



Successfully Utilizing The Freedom Of Information Act To Your Advantage When Asserting Or Defending Against A Claim

Webinar

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Agenda

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- Overview of the Freedom of Information Act (FOIA)
- The FOIA Process
- Using FOIA to Your Advantage When Asserting or Defending Against Claims
- Key Takeaways

FOIA Overview



Congress Passes Freedom From Information Act

April 1, 1998 | [Issue 33•12](#)

WASHINGTON, DC—Calling the unregulated flow of information "the single greatest threat to the emotional comfort and well-being of the American people," Congress passed the long-discussed Freedom From Information Act Monday.

The legislation—a response to widespread public demand to know less about the realities of the world around it—guarantees citizens protection from unpleasant information and imposes tough new restrictions on facts that federal authorities deem potentially damaging to the public's overall peace of mind.

Purpose

- “[T]o 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.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).
- “[A] means for citizens to know what their government is up to.” *NARA v. Favish*, 541 U.S. 157, 171-72 (2004) (quotation omitted).

History of FOIA

- **Codified at 5 U.S.C. §552**
 - Enacted in 1966
- **Significant Amendments**
 - Electronic Freedom of Information Act Amendments of 1996
 - OPEN Government Act of 2007
- **Obama's Executive Order**
 - 74 Fed. Reg. 4683 (Jan. 21, 2009)

State FOIA Statutes

- All states and some localities have passed laws similar to FOIA that allow people to access records
- Statutes have many different names:
 - Right to Know Laws
 - NH Right to Know Law, RSA § 91-A
 - Freedom of Information Laws (FOIL)
 - NY FOIL, N.Y. Pub. Off. Law § 87 *et seq.*
 - Public Records Laws
 - AZ Public Records Law, A.R.S. § 39-121 *et seq.*
 - Sunshine Laws
 - MO Sunshine Law, Mo. Code § 610.023 *et seq.*

The FOIA Process

The FOIA Process

- The Parties to a FOIA Request
- Records Available for Disclosure Under FOIA
- Requesting Records
- The Agency's Response
- Resolving Disputes

The Parties To A FOIA Request

■ Requesters

- “Any person” can submit a FOIA Request
- Includes individuals, partnerships, corporations, associations, and even non-citizens.

■ Recipient

- An “Agency” of the Executive Branch
- FOIA does not apply to:
 - White House
 - Legislative or Judicial Branch
 - Foreign Governments
 - State or Local Governments

What Can Be Disclosed Under FOIA

- “Records” may be disclosed under FOIA
 - Definition of “records” is very broad; adopted from the Records Disposal Act, 44 U.S.C. § 3301
- Records include:
 - Paper files
 - Electronic files
 - Metadata (likely)
- Records do not include:
 - Tangible objects
 - Answers to questions; compilations

What Records Cannot Be Disclosed Under FOIA

- Records that do not exist
 - Records that never existed
 - Records that have been destroyed
- Categories of records specifically exempted
 - Known as the FOIA exemptions, 5 U.S.C. § 552(b)(1)-(9)
 - However, the Agency still must produce reasonably segregable portions of record that are not exempt from disclosure, *i.e.*, redacted copies

FOIA Exemptions

- (1) Classified Documents
- (2) Internal Personnel Rules and Practices
- (3) Exempt by Other Statutes
- (4) Confidential Business Information
- (5) Privileged from Disclosure in Litigation
- (6) Personal Privacy
- (7) Law Enforcement Records
- (8) Financial Institutions
- (9) Geological Information

FOIA Exemptions

■ Exemption 1

- “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order”

■ Exemption 2

- “Related solely to the internal personnel rules and practices of an agency”

■ Exemption 3

- “Specifically exempted from disclosure by statute, if that statute (A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.”

FOIA Exemptions

■ Exemption 4

- Covers information that constitutes “trade secrets and commercial or financial information obtained from a person and privileged or confidential”
- Includes much information provided and received during the contracting process
- Often the use of this exemption is at issue in “Reverse FOIA” actions

FOIA Exemptions

- Exemption 5
 - Protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”

FOIA Exemptions

■ Exemption 5

- Exempts those documents that are normally privileged in civil discovery:
 - Attorney Client Privilege – Communications made between client agency and attorney for the purposes of obtaining legal advice
 - Attorney Work Product – Documents made in reasonable anticipation of litigation
 - Deliberative Process Privilege – (1) Pre-decisional; and (2) Deliberative (i.e., “a direct part of the deliberative process that makes recommendations or expresses opinion on legal or policy matters”)
- Cannot be used to withhold:
 - Business advice provided by an attorney
 - Post-decisional documents
 - Statements of fact

FOIA Exemptions

■ Exemption 6

- Guards against the disclosure of personnel, medical, and similar files which would constitute a clearly unwarranted invasion of personal privacy
- Allows agencies to withhold personal data kept in government files
- Makes it harder to obtain information about another individual without the consent of that individual

FOIA Exemptions

■ Exemption 7

- “Records or information compiled for law enforcement purposes,” but only if the disclosure would interfere with enforcement proceedings, deprive a person of constitutional rights, result in unwarranted invasion of privacy, disclose a confidential source, discloses law enforcement investigation techniques or procedures or could endanger someone’s life or safety

■ Exemption 8

- Protects information “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions”

■ Exemption 9

- “Geological and geophysical information and data, including maps, concerning wells”

Requesting Records

- Mechanics of the Request
 - Clearly labeled as a FOIA Request
 - Addressed to Agency FOIA Officer
 - Multiple addressees permitted
 - FOIA Officer information usually available online
 - Can be submitted online, by email or regular mail
 - Identify desired format for requested records
 - Confirm willingness to pay fees
 - Provide requester's contact information

Requesting Records

- Mechanics of the Request
 - “[R]easonably describe” the records sought
 - Agency staff can find records with “reasonable amount of effort”
 - Requests must be construed broadly
 - Follow the Agency’s published FOIA regulations
 - *E.g.*, DoD Regulations are located at 32 C.F.R. Part 286

The Agency's Response

- Initial Responses from the Agency
 - Agency acknowledgement of receipt
 - Simple vs. complex queue
 - Opportunity to focus the request

- Substantive Response from the Agency
 - Quantity of documents to be released
 - Whether documents will be withheld, and
 - Any appeal rights, if applicable

The Agency's Response

■ Response Times

- Statutory Requirement

- 20 working days

- Actual Average Response Time

- Usually longer
- Timing varies by agency and type of request
- But, documents must be produced within “days or weeks of a determination, not months or years.” *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).

Common Disputes

- Agency Failed to Meet Statutory Deadlines to Respond to Requests and Appeals
- Agency Turned Up Few, If Any, Records
 - Agency has an obligation to conduct a “reasonable search”
- Agency Released Heavily Redacted Records
 - Agency may only withhold or redact records when it can show that the applicable standards have been met
 - Agency must release “reasonably segregable” portions of records whenever possible

Resolving Disputes Prior to Litigation

■ Patience and Understanding

- Develop rapport with FOIA officer handling request through frequent check-ins
- Working with FOIA officer may facilitate response to request and document production

■ Administrative Appeal

- Each agency has its own procedures
- Provides for *de novo* review by senior official
- Submission usually consists of a letter
- Timetable for submission is usually short (30 to 60 days)

■ Mediation

- Office of the Government Information Service
- Non-exclusive alternative to litigation

Litigating Disputes

- **When Can Litigation Commence?**
 - Agency denies administrative appeal
 - Agency fails to respond to administrative appeal within 20 working days
 - Agency fails to respond to Request within the statutory time limits

- **Venue Options (5 U.S.C. § 552(a)(4)(B))**
 - U.S. District Court for the District of Columbia
 - District Court for the Requester's residence or principal place of business
 - District Court for the location of the records

Litigating Disputes

■ Litigation Realities

- AUSA is assigned to the case
- Agency must answer the complaint in 30 days, but will likely seek (and receive) extension(s)
- OPEN America Motions
- Negotiated Production Schedules
- Dispositive Briefing
- *Vaughn* index

Using FOIA To Your Advantage When Asserting Or Defending Against A Claim

Case Studies

- Dispute between prime contractor and United States Government (USG)
- Dispute between prime contractor and subcontractor

Case Study: Prime Contractor / USG Dispute

- Prime contractor experiences overrun on fixed price contract
 - Initially overrun was negligible; project management did not even elevate to senior management
 - One year later, overrun becomes significant; senior management wants to submit a claim

Case Study: Prime Contractor / USG Dispute

■ Claim preparation

- Initial investigation indicates that USG may have constructively changed the contract
 - Also hear whispers of bad faith, and lack of good faith and fair dealing
- Unable to identify many documents supporting proposed theory of entitlement
 - Significant turnover in contractor program office
 - Key employees do not have many relevant emails
 - Hardcopy contract files are disorganized; many documents destroyed as a result of a water leak

■ How do you assess and support your claim?

Case Study: Prime Contractor / Subcontractor Dispute

- Prime contractor initiates arbitration against subcontractor pursuant to mandatory arbitration clause
 - Prime contractor claims include breach of contract for delivering defective widgets (including costs to correct work)
 - Applicable arbitration procedures only permit very limited discovery; no subpoena power

Case Study: Prime Contractor / Subcontractor Dispute

- Subcontractor is formulating defenses
 - Believe that:
 - Prime contractor and USG recognized that USG specifications (which were passed on to subcontractor) had a latent ambiguity
 - USG changed specifications/requirements in prime contract to address defect, but prime contractor did not implement changes in subcontract
 - Prime contractor delivered alleged defective widgets to USG
 - USG required negligible rework
- How do you obtain documents to assess and support defenses?

Using FOIA To Your Advantage

- Pre-Claim Discovery and Assessment
- Supplement to Discovery
- Guarding Against Document Destruction
- Driving Towards a Favorable Resolution

Using FOIA To Your Advantage

- **Pre-claim Discovery and Assessment**
 - Obtain relevant documents through FOIA to assess/refine/support theories of entitlement (or defenses)
 - Two bites at the apple
 - FOIA production may differ from formal discovery production
 - Increase chances of receiving more pertinent documents
 - Obtain documents before they are archived
 - Retrieving archived documents during litigation can be costly and may not be permitted

Using FOIA To Your Advantage

■ Supplementing Discovery

- Obtain critical documents that cannot be obtained through proceedings where discovery may be limited (e.g., ADR)

■ Guarding Against Document Destruction

- Obtain pertinent documents that the agency may not be planning to preserve (or which may lose search functionality when archived)
- Avoid the scenario where relevant documents are accidentally destroyed (e.g., because of a fire, computer malfunction)

Using FOIA To Your Advantage

- Driving Towards a Favorable Resolution
 - Find the “smoking gun”
 - Fully develop factual support, and preempt opposing arguments
 - Ability to utilize less costly ADR (e.g., mediation) because already obtained pertinent documents

Key Takeaways

Best Practices

■ Submit a Detailed FOIA Request

- Specific authors or recipients
- Specific subject matters
- Types of documents (e.g., emails, hard-copy letters, reports)
- Titles of documents (e.g., report named “XYZ” and authored by ABC)
- Key words
- Date ranges
- Metadata

■ Request Format for Records

- *E.g.*, Native version, PDF, hardcopy

Best Practices

■ Address FOIA Fees

- Preauthorize fee charges
- Acknowledge that requester will pay

■ Submit FOIA Requests to Multiple Pertinent Offices

- *E.g.*, specific component copy department-level component

■ Hold Agency Accountable

- Monitor status of agency response
- Know when to fight your battles (and litigate a FOIA dispute), when to negotiate and when to acquiesce

Final Thoughts

Final Thoughts

■ Be Specific

- Guide the agency to what you want
- Don't be cryptic

■ Request Early

- Agency responses often delayed
- Can always submit supplemental requests later

■ Manage Expectations

- Be prepared for some resistance
- Don't be discouraged; take pragmatic approach
- In most instances, can still obtain documents through discovery
- Any pertinent documents received through FOIA is a bonus

Contact us with any questions

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Further Reading:

["The Contractor's Secret Weapon: Using FOIA When Asserting a Claim,"
The Procurement Lawyer \(Feb. 2015\)](#)