



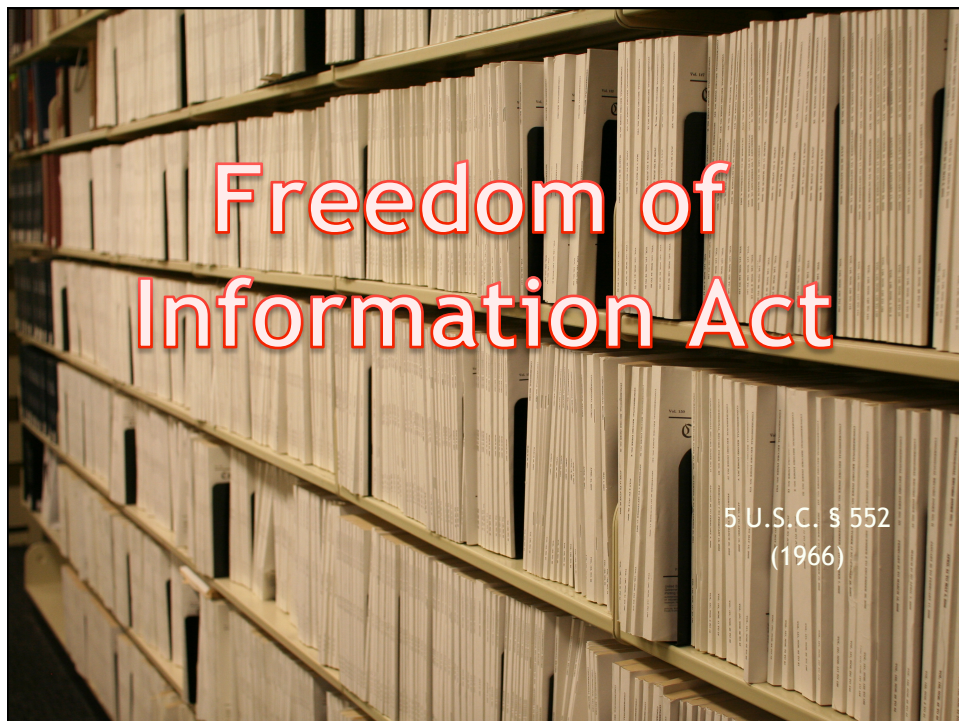
# Federal Freedom of Information Act

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## Competing Concerns

- Public access to government decision-making
- Confidentiality in government decision-making

## Purpose of FOIA

- “[T]o open agency action to the light of public scrutiny” in accordance with a “general philosophy of full agency disclosure” designed to “ensure an informed citizenry, vital to the functioning of a democratic society.”

## Basic FOIA

- FOIA provides access to all records of all federal agencies in the executive branch, except when records fall within any of nine categories, in which case the agency can (but usually is not required to) withhold

## Exemptions

- Classified information
- Internal agency personnel rules and practices
- Information specifically exempted from disclosure by statute
- Private commercial or trade secret information
- Inter-agency or intra-agency privileged communications

## Exemptions (cont'd)

- Personnel, medical, or similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy
- Information compiled for law enforcement purposes
- Information related to reports for or by an agency involved in regulating financial institutions
- Geological information concerning wells

## 5 U.S.C. §552(a)(3)(A)

- ... upon any request for records which
  - (i) reasonably describes such records and
  - (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person

## Construing exemptions

- To be construed narrowly
- To require disclosure of reasonably segregable information (i.e., if it will be intelligible with segregation)
  - Courts will consider burdens associated with segregation

## Administrations attitudes toward FOIA



## Administration attitudes toward FOIA



- Clinton Administration in 1993: Attorney General Janet Reno issues memorandum instructing agencies to use their discretion to release documents, even if the records request were arguably or technically subject to an exemption, unless there was foreseeable harm from disclosure.
- Bush Administration in 2001: Attorney General John Ashcroft issues standard encouraging federal agencies to thoroughly consider reasons for invoking exemptions to FOIA and assuring agencies that Justice would fully support denials that were legally defensible and that would not jeopardize the withholding of other information.
- Obama Administration in 2009: Return to 1993 stance, plus directing agencies to proactively take “affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government.”

## The FOIA Request

- “any person” includes foreign citizens, corporations, governments, undocumented aliens, non-resident aliens, prison inmates
- Need is irrelevant
- Purpose is relevant to fees

## FOIA request (cont'd)

- “reasonably describe” means “a professional employee of the agency who was familiar with the subject are of the request [would be able] to locate the record with a reasonable amount of effort”
- Agency rules govern

## Request Mechanics

- Check agency website for specific instructions
- Only a letter is needed - no special requirements of form
- RCFP has a FOIA letter generator

## FOIA Time Limits

- Agency to decide within 20 working days whether to comply with request
- If denies..
  - Explain basis for denial
  - Inform of internal appeal opportunities
    - If appealed, decision required within 10 days
- In “unusual circumstances” both deadlines can be extended up to 10 days
- Judicial enforcement
  - Plaintiffs can go to court if time limits not met
  - Unlikely to win if agency can show diligence
- Variable processing of requests is okay

## FOIA Fees

- Direct costs of search, duplication, and review are recoverable
  - Cannot charge for effort to determine whether or not to withhold document
- Waiver of fees
  - If “disclosure of the information is in the public interest because it 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 requestor
  - First two hours search time and first 100 pages of copying are free for non-commercial requests.



## Judicial Review Under FOIA

- Agency bears burden of proving it has not:  
(1) improperly, (2) withheld, (3) “agency records”
- De novo; no deference
- Attorneys fees and costs to prevailing plaintiffs
- Potential disciplinary action if denial was arbitrary or capricious
- DOJ defends agencies in FOIA litigation

## “Agency record”

- “Agency” is defined in §552
  - Includes “government corporations” with some combination of federal chartering and federal funding and federal control
    - Includes Amtrak, Postal Service
    - But does NOT include the Smithsonian, Freddie Mac, American Red Cross
  - Does NOT include legislature
    - Congress, CBO, Library of Congress, etc.
  - Does NOT include courts
    - But First Amendment requires courts access
  - Does NOT include president, immediate WH staff, entities whose only function is to advise the president
    - Does include Office of Management & Budget, Office of Science & Technology, Council on Environmental Quality which have statutory duties in addition to advising the president

## Classified Information

- Classified (“Top Secret,” “Secret,” “Confidential”) pursuant to an executive order
- Glomar denial
  - “neither confirm nor deny”

## Internal Personnel Rules

- Low 2 Exemptions: No need to disclose trivial, internal matters in “which the public could not reasonably be expected to have an interest”
- High 2 Exemptions: Item is of public interest but disclosure would interfere with proper agency functioning

## Confidential Business Information

- Trade secrets
  - Commercially valuable, has “independent economic value”
  - Used in one’s business
  - Maintained by the company in secrecy
  - D.C. Cir. adds: relates directly to the production process
- (a) Commercial or financial information if it is (b) obtained from a person and is (c) either privileged or confidential

## Reverse FOIA

- Executive Order 12600: Pre-disclosure notification to affected individuals or companies before their confidential information is released
- Reverse-FOIA suits can be brought as a claim by a person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action” under 5 U.S.C. §702.

## Personal Privacy

- “detailed government records on an individual which can be identified as applying to that individual”
- Where disclosure would be “a clearly unwarranted invasion of privacy”
  - Balancing public interest v. privacy interest

## Law Enforcement Records

- Exempts records compiled for law enforcement purposes (including criminal, civil, and administrative enforcement) if disclosure would cause harm because it could reasonably be expected to do any of the following:
  - Interfere with enforcement proceedings
  - Deprive a person of a fair trial
  - Constitute an unwarranted invasion of privacy
  - Disclose the identity of a confidential source (broadly defined)
  - Disclose confidential investigative techniques , practices or guidelines
  - Endanger the life or safety of a person