protecting-congress-during-the-pandemic/>.

⁷ U.S. Const. Art. I, § 5.

⁸ 5 U.S.C. § 552b.

⁹ www.c-span.org.

Every congressional committee has a website that contains bills and hearing transcripts, and every House and Senate member has a website replete with information about the member's positions, speeches, activities, and bills. Congressional leadership offices publish details of the legislative agendas, and Congress.gov provides online access to bills and legislative histories. Clearly Congress has in many ways taken steps to embrace transparency in recognition of its importance to the public.

Nonetheless, while application of FOIA disclosure principles to members and committees would undoubtedly yield additional useful information, it is unlikely that Congress would permit access to constituent communications, to communications with agencies or outside persons concerning nonlegislative matters, or to lobbyists' communications. Congress will undoubtedly take pains to preserve the constituent-elected official relationship from public scrutiny. And, while the public may have a legitimate interest in accessing communications among members once final legislation has been approved, again, it is improbable that members would want the curtain drawn back on what may be the kinds of political trade-offs that are the daily currency of congressional decision-making. As a practical matter, then, the issue of increasing legislative branch transparency should perforce focus on those congressional support agencies that perform functions quite similar to those performed by executive agencies.

Why Expand Access to Legislative Branch Records?

There is no principled reason why the public's *right* to know should stop at the Capitol's perimeter. If the focus is on support offices and agencies of the Congress, discussed in greater detail below, then the reasons for enhanced transparency take on greater salience. Most of those offices perform functions similar or even identical to those performed by executive branch entities that are fully covered by FOIA, such as law enforcement (Capitol Police); auditing, buildings and grounds maintenance (Architect of the Capitol); inspecting and adjudicating (Government Accountability Office); budgeting (Congressional Budget Office); publishing (Government Publishing Office); enforcing rights (Office of Congressional Workplace Rights); maintaining the library (Library of Congress); and performing research and drafting reports (Congressional Research Service).

It is not just their functions that these legislative branch entities have in common with their executive branch sisters and brothers. They are funded by the same taxpayer dollars that pay for executive agencies. They often have the same or greater impact on the lives of individuals, the viability and profitability of businesses, and the activities of all levels of government and all of the political subdivisions in our nation.

A rallying cry for enactment of FOIA was the need to increase accountability of unelected bureaucrats. Ditto for legislative branch offices and agencies – maybe more so, since the President is ultimately responsible for the actions of the executive branch, but no individual senator or congressperson is likely to be held responsible for the failing, inefficiency, waste, or mismanagement of a congressional support agency.

It is also worth noting that the Federal Records Act (FRA) includes within its definition of a “federal agency” any “executive agency or any establishment in the legislative branch,” except for the Senate, the House of Representatives, and the Architect of the Capitol and any activities under the Architect’s direction.¹⁰ Legislative support offices therefore create federal records that are retained under records schedules authorized by the National Archives and Records Administration. Since all executive branch federal records are subject to the FOIA, it is anomalous that federal records created within legislative support offices are nevertheless categorically inaccessible to the public.¹¹

In short, most of the arguments for access to information in the executive branch apply with equal force to the First Branch. However, given the existing level of transparency of House and Senate floor and committee proceedings, it is doubtful that the “good for the goose” argument is going to persuade many members of Congress to give a minute’s thought to expanding access to records of the legislative branch. Bills have been introduced in the past to subject Congress to the FOIA, but serious consideration has been less than perfunctory.¹² However, a focus on expanding access to support offices and agencies rather than the entire Congress may well yield more positive results. What mechanisms there might be to afford and enforce that access is a different question that will be addressed below.

Application of Access Laws to Legislative Bodies in the States and Other Countries

The argument for broader application of FOIA to Congress often points to the vast majority of states¹³ whose right-to-information laws¹⁴ apply in some way (directly or indirectly) to the legislative branch. Many of these state laws are modeled after the federal FOIA. Ryan Mulvey and James Valvo concluded that “almost half of all states—or twenty-four—have FOI laws that cover the legislature in explicit terms; in four other states, “the relevant analysis turns on the type of record at issue, rather than the entities covered by the open records law.” And only 12 states “exclude their legislatures from their FOI statutes.”¹⁵

¹⁰ 44 U.S.C. § 2901(14).

¹¹ The same provision of the FRA (44 U.S.C. § 2901(14)) also includes certain components of the judicial branch, the records of which similarly are federal records not subject to FOIA. See Public Comments Submitted to the Advisory Committee on Sept. 13, 2020, available at <https://www.archives.gov/ogis/foia-advisory-committee/2020-2022-term/public-comments-2020-09-13-baron> (numbered par. 3).

¹² James T. O’Reilly, *Applying Federal Open Government Laws to Congress: An Explorative Analysis and Proposal*, 31 Harvard J. Legis. 415, 453-54 (1994) (hereafter O’Reilly).

¹³ According to a 2020 survey, MuckRock found that 46 states and the District of Columbia applied some form of public records law to their legislatures. See <https://www.muckrock.com/place/>.

¹⁴ Often called Freedom of Information, Open Records, Right to Know, Sunshine, or Access to Information laws.,

¹⁵ Ryan Mulvey & James Valvo, *Opening the State House Doors: Examining Trends in Public Access to Legislative Records*, 1 J. Civic Info. (No. 2) 17, at 19, 24, 26 (Dec. 2019). This article presents the most comprehensive survey

Internationally, scores of other countries – from Afghanistan to Zimbabwe – apply their access-to-information laws to their legislative entities without special limitations.¹⁶

With these precedents, it becomes more difficult to argue that applying some form of access requirement to some elements of the legislative branch is unworkable.

The Many Parts of the U.S. Congress

While many Americans see Congress as a bicameral branch consisting of the House of Representatives and the Senate, most probably do not realize the number and variety of components that make up the legislative branch of the U.S. government.

Members, Leadership Offices, and Committees. Three factors support nonapplication of FOIA or a FOIA-like process to individual Representatives and Senators and their offices, to Leadership offices, and to congressional committees.

The first harkens back to the Political Consideration section at the beginning of this paper. A proposal to apply FOIA to members, their staffs, and their committees would not just be a proposal dead on arrival, but it likely would poison the water against consideration of any access recommendations applicable to other components of the branch. Legislatures in the states and in other countries have, with some exceptions, swept themselves under their right-to-information laws with little controversy, but when Congress from time to time considered subjecting itself to FOIA, that consideration has been brief and fleeting.¹⁷

In the current climate of polarization, intense partisan bickering, and chronic gridlock, the climate for restraint and self-examination has not improved. Additionally, through the years Congress has “reformed” and “improved” the FOIA on a bipartisan basis when addressing amendments; it is easy to predict that this trend would be reversed were Congress deciding to impose more stringent access procedures, and even sanctions, that applied to itself.

The second factor is the likelihood that there is very little information that would be disclosed that is not already made public. Congressional debates and hearings and mark-ups are open and transcripts posted. Bills and amendments are available online. Exchanges between and among staff and members would almost always be exempt from disclosure as internal deliberative records. Lobbyists’ communications would mostly be protected as deliberative or containing confidential commercial information, and constituent emails and letters would likely be cloaked under a privacy exemption.

and analysis to date of applying open records laws to state legislatures and includes an appendix with each state’s law categorized and cited.

¹⁶ The Centre for Law & Democracy’s *Global Right to Information Rating* lists countries where the right to information “applies to the legislature, including both administrative and other information, with no bodies excluded.” <https://www.rti-rating.org/country-data/by-indicator/8/>.

¹⁷ See O’Reilly, *supra* n.12, at 453-54.

Third, there would be constitutional thickets to navigate: the Speech or Debate Clause,¹⁸ the Arrest Immunity Clause,¹⁹ and the Presentment Clause.²⁰ These obstacles to applying open government laws to members were explored in detail in a 1994 *Harvard Journal of Legislation* article by James O'Reilly.²¹

Of course, there are many other components of the legislative branch where these threshold objections either do not apply or are only tangentially applicable.

Support Offices, Support Agencies, and Other Entities. Daniel Schuman has developed a topography of congressional components that illustrates their number and diversity.²² Specifically, the list includes:

Support Offices: Clerk of the House; Secretary of the Senate, Sergeant at Arms, Chaplain, House Office of Congressional Ethics, Senate Historian

Support Agencies: Library of Congress (including the Copyright Office and the Congressional Research Service), Government Publishing Office, Congressional Budget Office, Government Accountability Office, U.S. Capitol Police, Architect of the Capitol, Office of Congressional Workplace Rights, Open World Institute

Other Entities: House Democracy Partnership, Stennis Center, Commissions

Some Support Agencies Have Access Procedures, Others Do Not

Each entity within the legislative branch appears autonomous when it comes to disclosure regimes.

The congressional support agencies were surveyed in 2020 by Alex Howard at Demand Progress who asked, among other questions, whether there was “a formal process to request documents, records, data or other information from your agency” and, if so, how the process works.²³ In sum:

¹⁸ U.S. Const. art. I, § 6, cl. 1.

¹⁹ *Id.*

²⁰ U.S. Const. art. 1, § 7, cls. 2, 3.

²¹ O'Reilly, *supra* n. 12, at 423-29.

²² Daniel Schuman, “Transparency and the Legislative Branch,” presentation to the FOIA Advisory Committee March 3, 2021 (PowerPoint presentation available at <https://www.archives.gov/files/ogis/assets/foiaac-mtg-ppt-slides-2021-03-03.pdf> (starting at slide 7)).

²³ Alex Howard, “Exempt from FOIA, US legislative support agencies follow uneven transparency standards,” First Branch Forecast (Feb. 6, 2020), available at <https://firstbranchforecast.com/2020/02/06/foia-legislative-support-agencies-transparency/>. The full results of the survey are presented at <https://docs.google.com/spreadsheets/d/e/2PACX-1vSomXXmzwF5NP4ovDNx-waLgJZ4NbV01g4miGUrQWOOaInh9pnZLwJvTAv0AQua7aasOHG1v58LVVoB/pubhtml>.

At the top of the transparency gradient for congressional support agencies sits the U.S. Congressional Budget Office (CBO) and U.S. Government Accountability Office (GAO).

At the bottom of the gradient are the Library of Congress, the U.S. Capitol Police, and the Architect of the Capitol (AOC)

The [Government Accountability Office](#), although not legally subject to FOIA, has adopted “FOIA-like” regulations.²⁴ GAO acknowledges that “While GAO is not subject to the [FOIA] GAO’s disclosure policy follows the spirit of the act consistent with its duties and functions and responsibility to the Congress.”²⁵ GAO reports and an array of other GAO resources are available online.²⁶

The [Library of Congress](#) (LoC) has disclosure regulations that follow “the spirit of the FOIA,”²⁷ while one component of the LoC – the [U.S. Copyright Office](#) – is fully subject to the FOIA and has adopted regulations fully implementing the procedures for administering its requirements.²⁸

A call for greater transparency of the [U.S. Capitol Police](#) (USCP) began before the events that transpired at the Capitol on January 6, 2021. Congressional appropriators inserted in their report on the 2021 Legislative Branch Appropriations Bill language calling for USCP “Information Sharing” as follows:

While the USCP is not subject to the [FOIA] . . . the Committee encourages the USCP to develop a policy and procedure for the sharing of information that follows the spirit of the Freedom of Information Act. This policy should be consistent with, and not interfere with, USCP’s primary function of protecting the Congress.

After January 6, 2021, the calls for greater public access to USCP information increased; a Huffington Post Politics column headline read: “The Capitol Police Are Not Subject To Freedom Of Information Laws. Jan. 6 Could Change That.”²⁹

²⁴ 4 C.F.R part 81.

²⁵ *Id.* at § 81.1(a).

²⁶ <https://www.gao.gov/>.

²⁷ 36 C.F.R. § 703.1.

²⁸ 35 C.F.R. part 203. The Copyright Office characterizes itself as a “separate department of the Library” of Congress. 35 C.F.R. § 203.2. The FOIA applies to that office because Congress specified, in spelling out the responsibilities and organization of the Office, that it would be subject to the Administrative Procedure Act, in which the FOIA is lodged.

²⁹ Roque Planas (Jan. 12, 2021), available at https://www.huffpost.com/entry/the-capitol-police-is-not-subject-to-freedom-of-information-laws-jan-6-could-change-that_n_5ffddefbc5b63642b6ffa9c5.

Proactive Disclosure

While the discussion so far has focused on applying FOIA-like access procedures to the legislative branch, an important element of FOIA is its requirement for affirmative and mandatory disclosures.³⁰ As discussed above, Congress already goes quite far in making its activities and legislation publicly accessible; there is no reason why it could not and should not go farther.

House.gov and Senate.gov provide home bases for further exploration of the members, organizations, and activities of both bodies. Legislation and legislative action can be tracked on Congress.gov. GPO maintains a robust website, govinfo.gov, containing links to the *Congressional Record*, bills, hearings, reports, calendars, and other useful legislative information. And the House has a jam-packed repository of information about bills and committee proceedings at docs.house.gov. (There is no comparable site for the Senate.)

In addition, every member's office, committee, commission, and other congressional agency has websites chock full of data and information and links. GAO reports and testimonies can be found at gao.gov. CRS reports are available at crsreports.congress.gov. Plus, there is a plethora of information related to the output of Congress at usaspending.gov.

What more could we ask for? Congress has shown that it recognizes the importance of public access to information, as described above. How about expanding access to, and even mandatory proactive disclosure of:

- Legislative branch inspectors general's reports
- Historical CRS reports and current reports as data³¹
- Congressional serial set and enacted laws online and as data³²
- Reports to Congress from executive agencies (unless classified)

What About Enforcement?

Integral to any access regime is the concept of enforceability. *De novo* judicial review in the federal district courts of agency decisions to withhold requested information has been the enforcement mechanism of choice for FOIA³³ and the access laws of states and foreign countries. In some jurisdictions and countries, independent agencies are empowered to order government agencies to turn over requested records to requesters.³⁴ Elsewhere, the state Attorney

³⁰ 5 U.S.C. §§ 552(a)(1)-(3).

³¹ Many CRS reports are currently available online from CRS at <https://crsreports.congress.gov/>; other nongovernmental websites also post them. *E.g.*, <https://www.everycrsreport.com/>.

³² These first three items were recommended by Daniel Schuman, *supra* n. 19.

³³ 5 U.S.C. § 552(a)(3)(B).

³⁴ *E.g.*, Connecticut and Mexico.

General can bring a lawsuit against a recalcitrant agency or governmental subdivision to require disclosure.³⁵

Additionally, ombuds offices, independent information commissioners, and other entities external to the decisional agency process are in many jurisdictions empowered with various degrees of enforcement authority, ranging from opining on whether records should be disclosed to mandating release.

Since Congress has recognized the value of having an independent federal judge review agency decisions to withhold information under the FOIA, that approach would be equally valuable as applied to the legislative branch. However, it may be folly to think that Congress would vest jurisdiction in the federal judiciary to mandate public disclosure of legislative branch information.

Congress did create an Office of Congressional Workplace Rights (OCWR) to administer and enforce the Congressional Accountability Act,³⁶ which applied for the first time 13 civil rights, labor, and workplace safety statutes³⁷ to legislative branch employees, and the OCWR could be a model for a centralized Office of Congressional Information. It should be kept in mind that, while Congress oversees the support agencies and offices, Members of Congress do not personally head or work in those offices, so any order of enforcement would not be against a sitting member, avoiding both practical and constitutional, as well as political complications. At a minimum, there should be an opportunity for a requester to appeal any decision to withhold requested information, and that appeal might best go to a joint committee of the House and Senate.³⁸ Finally deadlines for responding to requests could be overseen, if not enforced, by such an entity.

Procedures for Accessing Congressional Information; Exemptions

Given the diversity of legislative branch offices – both form and function – ranging from the USCP to the LoC to the Open World Leadership Center – it would be tempting to conclude that the procedures and exemptions, crafted by Congress and amended multiple times over the past half-century in a FOIA applicable to the executive branch, might be ill-suited to application to Congress. But the hundreds of agencies and sub-agencies of the executive branch are even more

³⁵ Texas.

³⁶ 2 U.S.C. § 1301. *See generally* [Congressional Accountability Act of 1995](#).

³⁷ Including, *e.g.*, the Occupational Safety and Health Act of 1970, the Federal Labor Relations Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act. *See* [Office of Congressional Workplace Rights | \(ocwr.gov\)](#).

³⁸ The Joint Committee on Printing at this time does not appear to be active. Its rules and membership online are from the previous Congress, *see* [Joint Committee on Printing \(116th Congress\) | Committee on House Administration](#), and there does not presently appear to be a full complement of members, *see* [Office of the Clerk, U.S. House of Representatives - Joint Committee on Printing](#).

diverse – from the Bureau of Prisons to the Nuclear Regulatory Commission, from the National Council on the Arts to the National Labor Relations Board.

Although the FOIA’s nine exemptions might well be transferrable to a congressional right-to-information regime, it is probable that there would need to be special exemptions (in an Exemption 3-type provision) for some legislative branch information. It is more likely, however, that Congress will want to, and should, craft its own procedures modeled after those in the FOIA, creating a “FOIA-like” regime for the legislative branch offices.

Conclusion

The U.S. Congress has recognized in many ways the importance of access to government information as critical to maintaining an informed public and an accountable government. It has enacted a number of laws to provide transparency in the executive branch and has taken a number of steps to open its own proceedings and records to public access. Additional steps are needed, however, and the next one should be adoption by Congress of FOIA-like procedures to effect access by the public to information held by legislative branch support offices and agencies.