

December 29, 2022

The OPEN Government Data Act: A Primer

The Open, Public, Electronic, and Necessary Government Data Act—also called the OPEN Government Data Act (Title II of the Foundations for Evidence-Based Policymaking Act of 2018 [FEBPA], P.L. 115-435)—seeks to change how government information is formatted, catalogued, and presented for public access and use. The law established agency roles and responsibilities for implementing further information transparency and availability.

The act builds upon earlier executive branch guidance on information management and digitization, including executive orders and publications from the Office of Management and Budget (OMB) and the National Archives and Records Administration (NARA). This In Focus discusses access and transparency provisions of the OPEN Government Data Act and selected issues for Congress.

Expanding OMB's Information Roles

The OPEN Government Data Act (hereinafter, the act) added new definitions of terms for government information policy and new duties for agencies and OMB. The act placed these definitions in Title 44 of the *U.S. Code*, which discusses public printing, documents, and the Federal Records Act (44 U.S.C. Chapters 21, 29, 31, and 33). Further, the act's provisions are located in Chapter 35 of Title 44, which focuses on OMB coordination of federal information policy, as opposed to the broader administrative procedure statutes of Title 5 of the *U.S. Code*, where provisions associated with the Freedom of Information Act (FOIA) and Privacy Act of 1974 are located. The act's Title 44 location underscores the increased role of OMB to guide information policy, while it also tethers agency management of digital information to the existing statutory framework for records management.

Prior to the act's passage, Title 44, Section 3504 of the *U.S. Code* gave general authority to the OMB director to “oversee the use of information resources to improve the efficiency and effectiveness of governmental operations to serve agency missions, including burden reduction and service delivery to the public,” and to “develop, coordinate and oversee the implementation of Federal information resources management policies, principles, standards, and guidelines.” The OMB director institutionally shares information resources management policy roles with the General Services Administration (GSA), NARA, and certain other agencies (44 U.S.C. §3505).

The act made changes that affect government information and transparency policy, which include:

- defining and adapting certain information policy terms to also contemplate a digital environment,

- calling for government information to be made “open by default,”
- requiring agencies to conduct comprehensive data inventories and facilitating the creation of a federal data catalogue, and
- establishing agency-level chief data officer positions.

Adapting Terminology to a Digital Environment

In response to the proliferation of networked information technology, Congress continues to change federal recordkeeping and information practices via statute. It introduced several key definitions (44 U.S.C. §3502; see box). The act builds on the Presidential and Federal Records Act Amendments of 2014 (P.L. 113-187), which require records materials to be assessed by the content of the information—rather than the media used to store it—by similarly requiring agencies to adapt government information and data integration practices for a digital environment (S.Rept. 113-218). The act also codified portions of OMB Memorandum M-13-13 (2013) to be compatible with FOIA and the Privacy Act.

Definitions in the OPEN Government Data Act

Data: recorded information, regardless of form or the media on which the data is recorded

Data Asset: a collection of data elements or data sets that may be grouped together

Machine-Readable Data: data in a format that can be easily processed by a computer without human intervention while ensuring no semantic meaning is lost

Public Data Asset: a data asset, or part thereof, maintained by the Federal Government that has been, or may be, released to the public, including any data asset, or part thereof, subject to disclosure under FOIA

Open Government Data Asset: a public data asset that is (A) machine-readable; (B) available (or could be made available) in an open format; (C) not encumbered by restrictions, other than intellectual property rights ... that would impede the use or reuse of such asset; and (D) based on an underlying open standard that is maintained by a standards organization

Metadata: structural or descriptive information about data such as content, format, source, rights, accuracy, provenance, frequency, periodicity, granularity, publisher or responsible party, contact information, method of collection, and other descriptions

Responsibility to Make Data “Open by Default”

The act’s legislative history indicates a congressional intent for agencies to make data “open by default”—that is, publicly disclose data assets if they would otherwise be made available under FOIA, except when prohibited from disclosure for being personally identifiable information or subject to intellectual property rights (H.Rept. 115-411). The act also requires agencies to ensure that their public data assets are released in machine-readable formats while permitting agencies to conduct cost-benefit analyses on whether there is sufficient public value in converting such information (44 U.S.C. §3511(a)(2)(E)).

Implementation of this portion of the act depends in part on an Administration’s interpretation of FOIA, and that interpretation has changed over time. Previous Administrations have declared that such information should be disclosed “rapidly in forms that the public can readily find and use” (74 *Federal Register* 4685). In practice, critics have noted that such disclosure still faces legal and practical hurdles to convert analog or paper information into digital formats (OMB Memorandum M-19-21).

In combination, a varying interpretation of what it means for information to “otherwise be made available” under FOIA, as well as uncertainty related to OMB’s guidance for cost-benefit analysis of converting information, may cause the act’s effects on transparency to vary over time.

Comprehensive Data Inventories and the Federal Data Catalogue

The act also requires each agency to establish a comprehensive data inventory (CDI) that “accounts for all data assets created by, collected by, under the control or direction of, or maintained by the agency” (44 U.S.C. §3511). Each CDI must describe, in part:

- each data asset and all variable names and definitions,
- whether a data asset can be considered open or is partially or wholly exempt from disclosure,
- related methods of public access, and
- the owner of each data asset.

Agencies are to supply public data assets for inclusion in the federal data catalogue and update them in real time. While it is not explicitly stated in statute, it appears that Data.gov has become the home for the federal data catalogue.

Agency Chief Data Officers

With a statutory grounding in records management policy while working toward increasing agency digitization and use of data, the act also established the role of agency chief data officers (CDOs). Broadly, CDOs are to build agency capacity for information stewardship and use. As described in Title 44, Section 3520(c), of the *U.S. Code*, CDOs are to carry out agency requirements related to, among other things, (1) general information resources management, (2) collection of information and control of paperwork, (3)

information dissemination, and (4) records management policy.

Under the act, CDOs are also responsible for lifecycle data management, which includes the creation or receipt, maintenance and use, and disposition or destruction of the information (OMB *Circular A-130*; see CRS Report R47058, *Access to Government Information: An Overview*, by Meghan M. Stuessy).

Consistent with earlier digitization efforts, CDOs are also to manage data assets in accordance with transparency initiatives and privacy guidance (44 U.S.C. §3520(c)(3)). As facilitators of data use within agencies, CDOs are also to engage agency employees and statistical officials, the public, and contractors in using public data assets and support agency evaluation officers. CDOs are also to submit annual agency reports to congressional committees describing agency compliance and requirements that their agencies could not carry out.

Given the recent establishment of CDOs, their ability to collaborate among agency, public, and nonfederal entities is likely to evolve. The act does not specify the reporting relationship between agency Chief Information Officers (CIOs) and CDOs, which may support rapidly evolving duties. The role of CDOs is still developing in the absence of OPEN Government Data Act guidance from OMB (see Government Accountability Office [GAO] reports GAO-21-29 and GAO-23-105514). OMB has broadly discussed the supporting role of CDOs in guidance for other portions of FEBPA (OMB Memorandum M-19-23).

The statute suggests that CDOs will have contributing roles in information management, including but not limited to:

- dissemination and protection of data assets;
- collection and use of information within government and across sectoral boundaries; and
- facilitation of information use for day-to-day program management, statistical activities, and evidence-building activities.

Issues for Congress

Under the act, OMB is required to issue guidance on how to make data open and available and how agencies are to construct their CDIs. GAO has noted that OMB has not yet done so (GAO-21-29). Looking ahead, Congress may consider many questions, including:

- Does OMB guidance acknowledge and incorporate GSA’s and NARA’s information resources management responsibilities and expertise? How should agencies format information for public use?
- What are the roles for Congress and the public in determining whether agencies appropriately consider data assets available or exempt from disclosure?
- How will CIO and CDO duties evolve?

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