Law and the Public's Health

This installment of *Law and the Public's Health* examines the Freedom of Information Act (FOIA), the central federal legal tool by which access to law and law-related public health information not in the general public domain is secured. The column offers a highly accessible exploration of FOIA and related laws.

Sara Rosenbaum, JD

Hirsh Professor and Chair, Department of Health Policy, School of Public Health and Health Services
The George Washington University Medical Center, Washington, DC

THE FREEDOM OF INFORMATION ACT: IMPLICATIONS FOR PUBLIC HEALTH POLICY AND PRACTICE

MITCHELL BERGER, MPH, JD

This installment of *Law and the Public's Health* provides an overview of the federal Freedom of Information Act (FOIA).¹ FOIA is important to public health practitioners for at least three reasons: its power to aid public health advocacy, its impact on government accountability and transparency, and its ability to aid public health practice and policy-making. All states also have enacted laws governing open access to governmental information, many with provisions similar to the federal FOIA.²

Over the years, FOIA has played a central role in advancing public health policy by enabling investigations and research on topics as wide-ranging as human radiation experiments conducted during the Cold War,³⁻⁵ federal farm subsidies,⁶⁻⁸ reports about ill airline passengers,⁹ implementation of the President's Emergency Plan for AIDS Relief,¹⁰ and distracted driving due to cell phone use.¹¹

This column explains the history of FOIA's enactment, explores its operational elements, and discusses other relevant laws that may overlap with FOIA or prove useful when FOIA is inapplicable, including the Privacy Act and state freedom-of-information and open-public-meeting laws. The article concludes with a discussion of the implications of FOIA for public health practice.

BACKGROUND

FOIA, enacted in 1966, is part of the Administrative Procedure Act, which includes provisions governing rulemaking, administrative hearings, recordkeeping, and public information. FOIA's enactment came amid

concern that the then-in-effect law was "used more as an excuse for withholding than as a disclosure statute."¹²⁻¹⁴ One contemporaneous legislative report noted the "vastness" of the government and the need to promote trust and accountability.

In enacting FOIA, Congress strived to balance the encouragement of government disclosure and the need for accountability with a desire also to "protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records."¹⁴ This attempt to balance government accountability and transparency with protection of sensitive information has characterized FOIA debates since its enactment. For example, enhanced security concerns following 9/11 prompted then-Attorney General John Ashcroft to issue a memorandum to federal agencies in October 2001 recognizing FOIA's importance in promoting accountability and reducing fraud and government waste, but also emphasizing "other fundamental values held by our society" including "safeguarding our national security," "protecting sensitive business information," and promoting "functional and efficient" government.¹⁵ In a January 2009 memorandum to federal agency leaders, President Barack Obama set a different tone for his incoming administration, writing that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails."¹⁶ Two months later, Attorney General Eric Holder issued a memorandum expressly rescinding the Ashcroft memorandum and advising that "[a]n agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of an FOIA exemption."¹⁷

The Holder and Presidential FOIA memorandums were well-received by journalists and open-government advocates who had regarded the Ashcroft memorandum's change in emphasis from previous FOIA policy with skepticism and concern.¹⁸⁻²⁰ Nonetheless, despite the current administration's pronounced