

Chapter 7

THE FEDERAL FREEDOM OF INFORMATION ACT

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I. INTRODUCTION¹

“Democracies die behind closed doors.” – Judge Damon Keith, from his opinion in *Detroit Free Press v. Ashcroft*.²

The Freedom of Information Act³ (“FOIA”) was enacted in 1966 and established the first meaningful right of access to information in the possession of federal agencies. “The basic purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”⁴ The FOIA is implemented in three parts: (1) basic agency information must be published in the *Federal Register*;⁵ (2) other material information⁶ must be made generally available to the public, usually via agency “reading rooms” or the Internet; and (3) any information not falling within category (1) or (2), and that is not excluded or exempted from disclosure by the FOIA, may be obtained by filing a written request with the appropriate agency.⁷ This third prong represents the heart of the FOIA – that the public should be allowed access to any agency records unless protected by a statutory exemption or exclusion.

The decision to withhold information in response to a FOIA request is a matter of agency discretion; withholding is not mandatory.⁸ Persons who believe that they have been improperly denied access under the statute can file suit in a federal district court after exhausting any available administrative appeals.⁹ The United States Department of Justice (“DOJ”) oversees FOIA policy and issues guidelines to assist federal agencies in processing FOIA requests and any related litigation. FOIA policy is often established in a memorandum issued by the Attorney General early in each presidential administration, and sets forth when agencies can anticipate that the DOJ will defend an agency denial of a FOIA request.¹⁰ The Obama Administration’s policy, announced in early 2009, is that the “Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exceptions, or (2) disclosure is prohibited by law.”¹¹ For comparison purposes, the FOIA policy of the prior two administrations is available on the Internet.¹²

II. THE NUTS AND BOLTS OF FOIA.

A. FOIA Applies to Each Federal Agency.

“Agency” is defined as “each authority of the Government of the United States”¹³ including each “executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency”¹⁴ Congress, the courts of the United States, the governments of the territories and possessions of the United States, and the government of the District of Columbia are specifically excluded from FOIA coverage.¹⁵ In addition to the text of the statute and applicable case law, the legislative history of the FOIA is an important source for determining which agencies fall within FOIA coverage. By legislative history, the Postal Service, the Postal Rate Commission and Amtrak are subject to FOIA, but the Corporation for Public Broadcasting is not. Thus, Big Bird is safe. Executive Branch offices that assist the President are generally not subject to FOIA.¹⁶ While each agency must be “examined anew and in its own context”¹⁷ in determining whether it is subject to FOIA, the following determinations have been made:

- **Subject to FOIA** – the Government Printing Office; the Office of the Pardon Attorney; the Cost Accounting Standards Board; the Federal Home Loan Mortgage Corporation; Amtrak; and the United States Parole Commission.
- **Not subject to FOIA** – the National Security Council; the Office of Counsel to the President; the National Academy of Sciences; the Red Cross; and the Council of Economic Advisors.

B. What Constitutes an Agency Record.

Congress has not supplied a definition of “agency record” in the FOIA.¹⁸ However, the Supreme Court has held that in order to qualify as an agency record, the agency must: (1) create or obtain the requested material; and (2) be in control of the

material at the time the FOIA request is made.¹⁹ Agencies cannot be forced to create records, undertake research or answer questions raised by FOIA requests.²⁰ Several court decisions draw fine lines in determining what constitutes an agency record. Appointment calendars, schedules, and telephone message slips have been held not to be agency records because they were for the personal use of the employee and not incorporated into the agency recordkeeping system.²¹ “[D]ocuments are typically not agency records under the [FOIA] unless and until they are included within material controlled, created, approved and utilized by the agency itself.”²² Section 9 of the OPEN Government Act of 2007, discussed below, clarifies that an agency “record” includes any information that is in the possession of a private party pursuant to a government contract for purposes of records management (if such information would be considered an “agency record” if in the agency’s actual possession).²³

Any person, partnership, corporation, association, citizen, resident alien, foreign national, foreign corporation, foreign government and even federal prisoner may make a FOIA request. Formal requirements for FOIA requests are minimal. Requests must be in writing, should reference the FOIA, and be directed to the appropriate FOIA unit within the agency. Some agencies have a “catch-all” address for requesters who are unsure of which particular FOIA unit within the agency the request should be directed.²⁴ The request should also contain a reasonable description of the records sought. The description need not be exact; it just needs to contain enough information to reasonably allow the agency to locate the desired records.²⁵ As discussed below, requesters should note that, in certain situations, agencies are authorized to charge an hourly fee to search for the records, and additional fees for photocopying and computer time. Thus, the more accurate the original description, the lower the eventual charge. Requesters should undertake some basic investigation into the agency to attempt to identify agency forms and record-keeping methods to increase the accuracy of their FOIA request.

FOIA requesters should also follow any agency-specific requirements; these are typically listed on each agency’s website. In addition, the DOJ’s website is also a good source for basic FOIA information, such as a list of the principal FOIA contacts at each agency, an extensive guidebook for making a FOIA request and copies of the DOJ’s Annual FOIA Litigation and Compliance Report to Congress.²⁶ A careful review of agency requirements may prevent unnecessary delay as misdirected FOIA requests generally do not start the twenty working day response period until they are redirected to the proper FOIA office.²⁷

C. Publication and Availability Requirements.

Section 552(a) describes two kinds of information which must be widely available. First, the statute requires that certain information must be published in the *Federal Register*, such as agency rules, policy statements, organization and procedures.²⁸ Second, materials such as administrative opinions, staff manuals and policy statements must be made available to the public at large.²⁹ Information made available under this section is usually called “reading room” material.³⁰ The purpose underlying these “automatic” public disclosures is to avoid creating “secret (agency) law”³¹ This insures that the public has access to the same information relied upon by the agency in its decision making processes, and to the regulations and policies underlying these decisions.³² Section 552(a)(3) subjects all other types of records – except for narrow exceptions within subsections (b) and (c) of the FOIA – to disclosure when the agency receives a proper FOIA request.³³

III. PROCEDURE, TIMING AND FEES

A. Procedure and Timing.

All FOIA requests should be sent by certified mail, return receipt requested or by some other method that provides proof of delivery,³⁴ and directed to the FOIA office within the agency, or the designated FOIA official. Agencies are required by Executive Order 13,392, and the OPEN Government Act of 2007 to designate a Chief FOIA Officer who is tasked with “agency-wide responsibility for efficient and appropriate compliance.”³⁵ By statute, the agency has twenty (20) working days from the date of receipt to respond to a proper FOIA request. Extensions of time can be obtained by the agency if the information requested is “voluminous” or if there is a need to coordinate with another agency “having a substantial interest in the request.”³⁶

The time period begins when the request is received by the proper FOIA office within the agency. If the request is directed to the wrong FOIA office within the agency, the time period is tolled for up to ten working days to allow a transfer to the proper FOIA office.³⁷ Under the OPEN Government Act of 2007 (“OPEN Government Act”), an agency can no longer reject a request on the basis that it was directed to the wrong office within the agency.³⁸ However, an agency can continue to reject requests directed to the wrong agency.³⁹

Once the request is at the proper agency and FOIA office, the agency may toll the twenty working day time period by making one (and only one) inquiry of the requester for additional information that seeks to clarify the original request.⁴⁰ The time period is also tolled while the agency clarifies with the requester any issues regarding assessment of fees.⁴¹ Both of these tolling periods end upon the receipt of a response from the requester. Under the OPEN Government Act amendments,

if the agency fails to respond within the time period allowed, applying the time periods and tolling rules mentioned, it may not assess search or duplication fees for responding to the FOIA request.⁴² Thus, agencies have a minor financial incentive to respond within the statutory period, although given the tremendous backlog⁴³ and the *de minimus* amount of money that the government actually receives in FOIA fees, this portion of the OPEN Government Act may have little impact on the speed with which agencies respond to FOIA requests.⁴⁴

Many agencies are backlogged with months of pending FOIA requests. For example, in 2008, it took the FBI an average of 119 days to respond to a “simple” FOIA request; a “complex” request required 271 days. The oldest FOIA request still pending with the FBI in 2008 was received in February, 2006.⁴⁵ The U.S. Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit”) has approved a general policy of tackling these requests on a “first in-first out” basis, unless the requester can convince the agency to expedite the request.⁴⁶

Requesters may be able to convince the agency to expedite a request. Each agency is directed by the E-FOIA amendments to promulgate regulations providing for the expedited processing of requests upon a showing of a “compelling need” or in any other case the agency deems appropriate under its own regulations.⁴⁷ A “compelling need” can be shown in one of two ways: (1) by establishing that his or her failure to obtain the records quickly “could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;” or (2) if the requester is a “person primarily engaged in disseminating information,”⁴⁸ by demonstrating that an “urgency to inform the public concerning actual or alleged Federal Government activity” exists.⁴⁹ If applicable, requesters should include a claim for expedited handling in their initial FOIA request.

A final agency determination of the request to expedite is required within 10 days.⁵⁰ If the 10 day period runs without a decision, the requester may, in certain circumstances, also consider his or her administrative appeal constructively exhausted⁵¹ and file suit.⁵² FOIA requesters should take care to ensure they have actually or constructively exhausted their administrative appeals before filing suit as exhaustion of a prescribed administrative remedy is required in FOIA cases.⁵³

B. FOIA Fees.

The current FOIA fee structure has been in place since 1987 and defines three categories of fees: search costs, duplication costs and review costs. Requesters are divided into four categories: (1) commercial use; (2) educational and non-commercial scientific institutions; (3) representatives of the news media; and (4) all other requesters.⁵⁴

Level (1) requesters pay for searches, duplication and review of the records. Level (2) and (3) users pay only duplication costs. Level (4) users pay “reasonable” costs for searches, and duplication costs. The Office of Management and Budget (“OMB”), which oversees FOIA fees, has issued guidelines that allow all non-commercial requesters to receive the first 100 pages of duplication and the first two hours of search time free of charge.⁵⁵ As set forth in the OPEN Government Act, agencies are prohibited from assessing search fees (and duplication costs as to Level (2) and (3) requesters) if the agency fails to respond to a proper FOIA request within twenty (20) working days.

C. Availability of Fee Waivers.

Agency fees should be waived for the good of the public if the request is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” “[I]f the information disclosed is new, supports public oversight of agency operations, including the quality of agency activities and the effect of agency policy or regulations on public health or safety, or, otherwise confirms or clarifies data on past or present operations of the government”, a fee waiver request is likely to be looked upon with favor.⁵⁶ Any noncommercial requester should ask for a fee waiver in its initial FOIA request, and reference the above waiver language. If the fee waiver request includes “why the requester wanted the administrative record, what they planned to do with it, [and] to whom they planned on distributing it”, the requester has made out a initial case for a fee waiver and the burden then falls upon the agency to justify its denial.⁵⁷ The agency will generally be limited to the reason(s) set forth for denial in its initial response to the FOIA request and will not be allowed to “supplement” them at a later date during litigation.

IV. THE NINE STATUTORY EXEMPTIONS

There are nine “exemptions” to the FOIA.⁵⁸ These exemptions set forth the information contained in a record that can be withheld in response to a FOIA request. If a record includes information that is subject to release as well as information that is protected from public disclosure by a statutory exemption, the agency should redact the exempt parts and comply with the remainder of the request.⁵⁹ Section 12 of the OPEN Government Act requires that when an agency redacts information before providing it to a requester, the agency must also disclose the applicable FOIA exemption under which the information was redacted.⁶⁰ The nine statutory exemptions are:

A. National Security Matters, § 552(b)(1)

Agencies may withhold from disclosure all national security information that has been properly classified. In order to fall within Exemption 1, the requested records must be specifically authorized by executive order to be “secret.”⁶¹ Next, the records must have been correctly placed within that category by the agency. Any information that, if released, “could reasonably be expected to cause damage to the national security,” should be withheld.⁶²

In 1973, the Supreme Court held that documents, once classified by an agency, were *per se* exempted from disclosure under FOIA.⁶³ In response, Congress amended the FOIA in 1974 to provide a means of judicial review of agency classification determinations. Typically, the agency will submit an affidavit to the court for *in camera* review, setting forth the details of its classification decision. Substantial weight must be accorded to the agency’s affidavit.⁶⁴ Courts have shown great deference in this area, given the “magnitude of the national security interests and potential risks at stake.”⁶⁵ The U.S. Court of Appeals for the District of Columbia Circuit has noted that judges “lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case.”⁶⁶ Prior to 1986, the courts had unanimously deferred to an agency’s classification of a document. Since that time, courts have occasionally found that documents classified by an agency did not properly qualify for “secret” status.⁶⁷

Some types of agency information are so sensitive that knowledge of its very existence may pose a threat to national security. Publicly, the response to this type of request will be that the government can “neither confirm nor deny” the existence of the records. This response has acquired a nickname, the “*Glomar* response.”⁶⁸ A request for any information regarding United States involvement in subverting local governmental bodies in Nicaragua might be the type of FOIA request receiving a *Glomar* response.⁶⁹ The use of a *Glomar* response was specifically approved in Executive Order 13,292.

Executive Order 13,292 also allows each agency to determine the length of time a record should be kept secret, and mandates 10 year reviews of this determination. A record should typically not be kept secret for longer than 25 years. Documents classified under previous executive orders usually must be challenged under the executive order in existence when they were created.⁷⁰ There are provisions which allow the agency, in its discretion, to reclassify older documents using the new executive order.⁷¹ Suffice it to say that in the post-9/11 world, successful FOIA challenges to records classified “secret” by an agency authorized to so declare are few and far between.

B. Internal Personnel Rules and Practices, § 552(b)(2)

Exemption 2 allows the agency to withhold two basic types of information, classified in government jargon as “Low 2” and “High 2” information. To qualify for this exemption, the information must first be an internal agency practice or personnel rule. Second, the information must fall within one of the following two categories:⁷²

“Low 2” information consists of matters so routine or trivial that they could not be subject to “a genuine and significant public interest.”⁷³ Examples of “Low 2” information include agency sick leave policies, regulation of lunch hours, and other routine internal personnel matters.⁷⁴ More significant information, like Air Force Academy Cadet honor code proceedings, is not included.⁷⁵ “Low 2” information can be withheld because the burden placed on the agency to respond to the request is greater than the public benefit realized from its disclosure. However, if the information sought “sheds significant light” upon an agency rule or practice, the material should be released.⁷⁶

“High 2” information is not trivial. On the contrary, this information may be withheld because disclosure risks circumvention of a lawful agency regulation. The U.S. Court of Appeals for the District of Columbia Circuit has held that “High 2” information must be: (1) predominantly internal; and (2) its disclosure “significantly risks circumvention of agency regulations or statutes.”⁷⁷ Any public interest in disclosure is legally irrelevant in this analysis.⁷⁸ For example, security procedures for Supreme Court Justices are deemed to fall within the “High 2” exemption.⁷⁹ In the post-9/11 era, agencies have come to rely upon this exemption, based upon DOJ guidance that “High 2” information may affect national security interests.⁸⁰

C. Exempted by Other Statutes, § 552(b)(3)

Agencies may withhold information under Exemption 3 that is “specifically exempted from disclosure by statute, provided such statute: (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld”⁸¹ Only federal statutes are included in this exemption; the Federal Rules of Civil Procedure, federal regulations, and state statutes are not covered by Exemption 3.⁸² The 1996 E-FOIA amendments require that agencies include citations to the specific statutes that prohibit disclosure under FOIA in their annual reports to Congress.⁸³

In order to qualify, a federal statute must fall within one of the two categories outlined above. Statutes that have qualified under subpart (A) include Federal Rule of Criminal Procedure 6(e),⁸⁴ §§ 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964,⁸⁵ and the Census Act.⁸⁶

Most cases involve subpart (B) statutes. This subpart allows withholding based upon statutes that “provide criteria” for

withholding information or “refer to particular matters” to be withheld. The Consumer Product Safety Act has been held to “provide criteria” sufficiently for subpart (B) status.⁸⁷ The Supreme Court has held that § 102(d)(3) of the National Security Act of 1947 “refers to particular matters” with sufficient specificity to qualify.⁸⁸ Section 222(f) of the Immigration and Nationality Act also refers to particular matters to be withheld, *i.e.* documents “pertaining to the issuance or refusal of visas or permits to enter the United States.”⁸⁹

Congress has also enacted statutes that specifically prohibit public disclosure of records under the FOIA. For example, the Homeland Security Act of 2002⁹⁰ prohibits FOIA disclosure of critical infrastructure information voluntarily submitted to the federal government for homeland security purposes; 31 U.S.C. § 5319 prevents the Secretary of the Treasury from disclosing currency transaction reports; and the Bureau of Alcohol, Tobacco and Firearms (“ATF”) is prohibited from producing gun sale database information under the FOIA.⁹¹

D. Confidential Commercial Information and Trade Secrets, § 552(b)(4)

This exemption provides protection for “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” The dual aim of the exemption is to “protect the interests of both the government and submitters of information.”

For purposes of applying Exemption 4, the U.S. Court of Appeals for the District of Columbia Circuit has adopted the common law definition of trade secret as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”⁹² This definition of “trade secret” is narrower than the definition set forth in the Restatement of Torts.⁹³

The second category protected under Exemption 4 is information that is “commercial or financial,” and “obtained from a person,” and “privileged or confidential.” All three criteria must be present for information to qualify for this exemption.

1. “commercial or financial”

These two terms have been held to possess their “ordinary meanings.”⁹⁴ Records are considered commercial so long as the submitter has a commercial interest in them. Financial records do not need to solely pertain to business or commercial records, as personal financial records fall within the definition as well.⁹⁵

2. “obtained from a person”

A person, as defined in the FOIA, can be a “wide range of entities” and includes a corporation, a foreign government, a state government agency, and an Indian Nation or Tribe. A “person” has been held to be just about anything with the exception of the federal government.⁹⁶

3. “privileged or confidential”

The two terms here are not synonymous. The term “privileged” in Exemption 4 is based upon some recognized privilege existing under the law. Very few cases discussing the “privileged” portion of Exemption 4 have been reported. In one case, legal documents generated by lawyers for the Hopi Indians were granted Exemption 4 status because they were protected by both the attorney-client and attorney work product privileges.⁹⁷ The United States District Court for the Eastern District of Missouri found that “adverse impact analyses,” prepared by the submitter’s attorneys, were still protected from disclosure under Exemption 4.⁹⁸ The court rejected the argument that the submission of attorney-client privileged documents to the agency destroyed the attorney-client privilege.⁹⁹

In contrast to the limited case law discussing “privileged” information, the definition of “confidential” information has preoccupied much of the case law generated under Exemption 4. Two important U.S. Court of Appeals for the District of Columbia Circuit decisions have defined what material may be considered confidential, and thus exempt from disclosure.¹⁰⁰ Information is considered “confidential” if the release of the information would have either of the following two effects: (1) it may make it more difficult for the government to get necessary information in the future, or (2) it may cause substantial harm to the competitive position of the submitter.¹⁰¹

The first category is referred to as the “impairment” prong. As a general rule, the impairment prong is satisfied when an agency demonstrates that a FOIA request seeks information that was submitted to the agency by a third party and that, in the future, such entities would not provide this type of information if it were subject to public disclosure.¹⁰² The agency must demonstrate that the potential impairment would be “significant,” as a “minor” impairment is insufficient to overcome the disclosure obligations underlying the FOIA.¹⁰³

The second prong is called the “competitive harm” prong. This prong protects entities that have submitted financial or commercial information to an agency from any competitive disadvantages that would result from publication. The agency is allowed to “exercise its judgment in view of the nature of the material sought and competitive circumstances in which the

submitter does business,” but “no actual adverse effect on competition need be shown.”¹⁰⁴ Pursuant to executive order, if the agency believes that the FOIA requires release of submitted records, it must contact the submitter before disclosure. The submitter then has an opportunity to object to the proposed release and seek judicial relief to prohibit such disclosure.¹⁰⁵

In *Critical Mass*, the U.S. Court of Appeals for the District of Columbia Circuit issued a much criticized ruling that broadly protects information submitted to the government on a voluntary basis.¹⁰⁶ According to the court, the two-part “impairment” and “competitive harm” test set forth above only applies to information that was submitted to the agency under a legal compulsion. In contrast, information that was *voluntarily* submitted to the agency can only be released if the information is of a type that is customarily disclosed to the public.¹⁰⁷ Since *Critical Mass* was decided, any corporation seeking maximum protection for information it may have to turn over to the government now has a significant incentive to “voluntarily” provide the information requested by the agency rather than wait to be compelled by legal process or court order.

E. Internal Agency Memoranda, § 552(b)(5)

Exemption 5 excludes from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.”¹⁰⁸ Thus, the exemption incorporates the rules of civil discovery into the FOIA.¹⁰⁹ If the agency could properly refuse to produce the requested record in a civil lawsuit because it could assert a recognized privilege, the agency can refuse to produce the document under the FOIA. The Supreme Court has held that the exemption encompasses both statutory and common law privileges.¹¹⁰

The three privileges most often claimed by agencies under Exemption 5 are the “deliberative process” privilege, the attorney work product privilege, and the attorney-client privilege. The “deliberative process” privilege is designed to protect the “quality of agency decisions.”¹¹¹ Three policy considerations underlie the “deliberative process” privilege: (1) to encourage open and frank discussions of agency policy; (2) to protect against premature disclosure of proposed agency policy until adoption; and (3) to avoid public confusion potentially caused by a premature disclosure of inaccurate or incomplete agency reasoning behind agency actions.¹¹² The “deliberative process” exemption is essentially the equivalent of a “self-critical analysis” claim that is often asserted in civil litigation. The U.S. Court of Appeals for the District of Columbia Circuit has affirmed the government’s right to claim that records were protected by the deliberative-process privilege. In *Judicial Watch, Inc. v. Dept. of Energy*, the court held that the deliberative-process privilege applied even though the task force was not a federal agency.¹¹³

As a general rule, the attorney work product privilege applies to any documents that have been prepared by an attorney in anticipation of litigation and the attorney-client privilege applies to confidential communications between an agency and its attorneys. These privileges apply as they would to any private citizen.¹¹⁴ In *National Council of La Raza v. Department of Justice*, the U.S. Court of Appeals for the Second Circuit found that the DOJ’s constant and consistent reliance upon a legal memorandum to justify a change in interpretation of an immigration law was sufficient to show that the DOJ had waived any claimed privilege by adopting the memo as the basis for its policy.¹¹⁵

F. Personal Privacy, § 552(b)(6)

Exemption 6 is one of two exemptions that protect personal privacy – the other being Exemption 7(C). Exemption 6 protects individuals’ “personal and medical files and similar files.” The term “personal and medical files” is self-explanatory. In recent years, “similar files” has been interpreted broadly to encompass all information “that applies to a particular individual” and meets the threshold requirement for Exemption 6 protection.¹¹⁶ This broad definition of “similar files” has been applied to prevent the disclosure of a tape recording of the last words from the Space Shuttle *Challenger* crew.¹¹⁷

If the requested records can be rendered unidentifiable by redacting portions thereof, then Exemption 6 may not apply. If the agency can eliminate personal identifiers by a redaction, the record should be made available.¹¹⁸ If records containing personal information are requested, and the information cannot be redacted, the agency or the reviewing court must apply a balancing test.

In applying this balancing test, the agency must first determine whether a privacy interest exists. If the agency can’t identify one, then the information must be released. If a privacy interest can be found, the agency must then decide whether a real “public interest” in disclosure exists. The agency must then weigh these two opposing considerations. If the public interest weighs heavier, release is mandated.¹¹⁹

The Supreme Court’s application and explanation of the balancing test in *United States Department of Justice v. Reporters Committee for Freedom of the Press*¹²⁰ and subsequent cases shows that even a minimal privacy interest will often be found to outweigh the public’s interest. *Reporters Committee* lays out principles that should be considered under both Exemption 6 and 7(C). *Reporters Committee* involved a FOIA request for arrest records of persons involved in organized crime and political corruption in Pennsylvania.

In the *Reporters Committee* analysis, the Court first determined whether the information requested was private. Next,

the Court identified the public interests to be considered in the balance. Importantly, in identifying these interests, the Court looked only to those the Court found Congress intended the FOIA to address, *i.e.* public awareness of the “agency’s performance of its statutory duties.”¹²¹ The Court dismissed the FOIA requester’s claim that disclosure would help expose public corruption involving elected officials. In applying this balancing test, the Court held that the records were exempt from disclosure under Exemption 7, noting that the balancing test must be limited to the “core purpose” of the FOIA, “namely to shed light on an agency’s performance of its duties.” Thus, in Exemption 7 cases where anything other than the agency’s performance of its duties is at stake, even a minimal privacy interest will prevent disclosure, no matter how otherwise noble.

In *Department of State v. Ray*, the Court continued to narrow the interests that would be applied on the “public interest” side of the FOIA balancing test.¹²² At issue in *Ray* were notes of interviews conducted by the State Department with Haitian refugees that had been returned to Haiti after seeking asylum in the United States. The FOIA request was made by a lawyer who wanted the notes to help establish that the Haitian refugees were being persecuted upon return to Haiti, contrary to Haiti’s representations to the United States, and to further assist a human rights group in re-interviewing the refugees. The Court, applying *Reporters Committee*, upheld the State Department’s application of Exemption 7 because the release of the notes and identities of the refugees “would not shed any additional light on the Government’s conduct of its obligations.” Thus, the refugees’ own privacy interests were used to deny release of the requested records to an attorney working to assist these same refugees.

In the intervening years, the *Reporters Committee* case has been used by the Supreme Court as a basis to reject FOIA requests for lists of federal employees, sought by a labor union to assist in an organizing campaign; a list of persons that had indicated an interest in an Oregon desert, sought by a conservation group; and White House Deputy Counsel Vincent Foster’s autopsy photographs, requested by the group “Accuracy in Media.”

G. Law Enforcement Investigations, § 552(b)(7)

This exemption protects “records or information compiled for law enforcement purposes”¹²³ However, the exemption only protects the records or information when they also fall within one or more of six sub-categories.¹²⁴ The “law” to be enforced within the meaning of this exemption includes both civil¹²⁵ and criminal statutes,¹²⁶ as well as those statutes authorizing administrative proceedings.¹²⁷ In the post-9/11 world, “law enforcement” is broadly defined to extend to areas touching upon issues of national and homeland security. For example, the U.S. Court of Appeals for the District of Columbia Circuit upheld the DOJ’s refusal to make available a list of the names of certain 9/11 detainees on the basis that the information had been compiled for “law enforcement purposes” even though such information had traditionally been public.¹²⁸ In fact, information that was not initially obtained or generated for law enforcement purposes may still qualify under Exemption 7 if it is subsequently compiled for a valid law enforcement purpose at any time prior to “when the Government invokes the Exemption.”¹²⁹

The Supreme Court has expansively construed the reach of Exemption 7 in its interpretations of the phrase “law enforcement” purposes. In *FBI v. Abramson*, the Court held that summaries of information supplied to the White House were “law enforcement records” even though they were compiled for political purposes (to “name check” prominent liberals).¹³⁰

There are six subparts, (A) through (F), to this exemption. Information which “could reasonably be expected to interfere with law enforcement proceedings” is protected from disclosure under subpart (A).¹³¹ The government must show that an enforcement proceeding is actually pending, and that release would cause an “articulable” harm.¹³² “The principal purpose of Exemption 7(A) is to prevent disclosures which might prematurely reveal the government’s cases in court, its evidence and strategies, or the nature, scope, direction, and focus of its investigations, and thereby enable suspects to establish defenses or false alibis or to destroy or alter evidence.”¹³³ Furthermore, the requested records may be withheld even when the FOIA requester is not the subject of the enforcement proceedings, if such disclosure would interfere with other ongoing proceedings.¹³⁴

Subpart (B) protects material that may interfere with the right of a criminal defendant to receive a fair trial. One case to feature application of this exemption specified two conditions necessary to invoke the subpart. “[T]he government bears the burden of showing: (1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure would seriously interfere with the fairness of those proceedings.”¹³⁵ Obviously, when the trial is over, such protected material will lose its protection.

Personal information that can be found in law enforcement records is protected by the subpart (C) exemption. The articulated standard, as in Exemption 6, is whether the information “could reasonably be expected to be an unwarranted invasion of personal privacy.” Despite the similar language, Exemption 7(C) is different from Exemption 6, covering more information and lending itself more easily to “categorization.”¹³⁶ “In determining whether Exemption 7 applies to particular material, the Court must balance the interest in privacy of individuals mentioned in the records against the strong public interest in disclosure.”¹³⁷ Individuals have a “strong interest in not being associated with alleged criminal activity.”¹³⁸ Thus,

information regarding third parties mentioned in law enforcement records is universally exempt.¹³⁹ The identities of people who were subjects of an investigation, those who were consulted by investigators, as well as law enforcement personnel involved in the investigation, are protected as well. Rarely, and only where there has been obviously illegal behavior on the part of law enforcement, courts have allowed access to the names of the officials involved.¹⁴⁰ The privacy interest here is a substantial one, and is not extinguished by the passage of time as in Exemptions 7(A) and (B). The *Reporter's Committee* case, outlined under Exemption 6 above, contains guidelines for the proper balancing of public and private interests.

Designed to protect the identities of confidential sources, subpart (D) covers a wide variety of information, including information about foreign sources, state, local or other governmental sources and private institutional sources. The exemption “assures that confidential sources are protected from retaliation in order to prevent the loss of valuable sources of information.”¹⁴¹ Exemption 7(D) is properly invoked “whether the confidential source provided information under an express assurance of confidentiality or under circumstances from which such an assurance could be reasonably inferred.”¹⁴² Exemption 7(D) continues to be applicable even after the death of the confidential source.¹⁴³

Subpart (E) protects manuals, training tools, law enforcement techniques or any prosecution or investigation guidelines “if such information could reasonably be expected to risk circumvention of the law.”¹⁴⁴ This includes procedures and techniques used by FBI agents during an investigation, such as instructions to cooperating witnesses, and the amount of money used to purchase evidence during sting operations.¹⁴⁵

Finally, if the release of information “could reasonably be expected” to cause physical harm to an individual, it is exempt from disclosure. Subpart (F) can be invoked to withhold the identities of law enforcement agents and confidential informants.¹⁴⁶ “In reviewing matters under Exemption 7(F), court may inquire ‘whether there is some nexus between disclosure and possible harm.’”¹⁴⁷ The scope of subpart (F) has expanded since the terrorist attacks of September, 2001 to include a variety of seemingly harmless types of information that, when viewed in the context of the potential for large scale devastation, could be considered potentially harmful. Such information would include “inundation studies,” a type of study that attempts to predict the damage caused by large scale flooding and destruction after a dam failure.¹⁴⁸ The agency’s decision to withhold the information was based on the “reasonable expectation” of harm to those people who live downstream of the dam should these studies find their way into the hands of terrorists planning an attack.

H. Federally Regulated Banks, § 552(b)(8)

This exemption applies to matters “contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” This would include bank examination reports, documents “relating” to these reports, and even internal memoranda containing information about the status of a federally regulated bank. Just about any record documenting the stability (or lack thereof) of a federally regulated financial institution is going to be considered exempt from FOIA access.

Even records containing information about financial institutions which are no longer in existence can be withheld from disclosure under this exemption, to promote cooperation between regulators and current bank officials.¹⁴⁹ Documents relating to cease-and-desist orders that issue after a bank examination have also been found exempt, as are reports documenting bank compliance with consumer laws and regulations. About the only type of information which can be released under this exemption are reports prepared by a federal banking agency’s inspector general which detail a significant payout from the Federal Deposit Insurance Corporation.¹⁵⁰

I. Oil, Gas and Water Wells, § 552(b)(9)

Exemption 9 covers “geological or geophysical information and data, including maps, concerning wells.”¹⁵¹ Few decisions applying Exemption 9 have been issued. One court has held that the number, location and depth of uranium drill holes must be disclosed because such information “falls far short of the technical and scientific information envisioned by Congress.”¹⁵² In contrast, another court applied Exemption 9 to maps showing the locations of publicly-owned water wells.¹⁵³

J. Exclusions from the FOIA.

In addition to the nine exemptions discussed above, there are also three “exclusions” to the FOIA. Created by Congress in 1986, these exclusions provide a mechanism to protect sensitive law enforcement matters. If applicable, the exclusions allow an agency “to treat the records as not subject to the requirements” of FOIA; the FOIA requester is simply informed that there are no records responsive to the request.¹⁵⁴ To protect the fact that an exclusion was relied upon, agencies are directed to match the language of their “no records” exclusion response with the language used by the agency in other FOIA denials as “it does little to shield sensitive abstract facts if an agency phrases its response in an exclusion situation in any way different than usual.”¹⁵⁵

If a requester subsequently challenges the agency response by raising a claim regarding the suspected use of an exclusion, the government’s “standard litigation policy” is to routinely submit an affidavit for *in camera* review, no matter if an

exclusion was actually relied upon or not. Where an exclusion has been utilized, the affidavit will state the basis; if an exclusion has not been invoked, the affidavit will explain that the filing of the affidavit was done to protect the overall exclusion process, as the government does not want the requester to be able to discern whether an exclusion has been relied upon by the government's failure to submit an affidavit in any particular matter. The agency will also "urge the court to issue a public decision which does not indicate whether it is or is not an actual exclusion case."¹⁵⁶

A. (c)(1): Under this exclusion, records about an ongoing criminal investigation that fall within Exemption 7(a) are provided with another layer of secrecy. Under a (c)(1) exclusion, the agency can pretend that the requested records do not exist. To qualify for the (c)(1) exclusion, the records must fall within Exemption 7(a) and must be regarding an ongoing criminal investigation.¹⁵⁷ The (c)(1) exclusion exists to avoid tipping off the subject of the ongoing investigation that would occur when the (7)(A) exemption was invoked, as agencies are required to disclose their reliance on exemptions.¹⁵⁸

B. (c)(2): This exclusion attempts to anticipate FOIA requests where there is a possibility that the required answer under Exemption (7)(D) would reveal the identity of a confidential source. The somewhat far-fetched scenario, as outlined by Attorney General Meese,⁵⁹ involves all members of a criminal conspiracy filing FOIA requests for agency files about themselves. The agency, by invoking Exemption (7)(D) in only one case – the confidential source – would effectively name the confidential source to the other members of the conspiracy. Exclusion (c)(2) allows the agency to provide a "no records" response to all requesters, thus preserving the identity of the source.

C. (c)(3): The final exclusion is limited to records maintained by the FBI, particularly records pertaining to FBI activities in foreign intelligence, counter-intelligence and against international terrorism. The (c)(3) exclusion allows the FBI to respond that there are no records responsive to a FOIA request in these areas, again avoiding having to rely upon a public exemption.¹⁶⁰

V. THE CIVIL REMEDY - FOIA SUITS IN FEDERAL DISTRICT COURT, § 552(A)(4)(B)

The remedy for a requester denied under the FOIA is a lawsuit in federal district court. The lawsuit may be filed in the district where the requester resides, where a corporate entity requester has its principal place of business, where the agency records are located, or in the District of Columbia.¹⁶¹

A. Provisions for Attorney's Fees

The FOIA provides a statutory mechanism for shifting responsibility for plaintiff's "reasonable attorney fees and other litigation costs" to the agency if the plaintiff has "substantially prevailed" in the FOIA litigation.¹⁶² The district court may shift these fees and costs at its discretion.¹⁶³ Generally, a requester who proceeds without retaining an attorney (pro se) will not be entitled to recover attorney's fees.

In 2001, the Supreme Court, interpreting two federal laws containing similar attorney fee-shifting provisions, held that a party does not "substantially prevail" when the agency voluntarily changes its conduct before entry of a judgment on the merits or a consent decree.¹⁶⁴ In 2002, the United States Court of Appeals for the District of Columbia Circuit applied the Supreme Court's ruling to the FOIA.¹⁶⁵ As a result, agencies were free to litigate FOIA requests and refuse to turn over requested documents until a court-ordered disclosure was imminent; the agencies could then simply produce the records before entry of a judgment and leave FOIA requesters unable to recover their attorney's fees.

The OPEN Government Act of 2007 effectively reversed the Supreme Court's holding by statutorily providing that a complainant has "substantially prevailed" in two circumstances: (1) where the complainant has obtained relief through a judicial order, or an enforceable written agreement of consent decree;¹⁶⁶ or (2) where the agency has voluntarily or unilaterally changed its position if the complainant's claim "is not insubstantial."¹⁶⁷ In addition, the OPEN Government Act directs that attorneys fees and litigation costs awarded are no longer to be paid from the Department of Treasury's Claims and Judgment Fund, but rather out of agency funds, providing agencies with some financial incentive to comply with the terms of the FOIA.¹⁶⁸

B. Reverse FOIA: *Chrysler Corp. v. Brown*.

Persons and corporations that have submitted information to a federal agency, only to have that information subsequently subjected to a FOIA request from a third party, have in the past brought suit to prevent such disclosures. This type of suit is referred to as a "reverse FOIA" claim. In *Chrysler Corp. v. Brown*,¹⁶⁹ the Supreme Court held that jurisdiction could not be found in the FOIA for "reverse FOIA" claims because the nine statutory exemptions provided are discretionary with the agency, rather than mandatory. The Court also rejected the argument that jurisdiction could be found under the Trade Secrets Act, as it is a criminal statute.¹⁷⁰ Rather, the Court held that "reverse FOIA" lawsuits may be brought against an agency, challenging its decision to disclose requested records to a third party, under the provisions of the Administrative Procedure Act,¹⁷¹ as an "arbitrary and capricious" abuse of discretion by the agency.

In the reverse FOIA context, the U.S. Court of Appeals for the District of Columbia Circuit has held that information falling within the scope of Exemption 4 may not be released by the agencies because the exemption is co-extensive with the prohibition contained in the Trade Secrets Act.¹⁷² District court review of agency disclosure decisions in a reverse FOIA

matter is under a highly deferential standard of review. This means that the district court must usually rely upon the agency's administrative record in formulating its decision. District courts may conduct an independent review (termed *de novo* review) in cases where the administrative record is "severely defective."¹⁷³ Administrative procedures governing agency's responses in the reverse FOIA context are set forth in Executive Order 12,600. This Executive Order requires agencies to formulate and implement pre-disclosure notification procedures for information, including an opportunity for the party to object to an agency's contemplated FOIA disclosure, as well as additional time to seek judicial relief in the event the agency decides to release the information over the party's objection.

VI. RECENT STATUTORY AMENDMENTS TO THE FOIA.

The 110th Congress passed amendments to the Freedom of Information Act, creatively titled the "Openness Promotes Effectiveness in our National Government Act of 2007" (the "OPEN Government Act of 2007")¹⁷⁴ designed to improve FOIA administration and implement certain provisions of Executive Order 13,392.¹⁷⁵ The OPEN Government Act was signed into law on December 31, 2007 by President George W. Bush. The significant statutory amendments of the OPEN Government Act are summarized below.

Agency fees for responding to a FOIA request are limited to "reasonable standard charges for document duplication" when the request is made by "a representative of the news media"¹⁷⁶ The OPEN Government Act adds broad statutory definitions for the terms "news" and "representative of the news media." "The term 'news' means information that is about current events or that would be of current interest to the public" and "the term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."¹⁷⁷

This Section can be seen as a codification of judicial rulings that entities not engaged in what would be considered traditional news gathering and dissemination – such as the Electronic Privacy Information Center¹⁷⁸ and Tax Analysts¹⁷⁹ – are still eligible for news media status and, thus, reduced fee status for FOIA requests. The OPEN Government Act also makes a specific provision for members of the alternative media: "as methods of news evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunication services), such alternative media shall be considered to be news-media entities."¹⁸⁰ Freelance journalists are considered to be working for a news-media entity and entitled to reduced fee status "if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity."¹⁸¹

Section 7 of the OPEN Government Act, which applies to requests made on or after December 31, 2008 requires that agencies assign an individualized tracking number to any FOIA request that will require more than ten days to process.¹⁸² The agencies are further directed to establish a phone number or Internet site to enable requesters to inquire about the status of a pending request.¹⁸³ In addition, agencies are required to provide the date the request was originally received and an estimated date that the request will be completed.¹⁸⁴ Section 7 codifies portions of the contents of Executive Order 13,392.

Section 10 of the OPEN Government Act creates a FOIA ombudsman's office known as the Office of Government Information Services (OGIS) to assist FOIA requesters with mediation services as a "non-exclusive alternative to litigation."¹⁸⁵ The OGIS also may, in its discretion, issue "advisory opinions" if mediation did not resolve the dispute.¹⁸⁶ The OGIS would be located within the National Archives and Records Administration.

While the OPEN Act created OGIS, the federal budget process must provide the funding. As of the date of publication, it is unclear where the funds to operate the office will be found. President Bush's last budget directed that the office be funded out of DOJ appropriations.¹⁸⁷ President Bush proposed that the OGIS, which was created to mediate FOIA disputes between the government and the public, should be located – and paid for – within the same agency (DOJ) that is in charge of defending the government from FOIA lawsuits.¹⁸⁸

As of the date of publication of this chapter, no federal appellate decision had been issued dealing with the substantive provisions of the OPEN Government Act of 2007. Several district courts have been asked to decide whether the new attorney's fee provisions (allowing for recovery of attorney's fees after a voluntary change in agency position) applies to FOIA requests that were still pending when the bill was signed on December 31, 2007. To date, the district courts are split on the issue. In Missouri, the United States District Court for the Western District held that the OPEN Government Act's attorney's fee provision is not retroactive and, thus, applies only to FOIA requests made after December 31, 2007.¹⁸⁹

Footnotes

1 The author thanks Michael L. Ramsey, author of the chapter on the FOIA in the first edition of the Handbook. His prior work provides both the format and outline for the current update, and contains an excellent compilation of case law and analysis. Several portions of the current chapter are substantially unchanged from his work. This update is limited to the FOIA only; those looking for information on the Privacy Act should continue to refer to Mr. Ramsey's previous chapter.

2 303 F.3d 681 (6th Cir. 2002).

3 5 U.S.C. § 552.

4 *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

5 Information about the agency, its rules of procedure, its functions, and statements of general policy.

6 Final opinions in agency adjudications, statements of policy not published in the *Federal Register*, administrative staff manuals that affect the

public, and records processed and disclosed under FOIA that are likely to become the subject of subsequent requests for the same records.

7 *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

8 *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979).

9 While many FOIA lawsuits are filed in the United States District Court for the District of Columbia, FOIA's venue provisions allow suits to be filed in other federal district courts. Recently, a few prominent and repeat FOIA requesters, seeking a more favorable venue, have elected to file FOIA lawsuits in the United States District Court for the Southern District of New York.

10 On January 21, 2009 President Obama released a "Memorandum for the Heads of Executive Departments and Agencies," declaring that "[t]he Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."

11 Attorney General Eric Holder's "Memorandum for Heads of Executive Departments and Agencies," dated March 19, 2009.

12 Former Attorneys General John Ashcroft and Janet Reno issued FOIA Memorandums on October 12, 2001 and October 4, 1993 respectively.

13 5 U.S.C. § 551(1).

14 5 U.S.C. § 552(f)(1).

15 5 U.S.C. § 551(1)(A)-(D).

16 *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1970); see also *Rushforth v. Council of Economic Advisors*, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985) (discussing the "sole function" test and the legislative history behind this definition).

17 *Washington Research Project, Inc. v. Dep't of Health, Education and Welfare*, 504 F.2d 238, 246 (D.C. Cir. 1974).

18 *Forsham v. Harris*, 445 U.S. 169 (1980).

19 *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989).

20 United States Department of Justice, Freedom of Information Act Guide, May 2006, <http://www.usdoj.gov/oip/referenceguidemay99.htm> (last visited March 29, 2009).

21 *Bureau of Nat'l Affairs v. Dep't of Justice*, 742 F.2d 1484, 1495 (D.C. Cir. 1984).

22 *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1 (D.D.C. 1995).

23 5 U.S.C. § 552(f)(2)(B).

24 For example, the DOJ has a "catch-all" office, as well as 40 individual FOIA unit offices, including those for the Office of the Attorney General, the Antitrust Division, the Civil Rights Division, the DEA and the FBI.

25 See *Brumley v. U.S. Dep't of Labor*, 767 F.2d 444 (8th Cir. 1985) for a discussion of the legislative history of the 1974 FOIA Amendments.

26 United States Department of Justice, Freedom of Information Act (FOIA), <http://www.usdoj.gov/oip/> (last visited March 29, 2009).

27 United States Department of Justice, Office of Information and Privacy, FOIA Post, OIP Guidance: New Requirement to Route Misdirected FOIA Requests, <http://www.usdoj.gov/oip/foiapost/2008foiapost31.htm> (last visited March 29, 2009).

28 5 U.S.C. § 552 (a)(1).

29 5 U.S.C. § 552 (a)(2).

30 United States Department of Justice, What You Will Find in the FOIA Reading Rooms, http://www.usdoj.gov/oip/04_2_1.html (last visited March 29, 2009).

31 *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

32 *Welch v. United States*, 750 F.2d 1101, 1111 (1st Cir. 1985).

33 5 U.S.C. § 552(a)(3).

34 While this isn't a statutory requirement, it can be used as substantive proof of the date of receipt by the agency in case of subsequent litigation.

35 Pub L. No. 110-175, 121 Stat. 2524 (2007), enacted Dec. 31, 2007.

36 5 U.S.C. § 552(a)(6)(A)(iii)(II)-(III).

37 United States Department of Justice, Office of Information and Privacy, FOIA Post, OIP Guidance: New Requirement to Route Misdirected FOIA Requests, <http://www.usdoj.gov/oip/foiapost/2008foiapost31.htm> (last visited March 29, 2009).

38 *Id.*

39 *Id.*

40 5 U.S.C. § 552(a)(6)(A)(ii)(I).

41 5 U.S.C. § 552(a)(6)(A)(ii)(II).

42 Pub L. No. 110-175, §6, 121 Stat. 2524 (2007), enacted Dec. 31, 2007.

43 See Karen B. Mitchell, Sunshine in Government Initiative, An Analysis of Selected Sections of the "OPEN Government Act of 2007," March 16, 2007, http://www.sunshineingovernment.org/foia/HR1309_section_by_section.pdf (last visited March 29, 2009).

44 *Id.*

45 United States Department of Justice, Freedom of Information Act Report, Fiscal Year 2008, Sec. VII, www.usdoj.gov/oip/annual_report/2008/foiapg7.pdf (last visited March 29, 2009).

46 *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 614-15 (D.C. Cir. 1976).

47 5 U.S.C. § 552(a)(6)(E).

48 See *Tripp v. Dep't of Defense*, 193 F. Supp.2d 229, 241 (D.D.C. 2002).

49 5 U.S.C. § 552(a)(6)(E)(v).

50 5 U.S.C. § 552(a)(6)(E)(ii)(I).

51 5 U.S.C. § 552(a)(6)(C).

52 *Oglesby v. U. S. Dep't of Army*, 920 F.2d 57, 61-65 (D.C. Cir. 1990).

53 *Dettman v. Dep't of Justice*, 802 F.2d 1472, 1476-77 (D.C. Cir. 1986).

54 5 U.S.C. § 552(a)(4)(A)(ii).

55 5 U.S.C. § 552 (a)(4)(A)(iv)(II).

56 *Sloman v. U.S. Dep't of Justice*, 832 F. Supp. 63, 67-68 (S.D.N.Y. 1993).

57 *Friends of the Coast Fork v. U.S. Dep't of Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

58 Exemptions are different than exclusions. An agency's reliance upon an exemption to withhold records must be specifically disclosed to the requester. In contrast, if an exclusion is applicable, the requester is typically informed by the agency that "no such records" exist.

59 *EPA v. Mink*, 410 U.S. 73, 91 (1973).

60 5 U.S.C. § 552(b).

61 Executive Order No. 13,292; see also *Judicial Watch v. U.S. Dep't of Justice*, 306 F. Supp.2d 58, 64-65 (D.D.C. 2004) (applying amended Executive Order 12,958); *Primorac v. CIA*, 277 F. Supp.2d 117, 120 (D.D.C. 2003) (same).

62 Executive Order No. 13,292, issued March 25, 2003.

- 63 *Mink*, 410 U.S. 73.
- 64 *Hayden v. National Security Agency*, 608 F.2d 1381 (D.C. Cir. 1979).
- 65 *Center for Nat's Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003).
- 66 *Halperin v. Central Intelligence Agency*, 629 F.2d 144 (D.C. Cir. 1980).
- 67 *Donovan v. FBI*, 806 F.2d 55 (2d Cir. 1986).
- 68 Named after the case establishing this response, *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), which involved the vessel "Glomar Explorer."
- 69 See *Miller v. Casey*, 730 F.2d 773 (D.C. Cir. 1984).
- 70 *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987).
- 71 *Baez v. U.S. Dep't of Justice*, 647 F.2d 1328, 1333 (D.C. Cir. 1980).
- 72 *Founding Church of Scientology v. Smith*, 721 F.2d 828, 830-31 (D.C. Cir. 1983).
- 73 *Dep't of Air Force v. Rose*, 425 U.S. 352, 365-70 (1976).
- 74 S. Rep. No. 89-813 at pg. 8 (1965).
- 75 *Rose*, 452 U.S. at 365-70.
- 76 *Schwanner v. Dep't of Air Force*, 898 F.2d 793, 795 (D.C. Cir. 1990).
- 77 *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981).
- 78 *Voinche v. Federal Bureau of Investigation*, 940 F. Supp. 323, 328 (D.D.C. 1996).
- 79 *Id.*
- 80 See Attorney General John Ashcroft FOIA Memorandum, dated October 12, 2001; United States Department of Justice, Office of Information and Privacy, FOIA Post, New Attorney General FOIA Memorandum Issued, <http://www.usdoj.gov/oip/foiapist/2001foiapist19.htm> (last visited March 29, 2009).
- 81 5 U.S.C. § 552(b)(3).
- 82 *Founding Church of Scientology v. Bell*, 603 F.2d 945, 952-53 (D.C. Cir. 1979).
- 83 5 U.S.C. § 552(e)(1)(B)(ii).
- 84 FRCP 6(e), protecting certain Grand Jury material, qualifies because Congress singled it out for special treatment in 1977. See *Fund for Constitutional Government v. National Archives and Records Service*, 656 F.2d 856, 867-68 (D.C. Cir. 1981).
- 85 *American Centennial Ins. Co. v. U.S. Equal Employment Opportunity Commission*, 722 F. Supp. 180, 183 (D.N.J. 1989).
- 86 13 U.S.C. §§ 8(b), 9(a); see *Baldrige v. Shapiro*, 455 U.S. 345 (1982).
- 87 15 U.S.C. § 2055(b)(1); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 122 (1980).
- 88 *CIA v. Sims*, 471 U.S. 159, 167 (1985).
- 89 8 U.S.C. § 1202(f); *El Badrawi v. Department of Homeland Security*, 583 F. Supp.2d 285 (D. Conn. 2008).
- 90 Pub. L. No. 107-296, § 214(a)(1)(A), 116 Stat. 2135 (2002), enacted Nov. 25, 2002.
- 91 *City of Chicago v. U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco and Firearms*, 423 F.3d 777 (7th Cir. 2005).
- 92 *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).
- 93 This definition should not be confused with the definition contained in the Trade Secrets Act, which is also much broader than as applied by the U.S. Court of Appeals for the District of Columbia Circuit.
- 94 *Public Citizen*, 704 F.2d at 1290.
- 95 *Washington Post Co. v. U.S. Dep't of Health and Human Services*, 690 F.2d 252, 265-66 (D.C. Cir. 1982).
- 96 *Allnet Communication Services, Inc. v. FCC*, 800 F. Supp. 984, 988 (D.D.C. 1992).
- 97 *Indian Law Resource Center v. Dep't of the Interior*, 477 F. Supp. 144, 148 (D.D.C. 1979).
- 98 *McDonnell Douglas Corp. v. U.S. Equal Employment Opportunity Commission*, 922 F. Supp. 235, 237 (E.D. Mo. 1996).
- 99 *Id.*
- 100 *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (establishing two prong test for confidentiality); *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (establishing different standards for "required" and "voluntarily" reported information).
- 101 *In Defense of Animals v. National Institutes of Health*, 543 F. Supp.2d 83 (D.D.C. 2008) (applying *National Parks*).
- 102 *FlightSafety Services v. Dep't of Labor*, 326 F.3d 607 (5th Cir. 2003).
- 103 *Washington Post Co. v. U.S. Dep't of Health and Human Services*, 690 F.2d 252 (D.C. Cir. 1982).
- 104 *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 675 (D.C. Cir. 1976).
- 105 Executive Order 12,600, issued June 23, 1987.
- 106 *Critical Mass Energy Product v. Nuclear Regulatory Com'n*, 975 F.2d 871 (D.C. Cir. 1992).
- 107 *Id.* at 880.
- 108 5 U.S.C. § 552(b)(5).
- 109 *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).
- 110 *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984).
- 111 *Id.* at 151.
- 112 *Sears, Roebuck & Co.*, 421 U.S. at 150-51.
- 113 *Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125 (D.C. Cir. 2005).
- 114 *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980).
- 115 *National Council of La Raza v. Dep't of Justice*, 411 F.3d 350 (2d Cir. 2005).
- 116 *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982).
- 117 *New York Times Co. v. National Aeronautics and Space Admin.*, 782 F. Supp. 628 (D.D.C. 1991).
- 118 *Trans-Pacific Policing Agreement v. U.S. Customs Service*, 177 F.3d 1022, 1026 (D.C. Cir. 1999).
- 119 *Ripskis v. Dep't of Housing and Urban Development*, 746 F.2d 1 (D.C. Cir. 1984).
- 120 489 U.S. 749 (1989).
- 121 *Id.* at 773.
- 122 502 U.S. 164 (1991).
- 123 5 U.S.C. § 552(b)(7).
- 124 Records that fall within Exemption 7 may also fall within one of three statutory exclusions, discussed below, allowing the agency to provide a "no records" response, rather than having to invoke Exemption 7 by name.
- 125 *Rugiero v. United States Dep't of Justice*, 257 F.3d 534, 550 (6th Cir. 2001).
- 126 *Ortiz v. U.S. Dep't of Health and Human Services*, 70 F.3d 729, 730 (2d Cir. 1995).

- 127 *Center for National Policy Review on Race and Urban Issues v. Weinberger*, 502 F.2d 370, 373 (D.C. Cir. 1974).
- 128 *Center for National Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003).
- 129 *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989).
- 130 456 U.S. 615 (1982).
- 131 5 U.S.C. § 552(b)(7)(A).
- 132 *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).
- 133 *Maydak v. U.S. Dep't of Justice*, 218 F.3d 760 (D.C. Cir. 2000).
- 134 *Barnard v. Dep't of Homeland Security*, Civil Action No. 06-1393 (CKK), 2009 WL 305070 (D.D.C. Feb. 9, 2009).
- 135 *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988).
- 136 *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991).
- 137 *Robinson v. Attorney General of the U.S.*, 534 F. Supp.2d 72 (D.D.C. 2008); *see also Beck v. Dep't of Justice*, 997 F.2d 1489, 1491 (D.C. Cir. 1993).
- 138 *Stern v. Federal Bureau of Investigation*, 737 F.2d 84, 91-92 (D.C. Cir. 1984).
- 139 *SafeCard Services, Inc.*, 926 F.2d at 1206.
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- 141 *Garcia v. U.S. Dep't of Justice, Office of Information and Privacy*, 181 F. Supp.2d 356 (S.D.N.Y. 2002).
- 142 *King v. U.S. Dep't of Justice*, 586 F. Supp. 286, 295 (D.D.C. 1983).
- 143 *Bullock v. Federal Bureau of Investigation*, 577 F. Supp.2d 75 (D.D.C. 2008).
- 144 5 U.S.C. § 552(b)(7).
- 145 *Amuso v. U.S. Dep't of Justice*, Civil Action No. 07-1935(RJL), 2009 WL 535965 (D.D.C. March 4, 2009).
- 146 *Gonzalez v. Bureau of Alcohol, Tobacco & Firearms*, No. Civ. A. 04-2281(JDB), 2005 WL 3201009 (D.D.C. Nov. 9, 2005).
- 147 *Miller v. U.S. Dep't of Justice*, 562 F. Supp.2d 82 (D.D.C. 2008).
- 148 *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp.2d 1313, 1321-22 (D. Utah 2003).
- 149 *Gregory v. Federal Deposit Insurance Corp.*, 631 F.2d 896, 898 (D.C. Cir. 1980).
- 150 As of the date of publication, FOIA lawsuits seeking to discover the recipients of public funds expended by the U.S. Treasury under, *inter alia*, the Troubled Asset Relief Program (“TARP”) and the Capital Purchase Program (“CPP”) are pending.
- 151 5 U.S.C. § 552(b)(9).
- 152 *Black Hills Alliance v. U.S. Forest Serv.*, 603 F. Supp. 117 (D.S.D. 1984).
- 153 *National Resource Defense Council v. U.S. Dept. of Defense*, 388 F. Supp.2d 1086, 1108 (C.D. Cal. 2005).
- 154 A “no records” response should be distinguished from a *Glomar* response (where the agency refuses to admit or deny the existence of responsive records).
- 155 Attorney General Edwin Meese’s “Memorandum on the 1986 Law Enforcement Amendments to the Freedom of Information Act,” dated December 1987.
- 156 *Id.*
- 157 *Id.*
- 158 5 U.S.C. § 552(b).
- 159 *Id.*
- 160 *Id.*
- 161 5 U.S.C. § 552(a)(4)(B).
- 162 5 U.S.C. § 552(a)(4)(E).
- 163 *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1495 (D.C. Cir. 1984).
- 164 *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598 (2001).
- 165 *Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002).
- 166 5 U.S.C. § 552(a)(4)(E)(ii)(I).
- 167 5 U.S.C. § 552(a)(4)(E)(ii)(II).
- 168 Pub. L. 110-175, §4(b), 121 Stat. 2525, enacted Dec. 31, 2007.
- 169 441 U.S. 281 (1979).
- 170 18 U.S.C. § 1905.
- 171 5 U.S.C. §§ 701-06.
- 172 *CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987).
- 173 *National Organization for Women v. Social Security Administration*, 736 F.2d 727, 744-45 (D.C. Cir. 1984).
- 174 Pub. L. No. §110-175, 121 Stat. 2524, enacted Dec. 31, 2007 (hereinafter the “OPEN Government Act.”).
- 175 “Improving Agency Disclosure of Information,” issued by President George W. Bush on December 14, 2005.
- 176 5 U.S.C. § 552(a)(4)(A)(ii)(II).
- 177 5 U.S.C. § 552(a)(4)(A)(ii).
- 178 *Electronic Privacy Information Center v. Dep't of Defense*, 241 F. Supp.2d 5 (D.D.C. 2003).
- 179 *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060 (D.C. Cir. 1988).
- 180 5 U.S.C. § 552(a)(4)(A)(ii).
- 181 *Id.*
- 182 5 U.S.C. § 552(a)(7)(A).
- 183 5 U.S.C. § 552(a)(7)(B).
- 184 5 U.S.C. § 552(a)(7)(B)(i)-(ii).
- 185 5 U.S.C. § 552(h)(3).
- 186 *Id.*
- 187 Statement of Sen. Leahy, Cong. Rec. S201-02 (Jan. 23, 2008).
- 188 *Id.*
- 189 *Zarcon, Inc. v. NLRB*, No. 06-3161-CV-RED, 2008 WL 4960224 (W.D. Mo. Mar. 25, 2008).