Citizens of the United States hold many constitutional rights, including the right to vote, the right to bear arms, and the right to peaceably assemble. An unofficial “right” expected by many in today’s society is the “right to know,” which is supported by legislation such as the Freedom of Information Act (FOIA), U.S.C. Title 44, and the Open Government Initiative. A 2007 amendment to FOIA notes: “the American people firmly believe that our system of government must itself be governed by a presumption of openness.” This is supported by the Obama administration, which maintains “our democratic principles require that the American people be informed of the activities of their Government.” This perceived right to know, however, is not applicable to all areas of government information.

The government often claims “national security” to protect governmental actions and documents from public knowledge. When this argument is used for specific information such as military actions, many citizens—though they may not appreciate the secrecy—understand the decision. In other cases, the public is less accepting of classified government information. A 2015 New York Times opinion piece on secret negotiations in Congress argued: “National security secrecy may be appropriate to protect us from our enemies; it should not be used to protect our politicians from us.” However, several types of information can legally be classified as privileged or confidential under FOIA.

This paper will explore when and how the government justifies information as “classified,” when that information is released to the public, how easily the public can then access that information, what type of information can be requested, outline the options available for access, evaluate the limitations of current legislation, and identify potential obstacles to accessing declassified information.

**Historical background**

FOIA, passed in 1966, is arguably the most important piece of legislation regarding public access to unclassified and declassified information. Previous to the Act’s passage, the government had “wide authority to restrict access to perceived sensitive government information.” The Act has been amended four times since its original passage, which has helped it remain relevant in today’s changing information world. For example, the Electronic Freedom of Information Act Amendments of 1996 expanded FOIA to include electronic communications and required online reading rooms for government agencies. Without this amendment, the Act could have become irrelevant for today’s born-digital government documents.

Title 44 of the United States Code, enacted in 1968, further expanded public access to information. The title, which addresses public printing and documents, includes specific sections on the National Archives and Records Administration (NARA), the Government Printing Office, the Federal Depository Library Program, the Disposal of Records, and Access to Federal Electronic Information. Similar to FOIA, Title 44 has been revised throughout the years, most recently in 2002, to stay up-to-date with current communications technology.

Following the terrorist attacks of September 11, 2001, many policies—including the administration of FOIA—were amended to provide increased protection for government information. As the events of 2001 receded into history and a new administration took power, the federal government has again been making strides to increase public access to government information by passing new legislation that strengthens the power of FOIA, including the Openness Promotes Effectiveness in Our National (OPEN) Government Act of 2007 and the OPEN FOIA Act of 2009.

President Obama began his term in 2009 by promising his administration was committed “to creating an unprecedented level of openness in Government.” Four months later, Obama called for a revision of Executive Order 12958, a 1995 document outlining the system for classifying national security information. The memorandum focused on increasing access to
government information through reducing over-classification, implementing declassification reviews, and prohibiting reclassification of released materials.10

Following the passage of the OPEN Government Act, NARA created the Office of Government Information Services (OGIS) in 2009, a self-proclaimed “FOIA ombudsman” responsible for reviewing FOIA policies, procedures and compliance of Federal agencies, and recommending changes based on its observations (ogis.archives.gov). NARA also revised their regulations governing FOIA access to NARA records in fall 2014 to remain compliant with the OPEN Government Act.11

From the frequency of new legislation and executive documents regarding the freedom of information in the United States, it appears the federal government prioritizes public access to information. However, there are still great strides to be taken to truly make unclassified and declassified documents publicly accessible.

**Classified Information: FOIA and Its Limitations**

From a cursory review of FOIA, it may appear US citizens have the right to request access to all records produced by the federal government. However, FOIA only applies to executive branch records and does not apply to elected officials within the government, including the president, senators, and presidential advisers. Additionally, the president can claim executive privilege to withhold requested information in presidential documents.12 Furthermore, there are nine categories of government information that are exempt from disclosure under FOIA.

The nine exempt classifications under FOIA include the interest of national defense or foreign policy; internal agency personnel policies; material specifically exempted by another statute; trade secrets; inter- or intra-agency communications unavailable except in the case of litigation; private personnel and medical files; certain law enforcement records, mostly materials that would affect fair trial and/or personal privacy; records regulating financial institutions; and geological and geophysical information.13 Section 1.4 of Executive Order 13526 provides further detail on classification categories, including specific topics such as military weapons systems, intelligence sources and programs for safeguarding nuclear materials.14 Information seekers who request information that has been designated as classified may receive documents with heavy redactions to delete the exempted portions.

Obama’s 2009 memorandum on classified information also addressed the review of “controlled unclassified information”—information that does not meet the standards for national security classification, yet still requires some level of protection due to its sensitive nature.15 In May 2015, the Information Security Oversight Office (ISOO), part of NARA, proposed a rule to implement a Controlled Unclassified Information (CUI) program to standardize practices for designating, disseminating and disposing of CUI materials across the federal government.16 This proposal supports ISOO’s purpose of developing and evaluating “security classification policies for classifying, declassifying and safeguarding national security information” (www.archives.gov/isoo).

Another major limitation of FOIA is that it does not apply to many congressional records, as Congress is not part of the executive branch. The Congressional Research Service (CRS) claims: “CRS is unique because its time and efforts are devoted to working exclusively for Congress. Only Members and their staffs can place requests and attend most seminars. While some CRS research and reports may reach the American public, dissemination is at the discretion of congressional clients.”17 Many released CRS reports, however, can be found freely online through several “watchdog organizations.”

Documents produced by the executive branch that are not considered “public papers,” such as daily presidential briefings and agency memos, do not follow a standardized path into the public domain. Documents released as public information are not indexed in a single location, which can cause difficulties for researchers.18 Further limitations can also exist at the non-federal level, as FOIA does not apply to state or local governments; rather, each state develops their own legislation regarding the freedom of information.

**Declassification**

The federal government is supposed to declassify documents when they cease to meet the standards of classification, as outlined in Section 3.1 of Executive Order 13526.19 When information meets classification standards but public interest outweighs the need to protect the information, the priority is on declassification. Often, time limits are assigned to classified information, and such information is not reviewed for declassification until the provided time period has elapsed. Other material perceived as sensitive by the federal government can remain classified for extended periods of time. For example, correspondence between the U.S. government and foreign officials is often not declassified for thirty years or more.20

Additionally, the National Security Agency (NSA) regularly reviews “permanently classified documents” that are 25 years or older for possible declassification, in accordance with the Mandatory Declassification Review provisions of Executive Order 13526.21 The order also prohibits new information from being classified indefinitely.22 This is beneficial for information
seekers, as it ensures documents are not labeled as permanently classified and never reviewed again, despite potential situation changes.

NARA and ISOO provide many useful online resources for learning more about the process of declassification, including links to relevant documents regulating classified information and a blog devoted to the National Declassification Center (NDC), which solicits input from the public on which documents the NDC should prioritize for declassification review (blogs.archives.gov/ndc). The NDC, established by Executive Order 13526 and housed at the National Archives, intends to shorten the declassification timeline by evaluating and streamlining the current process, prioritizing the declassification of sought-after records, and implementing standard declassification training (tinyurl.com/pscnbvf).

**Dissemination of Information**

After federal government information has been declassified, it is theoretically available for public use. Despite classification changes, many information seekers must actively pursue their desired information, as it is not always readily available through a centralized, official source. Although FOIA allows information seekers to request declassified information from the federal government, users can explore other resources before resorting to filing an official request.

Perhaps the easiest and quickest place to obtain public information without filing a FOIA request is the *Federal Register* because it is published daily and freely available online (www.federalregister.gov). Users searching for information from a particular government agency should also visit the agency’s online reading room, which contains information not required to be included in the *Federal Register*, to see if the information is already available. Agencies often post documents that have been previously requested to avoid the necessity of future, duplicate requests.

The National Security Agency also offers a helpful service for researchers in its list of “Special Topical Reviews” provided on the agency website (tinyurl.com/nqzfyh). This list includes topics the NSA has determined are of “general public interest.” The agency reviews documents within these topics and posts them to the web page, in accordance with the Open Government Initiative. If a user is searching for information on a popular topic such as the “Cuban Missile Crisis” or “JFK assassination,” he or she may consider checking the NSA website first to see if the documents have already been publicly shared.

If a user is interested specifically in government spending, the federal government offers several “easy-to-understand” websites to help make federal spending information more accessible and empower the public, according to the Open Government Initiative (tinyurl.com/yh9mbv7). Such websites include foreignassistance.gov, recovery.gov and USASpending.gov.

Outside these official government sources, there are several academic, nonprofit or other special interest groups that serve as “watchdog organizations” to promote public access to government information by collecting and disseminating declassified documents. The Federation of American Scientists (FAS), for example, hosts a project on government secrecy, which “works to reduce the scope of official secrecy and to promote public access to national security information by seeking reform of national security classification and declassification policies” (fas.org/issues/government-secrecy). Part of this project includes publishing declassified documents online, typically regarding public policy and intelligence policy. One particularly helpful resource offered by FAS is a portal to available CRS reports (fas.org/sgp/crs/index.html). Stanford University also publishes archived copies of CRS reports for public access through its Archive-It collection (tinyurl.com/owc441t), and the University of North Texas offers a similar digital collection (tinyurl.com/bwjsyku).

Another useful public resource is the Digital National Security Archive (DNSA) from The George Washington University, which claims to be “the most comprehensive set of
declassified government documents available” and has been created through the extensive use of FOIA (tinyurl.com/l6t1k). If a user is searching for military or foreign policy documents dating back to 1945, this database can provide those documents without the researcher needing to submit his or her own FOIA request. Interested parties should note the archive has been transitioning to the ProQuest platform since May 2015 (go.proquest.com/dnsa).

The Declassified Documents Reference System (DDRS) is another useful database that contains full-text access to previously classified government documents dating back to 1950 (tinyurl.com/qd6dww). However, like DNSA, this database is not freely available; users must access the database from a subscribing library or academic institution, which adds another barrier to public access. A free alternative to these independent resources is the Federal Depository Library Program (FDLP), which offers public access to federal collections through partnerships with the US Government Publishing Office (tinyurl.com/o8evgg4).

Several of the aforementioned sites, including Archive-It and DNSA, are directly linked from the website of the FOIA ombudsman itself. OGIS has a page dedicated to non-governmental resources that FOIA requesters may find helpful in locating information (tinyurl.com/osbe728). The Department of State also offers a collection of CRS reports, which can be browsed by date, topic, or region (fpc.state.gov/c18185.htm).

If these avenues do not produce the desired information, information seekers generally must submit a written FOIA request to the appropriate agency contact. A list of all federal agencies and their FOIA contacts is available online (tinyurl.com/dy3yvu).

Access under FOIA and Compliance Statistics

Even when information is eligible to be released under FOIA and a complete, correct request is submitted, these requests are not always processed immediately. FOIA grants agencies up to twenty working days to fulfill requests, though expedited reviews are available for situations of “imminent threat to life or safety” or an urgent need for a reporter to inform the public about government activity.24 Contrarily, agencies have the option to extend the deadline another 10 days when special conditions exist.

However, not all agencies abide by these deadlines. Agencies such as the Federal Bureau of Investigation and the Department of Homeland Security have an average wait time of one year to process FOIA requests, and many requests wait longer.25 FOIA requires each executive agency to submit reports containing information on fulfilled, denied and backlogged requests to the Attorney General each year.26 These reports and data are available on FOIA.gov, which is run by the Department of Justice (www.foia.gov/reports.html). As illustrated in figure 2, the Department of Justice often takes longer than a year to process a “simple” FOIA request. In such cases, users must remain in active contact with the agency to ensure it is still processing their request.27

Figure 2. During fiscal year 2014, the DOJ processed most “simple requests” within the required 20 days, but 109 simple requests took more than 400 days to process. URL: www.foia.gov/data.html.
It is also important to note FOIA requests are not necessarily free. Fees for individual agencies can be found on their websites, usually in the electronic reading rooms. These fees often cover time and material costs for the staff locating the materials. Written requests should include a maximum price the user is willing to pay for their materials.\textsuperscript{28} If the fee poses an access issue to a user, he or she may apply for a fee waiver if the material is "in the public interest."\textsuperscript{29} Fees can also be appealed through FOIA's appeals process.

\section*{Conclusion}

Although the federal government has arguably made strides during the past decade to expand public access to information, classification decisions, and the dissemination of declassified information are not perfect. The government itself promotes transparency, participation and collaboration as the "cornerstone of an open government," yet there are improvements to be made in these three areas.\textsuperscript{30}

Although FOIA is a commendable piece of legislation, the public should not have to actively request information that should already be freely available to them. If information anticipated to be sought after by the public is not classified, it should immediately be made available online, with or without a specific FOIA request. The Open Government Directive espouses this viewpoint, noting: "Agencies should proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA."\textsuperscript{31} A higher priority needs to be placed on this method until the backlog of unpublished information is cleared, perhaps by hiring temporary staff or outsourcing publication duties to another agency or independent body.

This method could also prove beneficial from an economic perspective. Although sharing more information may seem to be an increased cost to the government, if material were consistently published digitally at the time of declassification, agencies would not need to later dedicate staff time and resources for each FOIA request received. This steady and consistent publication of declassified information would also reduce the long wait times and backlog of FOIA requests.

Furthermore, declassified material should be posted in a format that allows advanced search functions and browsing by important access points such as date created, date released, and topic. The Special Topical Reviews website maintained by the National Security Agency serves as an effective model for future sharing of declassified information. It is also vitally important that Congress fund online permanent access to federal collections through the Federal Depository Library Program, which could serve as a valuable resource in this proposed process by curating recently released documents from each agency's website to establish a central index for unclassified and declassified government information. This material could then be stored digitally for future access, helping provide permanent public access to declassified information.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{backlog.png}
\caption{A 2010 summary of FOIA findings listed the number one reason for backlog as an increase in the number of incoming requests. Publishing information immediately would reduce the number of requests received, as material would already be available to the public. URL: www.foia.gov/2010foiapost23.html.}
\end{figure}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
Reason & Number \\
\hline
Increased Incoming & 9 \\
Lost Staff & 8 \\
More Complex Requests & 12 \\
Competing Priorities & 19 \\
\hline
\end{tabular}
\caption{Common Reasons Given For Backlog}
\end{table}


10. Executive Office of the President, Classified Information and Controlled Unclassified Information, 74 Federal Register 26277-26280 (June 1, 2009).

11. National Archives and Records Administration, NARA Records Subject to FOIA, 79 Federal Register 56500-56513 (September 22, 2014).


15. Executive Office of the President, Classified Information and Controlled Unclassified Information.


19. Executive Order 13526, 713.


22. Executive Order 13526, 709.

23. FOIA, 5 U.S.C. § 552(a)(2)


28. Ibid.


