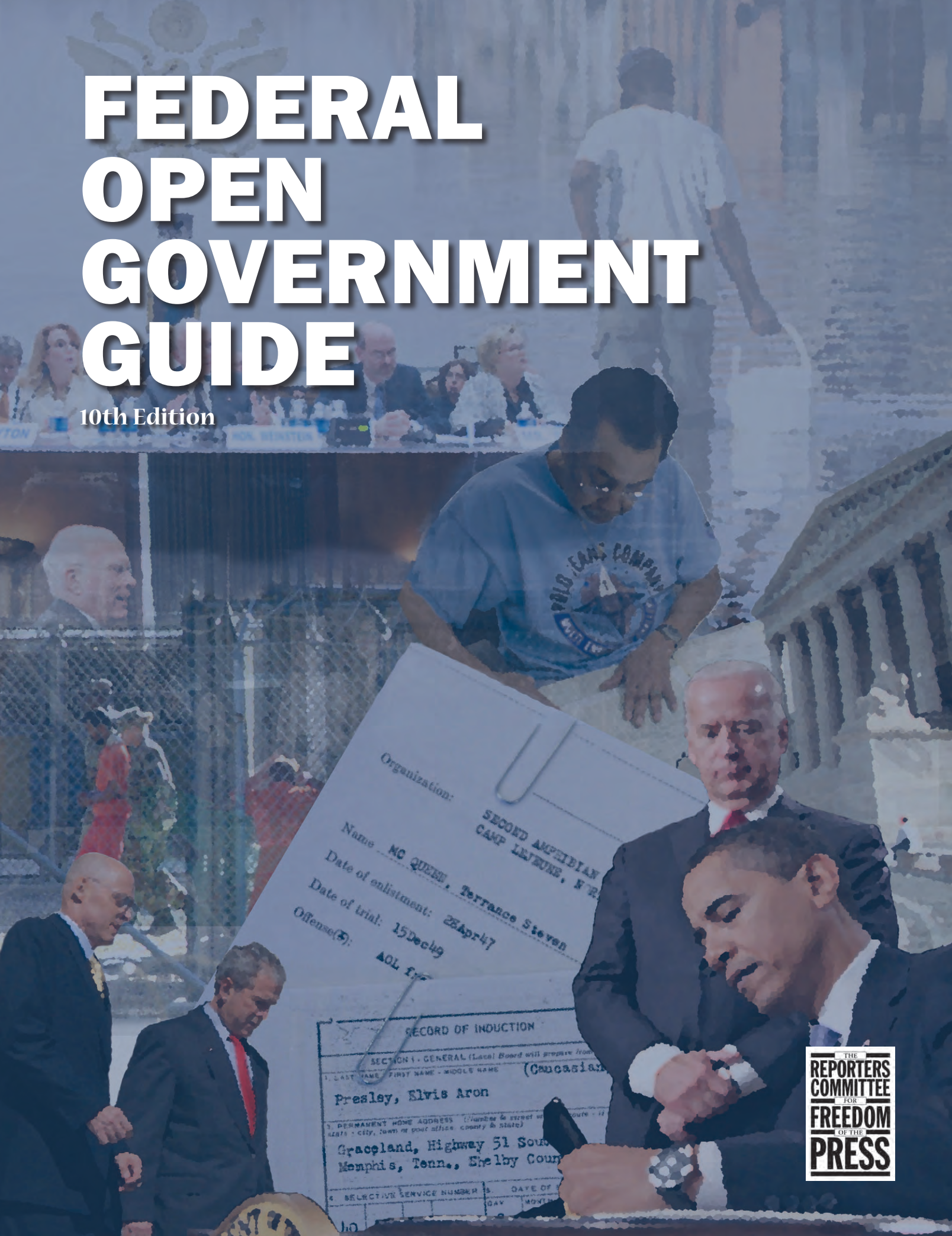


FEDERAL OPEN GOVERNMENT GUIDE

10th Edition



If you have questions about your state's open records or open meetings laws, we have answers.

OPEN GOVERNMENT GUIDE

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The fifth edition of our state Open Government Guide, formerly called Tapping Officials' Secrets, is a comprehensive and up-to-date guide to open government laws in the 50 states and the District of Columbia.

Each state outline is written by an open government expert whose law practice regularly handles access issues. New in this compendium is an emphasis on accessing certain information hidden by privacy and national security concerns in the post-9/11 era.

View it online at www.rcfp.org/ogg. If you like it, go to our order form — www.rcfp.org/orderform — and buy one for the newsroom. It's available as a complete compendium for \$100, or as individual state booklets for \$10.



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The Reporters Committee for Freedom of the Press
1101 Wilson Blvd, Suite 1100, Arlington, Va. 22209

Federal Open Government Guide

10th Edition

formerly titled
How to Use the Federal FOI Act

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Funding for this guide provided by:

Sigma Delta Chi
Foundation of the Society of
Professional Journalists

The Gannett Foundation

Published by
The Reporters Committee for Freedom
of the Press

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Executive Director

Special thanks to Editor Emeritus
Rebecca Daugherty

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Freedom of the Press

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this guide are available through the
Reporters Committee. Contact us for
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Vice President Joe Biden looks on as President Barack Obama signs executive orders during a meeting with their senior staff, Jan. 21, 2009. At the meeting, Obama issued memos on government transparency and FOIA. “For a long time now, there’s been too much secrecy in this city,” Obama said. “The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over.”

AP Photo by J. Scott Applewhite



Introduction

All significant aspects of civic life in the United States are affected by the federal government. The news media — including print, online and broadcast journalists — regularly inform the public about the policies and actions of government.

The public’s ability to receive information about government has been significantly enhanced by the federal Freedom of Information Act, passed in 1966; the Federal Advisory Committee Act, passed in 1972; and the Government in the Sunshine Act, passed in 1976.

By making all records of federal agencies presumptively available upon request, FOIA guarantees the public’s right to inspect a storehouse of documents. Likewise, FACA presumes the right to attend meetings of federal advisory committees and the Sunshine Act opens meetings held by federal agencies. The Privacy Act, passed in 1974, also affects the way journalists obtain information from the federal government about themselves and others.

Journalists and scholars have used FOIA, FACA and the Sunshine Act to investigate a variety of news stories and historical events. Their discoveries, based on documents they received or discussions they witnessed, have often brought about crucial change to many aspects of public life.

FOIA has been used to reveal to the public vital information on health and safety.

Five days after the collapse of the World Trade Center on Sept.

11, 2001, both the mayor of New York City and the Environmental Protection Agency administrator had declared the area a low risk for environmental dangers. But the EPA’s responses to FOIA requests from a *New York Daily News* reporter helped him demonstrate, months after the collapse, that “Ground Zero” was contaminated with asbestos and other chemicals. Manhattan residents, rescue workers and others were victims of a “web of environmental deception,” the *Daily News* reported.

In 2003, the *Dayton Daily News* reported the results of dozens of FOIA requests to the Peace Corps on the risks corps volunteers, especially women, have faced abroad from violence, accidents, disease and suicide. The responses, in tandem with the newspaper’s reporting through interviews and travels, showed that the agency’s own statistics masked the dangers to which the volunteers were exposed.

The newspaper had previously used FOIA to show that women in the U.S. military endured cavalier responses to rape charges brought against enlisted men and officers, many of whom had been accused before. It also used FOIA to obtain Occupational Safety and Health Administration databases and identify the most dangerous work places in the country.

Other reporters have used FOIA to identify wasteful government spending.

Several reports have spotlighted the mismanagement of funds



A New Orleans resident walks through the floodwaters left by Hurricane Katrina on Sept. 4, 2005. Days later, *Times-Picayune* reporter Mark Schleifstein filed a FOIA request with the EPA to learn whether any toxins or chemicals were found in its tests of the sometimes waist-high water that victims, rescue workers and journalists waded through. Although he was granted expedited processing, Schleifstein's request still had not been filled as of early 2009.

AP Photo by Rick Bowner

and put to use. The documents received by the public interest group Citizens for Responsibility and Ethics in Washington also showed the U.S. declined the free use of cruise ships from Greece and instead later paid Carnival Cruise Lines \$249 million to use its ships for hotels or hospitals — and then let those ships sit empty for several weeks.

FOIA has been used for many other purposes, uncovering important information about the 1950s-era Rosenberg spy trials; FBI harassment of civil rights leaders; surveillance of authors, scientists and composers; international smuggling operations; environmental impact studies; the salaries of public employees; and sanitary conditions in food processing plants.

Reporters have successfully used FOIA to learn about crimes committed in the United States by foreigners with diplomatic immunity, cost overruns of defense contractors, and even terrorist activities — including a plan to assassinate Israeli Prime Minister Menachem Begin during a trip to this country.

Although FOIA is an important source of information, reporters should recognize its limitations. Information obtained through a FOIA request is rarely the story itself. Rather, it can be used to verify other sources and information. Sometimes information obtained from a request can simply identify leads or sources for a story that the reporter later can follow up on in person. Some journalists who cover a specific agency routinely make requests to that agency in order to watch for emerging trends and to develop a checklist for story ideas. Some journalists even review FOIA requests that have been filed by others. Following up on these, either by filing identical requests or interviewing the original requester, can trigger new story ideas.

Despite Congress' intent, records are not always released by agencies within the 20-day time frame, and often are withheld, sometimes improperly, under one of the law's exemptions. As a result, journalists often plan long-term projects and reports around the information sought, allowing for delays should they occur. Diligent follow-up with the agencies can boost a journalist's chance of having the request filled. Also, if a request is denied, persistence in appealing the denial may help pry the requested records loose.

Reporting can be greatly enhanced through use of FOIA, FACA and the Sunshine Act — and that starts with understanding how each law works.

intended for those affected by Hurricanes Katrina and Rita in the Gulf Coast region in 2005. Eventually, as audits and investigations were made public, there were reports of debit cards issued as part of the Federal Emergency Management Agency's emergency cash assistance program being distributed to individuals who submitted falsified information. Later, reports surfaced that more than 10,000 unused trailer homes ordered by FEMA and intended for those displaced by the storms were sitting in Arkansas fields. More recently, CNN found that 121 truckloads of basic household goods, including dishes and linens, that were donated or purchased with government funds were being re-sold to federal and state agencies, rather than distributed to individuals still in need of aid.

A 2007 *Washington Post* article used FOIA to find that only \$40 million of \$854 million in cash and oil intended to be sold to raise money for the hurricane victims had actually been collected

The Federal Freedom of Information Act

How FOIA works

The federal FOIA¹ provides access to all records of all federal agencies in the executive branch, unless those records fall within one of nine categories of exempt information that agencies are permitted (but generally not required) to withhold.

On President Barack Obama's first full day in office — Jan. 21, 2009 — he issued two memos addressing government transparency and FOIA. Announcing that his administration is “committed to creating an unprecedented level of openness in Government,” Obama's Memorandum on Transparency and Open Government pledged that the White House would work with the public “to ensure the public trust and establish a system of transparency, public participation, and collaboration.”

With regard to FOIA, the Memorandum on the Freedom of Information Act directed his incoming attorney general to reestablish the presumption of disclosure for government records. This memo was almost certainly meant to address the previous standard established in 2001 by former U.S. Attorney General John Ashcroft. The Ashcroft standard encouraged federal agencies to thoroughly consider reasons for invoking exemptions to FOIA, and assured agency personnel that the Justice Department would fully support denials of exempt material so long as they were legally defensible and would not jeopardize the government's ability to continue to withhold other information.²

Obama's Day One memorandum brought the administration's interpretation of FOIA back in step with the 1993 memorandum issued by then-Attorney General Janet Reno. She had instructed agencies to use their discretion to release documents. Even if requested information arguably or technically fell within an exemption, agencies were not to invoke that exemption unless they could point to a “foreseeable harm” that would come from disclosure.³

The January 2009 Obama directive is even more proactive, ordering agencies to 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.” Finally, it urges timely disclosure — a long-standing barrier to filing requests.

The new attorney general is expected to further formalize the administration's approach to interpreting FOIA through his or her own memorandum, presumably in the first 120 days in office.

Filing a request

You may try to make an informal telephone request to an agency to obtain documents. However, agencies frequently require that requests be made in writing. In fact, you establish your legal rights under FOIA only by filing a written request. (See page 31 for a Sample FOIA Request Letter.) Once you have filed a FOIA request, the burden is on the government to release the documents promptly or to show that they are covered by one of the FOIA exemptions.

At all agencies, the request is received by the office designated to receive FOIA requests, and then processed in a FOIA Service Center overseen by a Chief FOIA Officer and FOIA Public

Liaison. Under amendments to the law in 2007, the request is to be assigned a tracking number, which allows requesters to later check the status of their requests online or over the phone and provides them with an estimated date by which action on the request will be completed.

The agency must respond to your written FOIA request within 20 working days; however, as a practical matter, agencies frequently disregard that deadline without penalty.

The amendments offer the agencies a potential “out” in meeting that deadline by allowing them one clarification request that stops the clock, either for fee assessment purposes or for additional information about the request.

A “response” to a request is a grant or denial of the records sought. A simple acknowledgment by an agency that it has received your request does not count as the response to which you are entitled under FOIA.

Should an agency fail to issue a response within the statutory 20-day deadline, it may also be allowed additional time without violating the law if there are “unusual or exceptional circumstances” associated with the request. A routine backlog of requests at the agency would not qualify as an unusual or exceptional circumstance. Despite this requirement, few FOIA requests are fulfilled in 20 days.

If you have an urgent need for the information, you should ask for “expedited processing.” You are entitled to expedited processing if you can show “compelling need” to the agency. This is most often granted if health and safety are at issue or if you are a person primarily engaged in disseminating information and there is an urgency to inform the public about an actual or alleged governmental activity. Agencies may also decide that they will grant expedited processing for other categories of records. For instance, the Justice Department grants expedited processing for requests concerning issues of government integrity that have already become the subject of widespread national media interest. That agency also grants expedited processing if delay might cause the loss of substantial due process rights.

An agency may charge you the reasonable costs of providing the documents, unless you are entitled to reduced fees or fee waivers. For instance, agencies cannot charge representatives of the news media for costs of searching for records. To minimize delay, the 2007 amendments provided agencies with a disincentive to dally — if an agency fails to comply with any time limit of the law, it may not charge the requester search fees for that request, even if the requester is a commercial entity. For requesters not required to pay search fees, such as the news media, the amendments forbid the agency from charging any duplication fees, no matter the volume of the request.

If an agency refuses to disclose all or part of the information, or does not respond within 20 working days to a written FOIA request, you may appeal to the agency's FOIA Appeals Officer. You may avoid the agency appeal and go directly to court only if the agency does not respond within the required time period. An appropriate agency response is a grant or denial of the requested information. The agency may also appropriately respond that it is extending its time limit for granting or denying the information by up to 10 additional working days if voluminous records must be searched, if records must be retrieved from various offices or

President Bush, left, walks down the steps of the Treasury Department with former Treasury Secretary Henry Paulson after the House of Representatives passed the \$700 billion financial bailout bill Oct. 3, 2008. Some news organizations attempting to obtain Treasury Department records on the issue have filed lawsuits after their FOIA requests were denied.

AP Photo by Charles Dharapak



if several agencies must be consulted.

If you file an administrative appeal that is denied or not responded to within 20 working days, you can then file a lawsuit in a federal court convenient to you. (See the Sample FOIA Complaint reproduced on page 33.) If you can demonstrate the need for prompt consideration, you may ask that the court expedite your case. If you win in court, a judge will order the agency to release the records and may award you attorney’s fees and court costs.

Which agencies are covered?

FOIA applies to every “agency,” “department,” “regulatory commission,” “government controlled corporation,” and “other establishment” in the executive branch of the federal government. This includes cabinet offices, such as the departments of Defense, State, Treasury, Interior, and Justice (including the Federal Bureau of Investigation and the Bureau of Prisons); independent regulatory agencies and commissions, such as the Federal Trade Commission, Federal Communications Commission and the Consumer Product Safety Commission; “government controlled corporations” such as the U.S. Postal Service and Amtrak; and presidential commissions. FOIA also applies to the Executive Office of the President and the Office of Management and Budget, but not to the President, his immediate staff, the Office of the Vice President or the Office of Administration, which advises the president.

Not all entities that receive federal funds are covered by FOIA. For example, entities such as the Corporation for Public Broadcasting and the American Red Cross — both of which receive federal funds but are neither chartered nor controlled by the federal government — are not covered.⁴

The Supreme Court also has ruled that a private organization that is established for the sole purpose of carrying out government research contracts and is totally funded by the federal

government is not automatically an “agency” subject to FOIA.⁵ However, some entities that receive federal funds but are not subject to FOIA, such as the Smithsonian Institution, voluntarily adopt disclosure policies very similar to FOIA. While asserting its need to protect certain financial and donor data through exemptions that are broader than the Act’s, the Smithsonian has adopted the presumption of disclosure present in FOIA and many other provisions in the law.

FOIA does not apply to Congress, the federal courts, private corporations or federally funded state agencies. Because the military court system was created through Department of Defense regulations and not by the U.S. Constitution, military branches often argue FOIA applies to military court records including court dockets, which can render access to those records very

When an agency isn’t an agency

Many federal government entities are not subject to FOIA because they don’t fit the law’s definition of an “agency.”

However, these entities — like the Smithsonian and the Corporation for Public Broadcasting — often follow their own FOIA-like policies. While these policies don’t endow requesters with the same rights in court, they often provide access to records and a method of appeal. The policies should be available by contacting the entity or on its Web site.

In addition, entities such as Freddie Mac and Fannie Mae have significant reporting requirements to the agencies that supervise them. The Securities and Exchange Commission’s records can provide a wealth of information on those entities.

Frequently asked questions

Q: Can I get access to the calendars or schedules of government officials?

A: Yes, you generally can so long as the calendar is an agency record and not a private document which the government official keeps confidential. *Consumer Federation of America v. Department of Agriculture*, 455 F.3d 283 (D.C. Cir. 2006).

Q: Can I use FOIA to request access to a settlement agreement the government has entered into?

A: Settlement agreements should be disclosed under FOIA, although some information contained within them may be withheld under various exemptions. The Justice Department has long had a policy supporting release of settlement agreements. Title 28, part 50.9 of the Code of Federal Regulations states the Department's policy to promote open judicial proceedings generally.

Q: Can I use FOIA to get copies of government officials' e-mail?

A: E-mail messages are public records, covered by FOIA. However, just like any other correspondence from government officials, one of the exemptions to FOIA may prevent the content of the e-mail from being disclosed.

Q: Can I get the FOIA log and copies of recent FOIA requests to a government agency?

A: Yes, you should be allowed access to logs and requests made under FOIA. Exemption 6 of FOIA allows an agency to withhold information only if releasing the information "would constitute a clearly unwarranted invasion of personal privacy." There is nothing inherently private about FOIA requests or logs.

difficult given the delays that accompany most FOIA requests.⁶ Court documents are public because of a First Amendment-based right of access — which also applies to military courts documents.

While the Federal Reserve Board of Governors in Washington, D.C., is covered by FOIA, the 12 regional banks of the Federal Reserve are not considered government agencies and FOIA does not apply to them. Records held by the regional banks — like many of those recently sought in connection with the government's private-sector financial bailout packages — are not subject to FOIA unless also filed with Washington's Federal Reserve Board.

Similarly, documents generated by these groups, other branches of the federal government and the states that are filed with executive branch agencies of the federal government become subject to disclosure under FOIA, just as if they were documents created by the agencies. Congressional agencies such as the Library of Congress and the General Accounting Office follow their own records disclosure rules and procedures patterned after FOIA.

The federal FOIA also does not apply to state or local governments. All states have their own "open records" laws that provide access to state and local records. Information on how to use these state laws is available from The Reporters Committee for Freedom of the Press through its "Open Government Guide" — a compendium of open records and meetings laws for each state and the District of Columbia. The compendium is available as a one-volume book, as a CD-ROM or online at www.rcfp.org/ogg. Separate booklets on the open government laws of each state are also available.

Asking for records

FOIA is very broad. It covers all "records" in the possession or control of a federal agency. Under the 2007 amendments, this also includes records maintained by entities outside government under a government contract. The term "records" is defined expansively to include all types of documentary information, such as papers, reports, letters, e-mail, films, computer tapes, photographs and sound recordings in any format, including electronic. But physical objects that cannot be reproduced, such as water quality samples kept by the Environmental Protection Agency, are generally not considered "records" under the Act. If in doubt as to whether the material you want is a

"record," assume it is and request it.

An agency's mere "possession" of documents is sometimes not enough to make them subject to disclosure under FOIA. In determining if a record is an agency record, courts have looked at whether the agency also created, controlled, used, relied upon or filed the documents in its possession. For example, appointment calendars and phone message slips of agency officials that serve some official agency purpose are considered agency records if they are not created solely for personal convenience.⁷ On the other hand, transition team reports prepared by advisers of the president-elect recommending agency priorities are not agency records even when copies of the report are physically located at the agency.⁸

When requesting records, you must "reasonably describe" the material you want. This does not mean you need to know an exact document or docket number, but your request should be specific enough so that a government employee familiar with the subject area can locate the records with reasonable effort, either by physically inspecting files or by using computerized index and retrieval systems.

Your request should be made for existing records only. FOIA cannot be used as a way to compel an agency to answer specific questions you might have, and agencies will be very quick to tell you that they do not have to "create" records under FOIA.⁹ However, if it seems more practical for both you and the agency, you may offer to accept the information you seek in a list or other abbreviated response rather than receive copies of every related individual document.

Do you actually have to file a request?

Most people think of FOIA in terms of requesters: people writing to agencies in search of information. But the Act goes further to make information public. It requires the agencies to make documents available on their Web sites and in physical "reading rooms."

FOIA requires agencies to publish in the *Federal Register* any regulations or general policy statements. For instance, each agency must publish its regulations telling the public what rules it will follow in processing FOIA requests. Final regulations are published in the Code of Federal Regulations available at law libraries. The Government Printing Office Electronic Information Enhancement Act of 1993 requires GPO to make these materials available online as well.¹⁰

The Act also requires agencies to make available for inspection or copying final opinions, staff instructions and other information that would affect a member of the public. This is often called the “reading room” requirement — meaning those documents need to be available to the public in a physical reading room.

The Electronic FOIA Amendments of 1996 greatly expanded the requirements that the government take affirmative steps to make information available. It requires government agencies to post online any information created after November 1996 that would have formerly been required to be placed in physical reading rooms. The law further requires that responses to requests likely to be repeated be made available online as well as in paper form. The agencies must index these records for the public and make both the index and the documents available electronically.

Agencies must also develop reference guides to help the public access agency information. These must be available both in the physical reading rooms and online.

Who may use FOIA?

A FOIA request may be made by “any person.” This means that all U.S. citizens, as well as foreign nationals, can use the Act to request information from government agencies. A request can also be made in the name of a corporation, partnership or other entity, such as a public interest group or news organization. Members of the news media have no more and no fewer rights to information under FOIA than other requesters, although the law gives journalists some rights to fee benefits and expedited processing. To obtain information, you do not need to tell the agency why you are making a request. However, advising the FOIA officer that you are a journalist or author and intend to publish some or all of the requested information may encourage prompt consideration of your request and entitle you to fee benefits.

Try the informal approach first

Anyone seeking information from government documents should first try to obtain the documents through informal

For a comprehensive list of executive branch agencies and their FOIA contact information, see www.rcfp.org/fogg.

means. The government may agree to supply all or part of them on the spot. Assuming you know with reasonable specificity which records you want and which agency has them, call the public information or press officer at the agency involved, identify yourself as a news reporter, researcher or scholar, and ask for the information. It might be helpful to offer some explanation of why you want the documents but you are not required to give one.

If you are turned down, try the agency’s FOIA officer, who may tell you how to obtain the documents you want without filing a formal FOIA request. If necessary, use your right to make a formal FOIA request as leverage in your efforts to persuade the agency to release the information you are seeking informally. Make a point of telling any officials with whom you speak that you intend to make a formal request. Remember that only a written FOIA request — not an informal, oral request — will place the agency under a legal duty to act on it.

Make a formal request: A simple letter is all you need

If the informal approach does not succeed, exercise your rights under FOIA to make a formal request. To preserve all your rights under the Act, your formal request must be made in writing. Any reporter should be able to prepare a request letter on his or her own. (For a Sample FOIA Request Letter, see page 31, or use our online generator at www.rcfp.org/foia_letter.)

Each federal agency subject to FOIA has a designated FOIA Service Center and a Chief FOIA Officer responsible for managing information requests. Large cabinet agencies, such as Defense and Agriculture, have separate FOIA Service Centers for their various subdivisions and regional offices. If you are sure which subdivision of an agency has the records you want, send your request letter directly to that FOIA officer. If you are uncertain, send your request to the agency or departmental FOIA officer, who will then forward it to the appropriate division. You will save time by calling the agency first to determine where the records you seek are located and where you should direct your request. (See our online guide at www.rcfp.org/fogg for an updated list of agency FOIA officers and their contact information.)

Sometimes it is advisable to send separate requests to agency headquarters and

Q: I submitted my FOIA request awhile ago and it hasn’t been granted or denied. When can I sue?

A: If an agency doesn’t comply with the time limits in FOIA — generally answering the request in 20 days — then a requester can sue. However, it can often be a good idea to exhaust all appeal remedies before suing in court.

If an agency denies a request within the time limit, then there has to be an administrative appeal before a court will allow a lawsuit for the information to go forward.

Q: How can I obtain the FBI files of a notable person who has recently died?

A: Request them directly from the FBI. When someone dies, his FBI file becomes subject to release pursuant to the Freedom of Information Act.

According to the FBI, it does not maintain an FBI file on every citizen in the country. For those on whom it does have a file, the Privacy Act can prevent its release until the subject dies.

The file contains reports on FBI investigations as well as documents such as rap sheets. A rap sheet is a list of information taken from fingerprint cards, arrests, federal employment, naturalization, or military service. An individual may obtain a copy of his or her own rap sheet by requesting it directly from the FBI.

Just because someone has died, it does not mean you will receive everything contained in his FBI file. The bureau may still assert a basis independent from privacy for withholding information contained in the file. For example, the FBI withheld files on former Beatles band member John Lennon for a quarter-century after his death, claiming their release could cause “military retaliation against the United States.”

Q: What if a criminal defendant says the release of documents under FOIA will impair the defendant's right to a fair trial?

A: Exemption 7(b) prevents the release of information that “would deprive a person of a right to a fair trial or an impartial adjudication.”

Q: What documents are reporters who are covering a major natural disaster in their communities legally entitled to, and what information, if any, can legally be shielded from them?

A: The Federal Emergency Management Agency may have the most important records on the federal response to a disaster, including financial assistance. FEMA, however, has historically been slow to release information in the wake of disaster.

Federal officials have, in the past, restricted media access to disaster-struck areas. However, news organizations — notably CNN — have challenged these restrictions, including after Hurricane Katrina, and won in court.

Experts have suggested reporters may consider negotiating coverage and access with officials, for example by agreeing not to publish names of disaster victims until their families have been notified of the circumstances.

Other records experts suggest looking at the Storm Events Database from the National Climactic Data Center — a government database of storm events around the country, including hurricanes and floods. Fields in the database include: date and time the storm event began; event type; states and counties hit; latitude and longitude of the location; property and crop damage values; and injuries and fatalities.

For information about cleanup, experts suggest using the Individual Contract Action Reports created by the Government Services Agency. This could be relevant as FEMA and other agencies contract with local businesses in cleanup and repair.

to field offices that may have records you want. The FBI, for example, searches its field offices for records only when requests are made directly to those offices; a request to the bureau in Washington, D.C., will lead only to a search of its central files. If you are unsure which federal agency or office has the records you want, send the same request to several of them.

Address your request letter to the FOIA officer at the appropriate agency or subdivision. Agencies will accept a request by hand delivery, mail or e-mail. If you mail your request, mark the outside of the envelope “FOIA Request.” If you send the request by registered mail with return receipt requested, you may be able to track the request if you should later need to do so. Keeping a photocopy of your letter and your receipt will also help you later if you need to make an appeal. Some agencies, like the National Oceanic and Atmospheric Administration and the National Aeronautics and Space Administration, have built FOIA request generators into their Web sites to receive requests electronically. All agencies are required to accept FOIA requests via e-mail.

Generally, a request letter should contain the elements included in the Sample FOIA Request Letter on page 31. However, any written request is covered by FOIA. In most cases, you should be able to draft a simple request letter by yourself. The Reporters Committee provides an online FOIA letter generator (www.rcfp.org/foialetter) that asks a requester to simply fill in the required information, and produces a request letter. If you are a journalist and need assistance, you can call the Reporters Committee's FOIA attorneys on our toll-free hotline at 1-800-336-4243 or send e-mail to hotline@rcfp.org.

Paying fees

Agencies may charge “reasonable” fees for the “direct” costs of searching for and copying the records you request, unless you are entitled to fee benefits or waivers. (For instance, representatives of the news media do not pay search fees; see below.) Search fees generally range from \$11 to \$28 per hour, based on the salary and benefits of the employee doing the search. Fees for computer time, which are described in each agency's FOIA regulations, vary greatly. They may be as high as \$270 per hour. Photocopying costs are normally between 3 and 25 cents per page.

Search fees may be charged even if few or no documents are located in response to your request. Unless you are requesting

information for a commercial use, agencies may not charge you for the time they spend examining files to determine what individual documents should be exempt from disclosure or for deleting material in those documents. News media requests are not considered “commercial” uses.

A “representative of the news media” is a person or entity that gathers and disseminates information of current interest to the public. In addition to traditional broadcasters and periodicals, it encompasses freelance journalists and sometimes bloggers if they “can demonstrate a solid basis for expecting publication” with a particular news-media entity, which might include a blog.

Agencies may not require advance payment of any fee under \$250 unless the requester has previously failed to make timely payment. Despite this, many agency regulations require that you agree to pay any anticipated fees in excess of \$25 before they process your request.

On rare occasions, some agencies have “aggregated” multiple requests by a requester or group of related requesters, defining them as a single request in order to limit fee benefits. Agency regulations permitting this practice require that the requests clearly be related.

Before making your FOIA request you may want to obtain an estimate of the search and duplication fees. These will vary based on the category of requester you fit into (discussed below). In some cases, the agency's FOIA officer can give you this information by telephone. As an alternative, state in your request letter your willingness to pay fees up to a certain limit and ask to be contacted by telephone or letter if the fees are likely to exceed that amount. (See Sample FOIA Request Letter, page 31.)

FOIA requires agencies to publish in the *Federal Register* uniform schedules for search and reproduction fees. You may also obtain a fee schedule by contacting the agency FOIA officer.

Fee waivers

You may ask the agency to waive or reduce search and copy fees if you think the fees are too high, or if the fees are fair but the total charges make the request prohibitively expensive. The law provides that the agency “shall” waive or reduce fees if you meet the public interest test described below. And you may be entitled to fee benefits if you fall within a certain category of requester.

The FOIA Reform Act of 1986 set out specific fee provisions for four catego-



The Smithsonian Institution's Board of Regents conducts its first open public meeting Nov. 17, 2008, at the Museum of Natural History in Washington. The Smithsonian Institution receives government funds but is not an agency subject to FOIA. However, bowing to pressure for increased transparency, in January 2009 the Smithsonian adopted a FOIA-like policy providing public access to some of its records and has begun holding public meetings.
AP Photo by Manuel Balce Ceneta

ries of requesters: (1) commercial use requesters must pay fees for document search, duplication and review; (2) non-commercial requesters from educational or scientific institutions pay no search fees and receive 100 pages of free duplication; (3) representatives of the news media pay no search fees and receive copies of 100 pages free; (4) all other requesters receive two hours of search time and copies of 100 pages free.¹¹

The Office of Management and Budget issued guidelines for federal agencies to use in writing fee schedules, defining each category of requester.¹²

You will be considered a representative of the news media if you are actively gathering “news” for an organization that publishes or broadcasts news to the public. That may include bloggers, depending on the manner of publication. An appeals court has ruled that a book author who culls and edits information from documents is entitled to the fee benefits due to representatives of the news media.¹³

The guidelines attempt to define “news” as information about current events or of current interest to the public. Your request should explain how information sought would meet this definition.

News organizations using new technologies to distribute information qualify if they “perform an active rather than passive role in dissemination” of news. Newsletters generally are included in this category.

The guidelines specifically exclude libraries, which store information and make it available on request, from the definition of “news media.”¹⁴

A freelancer may qualify as a representative of the news media by demonstrating a solid basis for expecting publication. A beginning freelancer might have to show a reasonable expectation that a story will be published, perhaps evidenced by a publication contract. Past publication also may assist the agency in making a

freelance determination.

Educational institutions also qualify for free search time and copies of 100 pages of documents at no charge. This benefit is available only to requesters from schools with scholarly research programs and when disclosure will serve “a scholarly research goal of the institution, rather than an individual goal.”

Similar treatment is given to requests from scientific institutions when information is requested “solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.”

All other non-commercial requesters, such as nonprofit organizations, pay for document-search time in excess of two hours and duplication in excess of 100 pages.

Commercial-use requesters must pay all costs, including the salaries and benefits of personnel while they decide whether to release information. OMB says these fees are chargeable if disclosure “furthers the commercial, trade, or profit interests of the requester.” An agency will consider the identity of the requester in deciding if the request is for commercial use. Remember, news dissemination is not a commercial use.

Whether or not you are in a category of requesters who receive fee benefits, you may be entitled to a waiver or reduction of fees if disclosure of information is “in the public interest.”

Under language added to FOIA in 1986, a requester is entitled to a waiver or reduction of fees where “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 requester.”

Congressional authors of this language said in floor statements that they intended that this provision make more requesters eligible for fee waivers.

However, while federal agencies were preparing new fee regu-

lations, the Justice Department issued a lengthy and controversial memorandum saying that the public interest standard under the 1986 amendments would be more difficult for requesters to meet.¹⁵ It outlined six criteria agencies should consider before granting fee waivers. You may wish to address these criteria in your request for a fee waiver.

A waiver may be granted if:

- The subject of the requested records concerns government operations and activities.
- The disclosure is likely to contribute to understanding of these operations or activities.
- Disclosure will likely result in public understanding of the subject.
- The contribution to public understanding of government operations or activities will be significant.
- The requester has a limited commercial interest in the disclosure.
- The public interest in disclosure is greater than the requester's commercial interest.

The last two factors concern the commercial value of the request to the requester. The memo says dissemination of news to the public is not a commercial activity, so news media requesters need to address only the first four criteria if they are seeking more than 100 pages.

Experience shows that requesters seeking a relatively modest number of documents are more likely to be granted fee waivers than those whose requests encompass thousands of pages. In this regard, you may want to show that you have narrowed your request as much as possible and therefore are not unduly burdening the agency.

You may appeal any agency decision regarding fee categories or waivers just as you would an agency's decision to withhold information. If you are a journalist, call the Reporters Committee for assistance.

A fee waiver request and a request for consideration as a representative of the news media are included in the Sample FOIA Request Letter on page 31.

Response times

The law requires that agencies grant or deny your request within 20 working days unless an "unusual circumstance" of a sort specifically described in the statute occurs.

Time and again, requesters find that their greatest obstacle to successfully using FOIA is delays in processing requests. Although the statute has always required agencies to respond to FOIA requests by granting or denying them (not just acknowledging them) within a short time frame, few agencies have consistently adhered to the time limits.

For journalists, the nearly routine failure of agencies to provide timely access to records has triggered the need to go outside the Act and get information from sources who may have seen the records in question.

The Electronic FOIA Amendments of 1996 addressed delays in three specific ways:

- They established expedited processing for some requesters in special circumstances.
- They provided for multi-track processing, allowing agencies to divide simple and more complex requests into different "tracks" and to process each set in order.
- They changed the standards under which delay could be considered acceptable.

The law permits courts to allow agencies additional time for response in "exceptional circumstances" provided the agency is

exercising "due diligence" in getting responses out to requesters. The new amendments do not allow agencies to count routine delays as "exceptional circumstances."

More generally, after the 1996 amendments, members of Congress expressed a hope that heightened day-to-day accessibility to the public of more government databases would diminish the need for FOIA requests. Unfortunately, for the most part, database accessibility has not reached the levels hoped for. But under the 2007 amendments, agencies that do not respond to requests within the statutory time period are now precluded from charging search fees (or copying fees for requesters such as the news media, who are not subject to search fees).

Expedited processing and fast-tracking your request

In some circumstances, defined either by the statute or by agency regulations, you are entitled to expedited processing of your FOIA request.

If you ask for expedited processing, an agency must grant or deny you faster processing within 10 calendar days. If the agency grants you expedited processing, it will take your request out of order and process it before other requests.

To support your request you should describe the circumstances that you feel make it eligible for expedited processing. You should also "certify" to the agency that the reasons you give for seeking expedited processing are true with a declaration such as, "I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief." The statute allows agencies to require certification, although as a practical matter many agencies have agreed in their FOIA regulations to waive this requirement.

An agency will honor a request for expedited processing if you have a life-threatening need for the information or if delayed disclosure could threaten the physical safety of any individual. It will also grant a request for expedited processing if you are a reporter or a person who is otherwise "primarily engaged in disseminating information" and your request concerns a matter of "compelling need."

Of more importance to reporters, the Justice Department also provides for expedited processing if your request concerns a matter of "widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." Requests to the Justice Department for expedited processing under this last standard should be directed not to the FOIA officer but to the department's Office of Public Affairs.¹⁶

The law allows agencies to separate requests into different queues depending upon how much work or time it will take to fulfill the request. It also allows agencies to give requesters an opportunity to narrow their requests to fit the fastest track.

Simply splitting up your request into smaller segments is probably not sufficient to gain a spot on the faster tracks. The law allows agencies to "aggregate" requests that are clearly related and treat them as a single, larger request.

If an agency offers to negotiate, you should work with it to narrow your request. Ultimately if you sue the agency over its delays, a court will consider your efforts to cooperate or to negotiate in determining whether the agency is acting "reasonably" to exercise diligence in fulfilling your request.

You can learn which "track" your request is placed on and when it is anticipated to be filled once the agency provides you with a tracking number. You can check online or over the phone to see when your request was received and where it falls in the queue.



Seth Rosenfeld, an investigative and legal affairs reporter for the *San Francisco Chronicle*, poses at his desk in 2005. Rosenfeld holds the dubious record of having the “longest pending FOIA request,” according to the National Security Archive, a nonprofit research center focused on declassified documents. He filed his request — seeking information on the FBI’s 1960s-era investigation, infiltration and surveillance of student political groups in the San Francisco Bay area — in November 1981 with the Justice Department and still has not received the records he was seeking.
AP Photo by Jeff Chiu

Personally inspecting records

If you think the time or expense involved in having documents copied by the agency would unduly delay your story or be too expensive, many agencies will permit you to visit their offices and inspect documents in person. Some agencies may let you do a modest amount of copying without charge. The FOIA Service Center at the agency may assist you.

Appealing an initial denial

If your request is wholly or partially denied, you have the right to appeal to the head of the agency in what is called an administrative appeal. You may also appeal the delay of a response, the failure of the agency to conduct an adequate search, a prohibitively high fee levy, or other matters that could effectively interfere with your ability to receive records.

Even if your request is only partially denied, you may want to take the documents you are offered and appeal the rest. You also have the right to appeal if your request was granted but you think the fees you were charged are too high. A FOIA appeal can be filed by a simple letter. See the Sample FOIA Appeal Letter on page 32.

If 20 business days have elapsed since the date your request should have been received, and you still have not received a reply from the agency, you also have the right to appeal. (An additional 10 days may be available to the agency in “unusual circumstances,” which are defined as cases involving voluminous requests or requests requiring a search of field files or consultation between components of an agency. The agency must notify you in advance of the expected delay if such circumstances exist.)

Certain agencies regularly fail to meet the Act’s time requirements. For example, the FBI and the Department of Homeland Security have an average processing rate of one year, although many requests have lingered for several years at both agencies

and others. Other agencies where long delays may be anticipated include the State Department, the Justice Department and the CIA.

Because of the size of the backlogs, courts have been reluctant to strictly enforce the Act’s time limits so long as agencies are processing requests in a reasonable manner.¹⁷ Unless you believe that is not the case, it may be best to wait for the agency to complete the processing of your request — especially because of the 2007 provision precluding the agencies from charging fees in these cases. However, it is wise to keep in touch with the agency while your request is pending so the agency will not think you have lost interest in the documents. You can also track your request on your own, either online or over the phone, by using the tracking number the agency is required to provide you. Agencies must log the date on which they received the request and the estimated date they will complete action on the request, and link that to the tracking number.

Before making a formal appeal, it is often helpful to call the agency’s FOIA officer to try to negotiate for release of at least some of the documents that were denied. By agreeing to narrow the scope of your request or permitting some information the agency considers particularly sensitive to be redacted, you may be able to persuade the FOIA officer to give you most of the documents you originally wanted.

If your negotiations are unsuccessful, however, you should generally make a formal appeal. Appeals are made to the head of the agency involved (for example, the attorney general or the secretary of defense). If possible, file your appeal within 30 days after the denial, even though agencies generally permit a longer time to appeal. In some cases, appeals are reviewed by agency personnel better trained in FOIA matters than the employee who initially denied your request. Regardless, making a written appeal imposes a legal duty on the agency to re-evaluate your request and establishes your right to bring a FOIA lawsuit if your appeal is denied.

Former Archivist of the U.S. Allen Weinstein, center, testifies on Capitol Hill on Feb. 26, 2008, before the House Committee on Oversight and Government Reform hearing on electronic records preservation at the White House. In 2007, government transparency advocates discovered that more than 1,000 days of e-mail messages were missing from the White House archives. The groups have sued to recover the messages.

AP Photo by Manuel Balce Ceneta



Your appeal can be made in a brief letter to the agency administrator asking that he or she review your previous request and denial, and stating your belief that the denial was improper. Attach copies of any correspondence. If the agency cited one or more exemptions as the reason for denying your request, consider arguing in your appeal that the requested documents do not fall within those exemption categories and, even if they do, that the public would benefit from release of the information. You may also want to state your intent to take your case to court if the denial is upheld.

You may also make appeals relating to the agency's handling of your request. For instance, you can appeal the failure to grant fee benefits or waivers, or the denial of a request for expedited processing. If you feel that the agency has not adequately searched for the records you request, you may appeal.

Again, keep a photocopy of your appeal letter, mark the outside of the envelope "FOIA Appeal," and consider sending the appeal letter by registered mail, return receipt requested.

You may also want to include some legal or practical arguments in your appeal letter. For assistance in framing these arguments, journalists can contact the Reporters Committee's FOIA attorneys for cost-free help, or consult a private attorney. Generally, however, an appeal letter will be sufficient if it contains the elements included in the Sample FOIA Appeal Letter on page 32.

How to file a FOIA lawsuit

If your appeal is denied, or if the agency fails to respond to your appeal within 20 working days, you may file a FOIA lawsuit in the United States District Court most convenient to you, nearest the agency office where the records are kept or in the District of Columbia. Though technically you have up to six years after the date on which your appeal was denied to file a lawsuit, you should try to file the suit as soon as possible in order to demonstrate to the court your need for the information.¹⁸

The Federal Courts Improvement Act removed the automatic expedited judicial review provisions from a number of statutes, including FOIA. However, under that law expedited processing will still be given by a court whenever "good cause" can be shown. The statute does acknowledge that in FOIA cases the need for timely release of information will qualify under the "good cause"

standard.¹⁹

Although there are immediate financial costs for filing any complaint in federal district court, filing a FOIA complaint should be relatively inexpensive and simple. Sometimes, as soon as a complaint is filed, the government will capitulate and release documents without further litigation. Federal courts allow non-lawyers to file complaints against the government without the assistance of an attorney. If your case is a routine denial of documents that you think are clearly covered by FOIA, you may wish to draft and file your own "short-form" complaint using the Sample FOIA Complaint on page 33.

Also consider filing a "Motion for Vaughn Index" using the Sample Vaughn Motion on page 34. This is a formal request asking the court to order the government to give you an index describing the documents it is withholding and the justification it claims for withholding each piece of information.²⁰

However, while a Vaughn index is extremely useful in establishing your case, it may not be granted immediately by the court if you ask for it along with your complaint. You must often wait until the government has answered your complaint before the court will consider your motion for a Vaughn index.

If your case appears to be complex or to involve special problems, you might want to obtain the services of a private attorney. Journalists can contact the Reporters Committee to help you decide if an attorney would be helpful.

After you file your complaint, the burden is on the government to come forward and justify the withholding of the information. Courts often demand that the government show precise and detailed reasons why it refuses to release the information. When the government replies, you will obtain a fairly good indication of how strong or weak its case is and how much it will cost to continue the lawsuit.

FOIA provides for the payment of your attorneys fees and court costs if you have "substantially prevailed" in your lawsuit. Prior to the 2007 amendments this required a court order declaring release of the information. Now, should an agency voluntarily release information — at any stage of the litigation or because of a court order — you are considered to have "substantially prevailed" and may recover fees.

Some courts will not award you attorney's fees if you have argued your case yourself.



Senate Judiciary Committee Chairman Patrick Leahy, D-Vt., left, shakes hands with Associated Press President and CEO Tom Curley prior to the start of a hearing on reforms to the Freedom of Information Act on March 14, 2007. Leahy was instrumental in passing the 2007 FOIA reforms.
AP Photo by Susan Walsh

Exemptions to disclosure under FOIA

1. National security

This exemption is designed to prevent disclosure of properly classified records, release of which would cause some “damage” to the national security.

It covers records that are:

(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 an executive order.

In 1995, President Bill Clinton issued an executive order intended to limit the circumstances under which government agencies can classify information and to hasten the declassification of records for which classification has become unnecessary after the passage of time or a change in circumstances.²¹

In 2003, President George W. Bush amended the Clinton order, eliminating its instruction that agencies should not classify records if there was “significant doubt” that disclosure could harm national security. The Bush order also called for automatic classification of foreign government information when disclosure is not authorized, under a presumption that disclosure would damage national security.²²

Bush’s Executive Order 12,958 allows for the classification of records in certain categories. If the records you seek do not fit into any of the categories, they should not have been classified at all. Records that are classifiable concern military plans,

weapons or operations; foreign government information; intelligence sources, methods or cryptology; scientific, technological or economic matters relating to national security; U.S. government programs for safeguarding nuclear materials or facilities; vulnerabilities or capabilities of systems, installations or projects relating to national security; or weapons of mass destruction.

Records in these areas can be classified if “the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.”

Still, the proper classification of just a few pages of a report does not mean that the remaining non-sensitive portions can be cloaked in secrecy. The government must justify the withholding of each document, and within each document it must justify the withholding of every paragraph, sentence, word and phrase. Just because information is in the possession of the Central Intelligence Agency or the Department of Defense or Department of State does not necessarily mean it is classified.

In 2006, the U.S. District Court in Manhattan held that Exemption 1 protected past and present photographs of inmates housed at the military base at Guantanamo Bay, Cuba, because of the safety risks to the detainees and their families from terrorist organizations.²³

In addition, a category of information often referred to as “sensitive but unclassified” and related to homeland security has burgeoned since Sept. 11, 2001. This information may still, in

many cases, be released via a FOIA request. Since such “SBU” information is not technically classified, it can only be withheld if another FOIA exemption applies.

If your FOIA request is denied and you ultimately file a lawsuit, the agency will submit affidavits to the court explaining the nature of the withheld information and that it is classified. The courts often give substantial deference to these affidavits.

Essentially, the court will defer to the agency and not even review the information to determine whether it was properly classified (and thus properly withheld under FOIA) if the agency has a “reasonable” basis for finding potential harm, the information falls within the claimed exemption and there is no evidence

A FOIA alternative: Mandatory declassification review

If you choose to file a request for mandatory declassification review rather than file a FOIA request, check with the agency that has the records you seek to find out who is designated to receive these requests. Each agency with classification authority designates an official to receive them.

In a letter to that official, describe the records you want as specifically as you can and ask the agency to declassify them.

The rules governing declassification review state that you should receive a final determination promptly and have your request addressed within 180 days. If the agency cannot process your request promptly, it should notify you that it needs additional time. If it has not contacted you within 120 days, you may file an appeal directly with the Interagency Security Classification Appeals Panel (ISCAP).

If the agency does not declassify any of the records you request, it must release the records or portions of records it has declassified and tell you how to appeal its decisions within the agency. You should file your appeal with the agency within 60 days. If you receive a denial of your appeal to the agency, or if you do not receive an initial response within 120 days or a response to your appeal within 90 days, you may appeal to ISCAP. Address your appeal to:

Interagency Security Classification Appeals Panel
Attn: Classification Challenge Appeals
National Archives and Records Administration
7th and Pennsylvania Ave, N.W., Room 5W
Washington, D.C. 20408

The ISCAP will vote to reverse or affirm an agency’s decision, or to go back to the agency with directions on reprocessing the request. Only the president can reverse an ISCAP decision. If an agency decision is reversed, the agency head may petition the president through the Assistant to the President for National Security Affairs for a reversal.

If you have no intention of filing a lawsuit over your records, declassification review can be a convenient avenue to obtain them. Unlike with FOIA, the requester is not charged fees for this option. Also, delays are far less significant and can result in prying at least some records loose.

However, if you pursue declassification rather than requesting your records under FOIA, you lose the right to litigate if the records are not declassified. ISCAP is the only available review in this process. In addition, you may not file a FOIA request for that information for two years.

that the agency acted in bad faith. In these cases, the suit may be dismissed at an early stage.

Alternatively, the judge may review the documents in private if he or she is unable to determine whether the claimed exemption was properly applied on the basis of the agency’s public descriptions alone. Sometimes judicial inspection can be helpful in securing access to historical records that were obviously classified merely to prevent political repercussions.

Agencies might avoid a decision on the release of classified records if the fact the records even exist is itself classifiable. In a FOIA case involving a request for records pertaining to a ship, the *Glomar Explorer*, an appeals court allowed the CIA to neither confirm nor deny the existence of the requested records. The “*Glomar*” response has been routinely invoked since. When agencies neither confirm nor deny the existence of records, requesters should not presume that the records exist.²⁴ The government has become fairly adept at applying the response to categories of records and invoking it whether or not the records actually exist. Unfortunately, agencies are also using the *Glomar* response while invoking the privacy exemptions as well the exemption for national security.

For the requester who seeks classified records, the most important question is whether to file a FOIA request at all.

Under the Bush executive order, a requester can seek mandatory declassification review rather than file a FOIA request (*see box at left*). However, unlike denial of a FOIA request, a denial of mandatory declassification review request cannot be appealed to a court. Instead, such appeals are made to the Interagency Security Classification Appeals Panel (ISCAP). In a 2007 report to the President, ISCAP said it had declassified material in 61 percent of appeals.

Also, under mandatory declassification review, reviewers have a longer time to inspect records and do not have to abide by expedited processing requirements, but the requester does not have to pay fees as with FOIA.

Typically, the mandatory declassification review process is better suited to processing requests for specifically identifiable documents that the requester knows are classified. In contrast, the FOIA process is better suited to handle requests for large amounts of information or for more general requests.

Regulations to implement the Bush executive order require a requester to decide between FOIA and mandatory declassification review up front. The requester may not make a FOIA request and seek declassification review for the same classified records. Faced with a request for both, an agency will require the requester to elect one process or the other. If the requester fails to choose, the agency will treat the request as a FOIA request. If the requester simply seeks the information without mentioning either FOIA or mandatory declassification review, the agency will probably categorize the request as a FOIA request.²⁵

Furthermore, a requester cannot seek mandatory declassification review within two years of filing a FOIA request for the same information.

2. Internal agency rules

This exemption concerns records that are:

related solely to the internal personnel rules and practices of an agency.

This exemption covers two different kinds of records. “Low 2” applies to agency management or “housekeeping” records Congress decided would not be of interest to the general public. “High 2” applies to internal documents that would allow a



Archivist Ira Pemstein, with the National Archives and Records Administration, listens online to the recently released tape recordings from the Nixon White House at the Nixon Presidential Library in Yorba Linda, Calif., on Dec. 2, 2008. Documents shed new light on just how much the government struggled with growing public unrest over the protracted war in Vietnam.
AP Photo by Damian Dovarganes

requester to circumvent laws or regulations or to gain an unfair advantage over other members of the public.

Initially, the provision was designed to relieve government agencies of the burden of maintaining for public inspection routine materials that are more or less trivial and assumed to have little or no public interest. This “Low 2” information includes documents such as employee parking rules and agency cafeteria rules. “Low 2” does not cover documents that could be viewed as the subject of legitimate public concern, such as personnel evaluation forms.²⁶

In contrast, internal “insider” information is protected by what has come to be known as “High 2.” Agencies use this to withhold, for example, law enforcement manuals, computer security codes and a prison memorandum on telephone surveillance of prisoners. Agencies may use the exemption in conjunction with the arm of the law enforcement exemption that protects the enforcement process (Exemption 7(E)).²⁷ But the exemption also has applied to guidelines such as those for conducting an audit, for rating applicants for federal employment, and for awarding Medicare reimbursement. High 2 presumes that requesters should not get information that will allow them to circumvent not only laws, but agency policies and procedures as well. This is known as the “circumvention of harm” rationale.

Since Sept. 11, 2001, Justice Department FOIA officials have promoted the use of Exemption 2 to protect the government’s own assessments of vulnerability. Officials speculated that because terrorists might benefit from knowing about governmental vulnerabilities, information about them could be protected under the “circumvention of harm” rationale for invoking Exemption 2.

Initially, courts were not particularly receptive to using Exemption 2 to protect vulnerability information from terrorists, pointing out that the exemption applies only to “personnel” practices.²⁸ However, the courts have since upheld a number of agency decisions to withhold this type of information, including information on the airport detention of Iranian-born U.S. citizens and e-mail between the Department of Homeland Security and Census Bureau employees about individuals who identified

themselves as Arab during the 2000 census.²⁹

To be protected under “High 2,” information must still be predominantly internal and relate to a personnel practice. For example, an agency policy of protecting natural resources was not sufficient to allow the Forest Service to withhold maps showing the location of nesting sites of the Northern Goshawk, a large bird of prey. Even though the agency speculated that public disclosure of the maps would endanger the nests, courts ruled that maps are not predominantly internal and do not relate directly to personnel practices.³⁰

Unless disclosure would clearly enable the public to “circumvent” the agency’s regulations or statutes, staff manuals and instructions should not be withheld.³¹ Also, agencies should not withhold any more information than is necessary to protect against circumvention. If some of the materials are withheld, the agency must segregate out and release non-exempt portions of the records.

3. Statutory exemption

The “statutory exemption” is designed to exempt from disclosure information that is required or permitted to be kept secret by other federal laws, when the law in question:

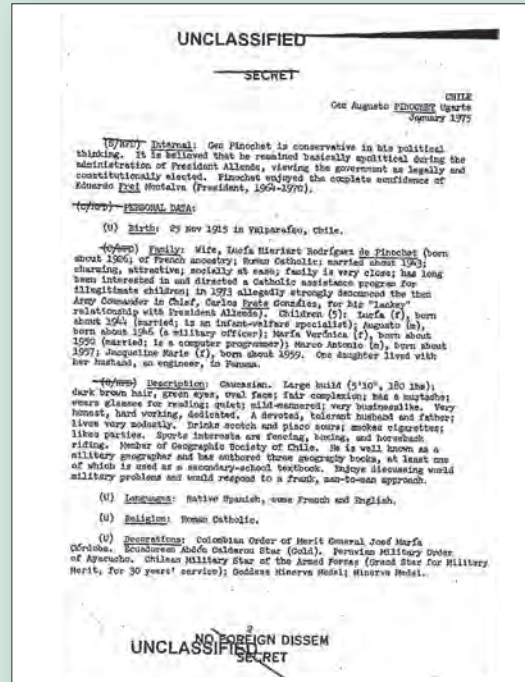
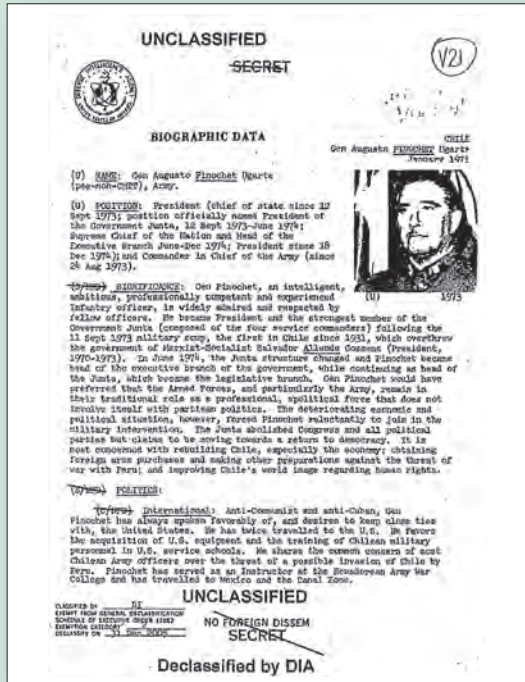
- (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or,
- (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Subsection (A) incorporates statutes such as the Census Act, which prohibits use of information furnished under that Act “for any purpose other than the statistical purpose for which it was supplied.” Subsection (B) incorporates statutes such as the Consumer Product Safety Act, which requires the Consumer Product Safety Commission to withhold documents submitted by private companies if information contained in them is not “accurate,” and the National Security Act, which exempts from disclosure

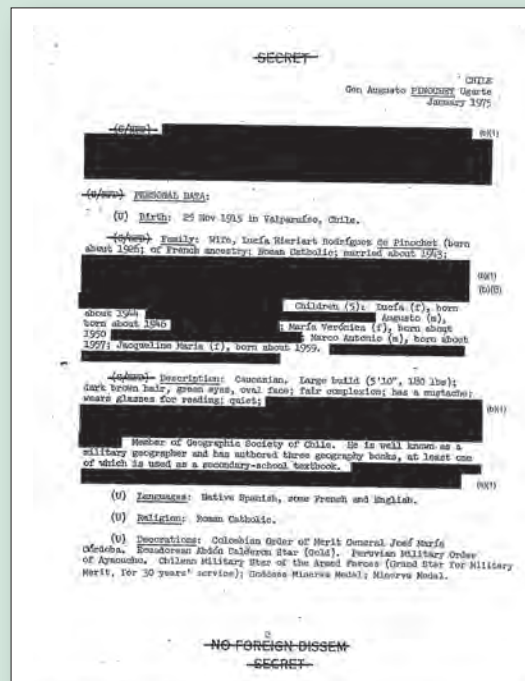
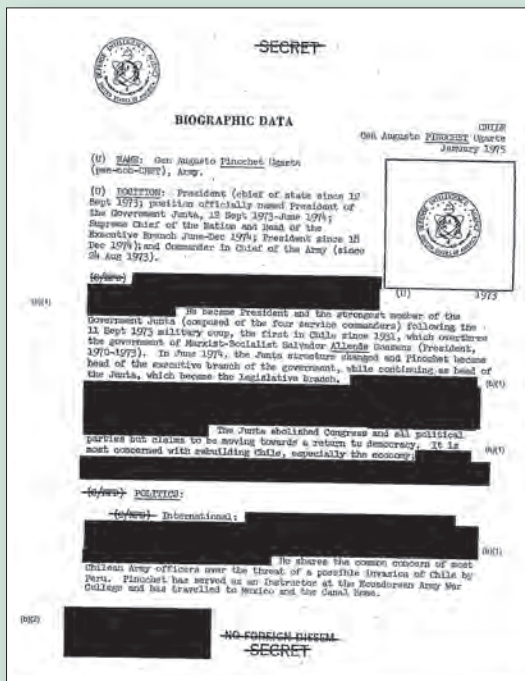
A tale of two releases

During the Bush administration, millions of pages of information was classified or re-classified. The National Security Archive, a nonprofit research facility that files hundreds of FOIA requests each year, discovered that a 1975 Defense Intelligence Agency document on former Chilean dictator Augusto Pinochet had been declassified in full and released in 1999 but re-classified in part in 2003 with major 1999 release:

redactions. Within that four-year period, the agency apparently realized it had let out major "secrets" including the image of Pinochet as well as his tendency toward modest living and his affinity for scotch and pisco sours. Defense Intelligence Agency Secret Biographic Data on General Augusto Pinochet, January 1975, provided by the National Security Archive.



2003 release:



“the names, titles, salaries or number of persons employed by” the National Security Agency.³²

The CIA Information Act, passed in 1984, removed the CIA’s “operational files” from public accessibility, exempting them from search under FOIA.³³ These files contain information dealing with foreign intelligence or counterintelligence operations, background investigations of informants, liaison arrangements with foreign governments or the scientific or technical means of gathering foreign intelligence. However, under the statute, a requester who is a U.S. citizen or permanent resident alien can still receive information on themselves. This is true even if the information is maintained in the CIA’s operational files. The CIA also has to search its operational files for information that was used in investigations by certain Congressional committees, the CIA Inspector General or by other executive agencies investigating the CIA for possible wrongdoing. This information must be released if it does not fall under one of the FOIA exemptions.

Traditionally, much of the information in the CIA’s operational files was not released under FOIA because the information was properly classified under the national security exemption (Exemption 1). Before this amendment, however, the CIA was required to search and review each document in order to justify the withholding. The agency claimed this was a very time-consuming process and that by excluding these files from FOIA altogether, the agency could process other information requests more promptly. The CIA is still behind in processing FOIA requests, but it no longer considers requests for “intelligence sources and methods.”³⁴

In addition, several other intelligence agencies now have similar exemptions. These include the National Reconnaissance Office, the National Geospatial Agency (formerly known as the National Imagery and Mapping Agency), the Defense Intelligence Agency and the National Security Agency.³⁵

Federal agencies have cited more than 250 statutes to justify withholding documents. The most frequently invoked laws have been tested in courts to determine if they meet the Exemption 3 criteria. Courts require that the statute authorize or require withholding, that Congress intend the specified statute to grant the agency the power to withhold information, and that the specified statute set the criteria for when information can be withheld, leaving no discretion to agency officials.

For example, courts have ruled that the exemption cannot be invoked under a provision of the Export Administration Act that permits the government to withhold foreign trade information about private corporations unless it determines that doing so would be “contrary to the national interest.”³⁶ The Trade Secrets Act, which establishes penalties for the disclosure of trade secrets, is also not covered by Exemption 3, according to the case law.³⁷

Similarly, the exemption does not incorporate a provision of the Federal Aviation Administration Act of 1958, which authorized the Administrator of the FAA to withhold agency reports on airline operations when, in his or her opinion, disclosure would “adversely affect” the company that submitted the data and “is not required in the interest of the public.”³⁸

An appropriations statute that prohibits expenditure of funds for releasing certain agricultural information does not qualify as an Exemption 3 law because Congress only barred the “expenditure” and not routine disclosure under FOIA.³⁹

An amendment to the Privacy Act makes clear that Congress did not intend that statute to be subject to Exemption 3.⁴⁰

On the other hand, there are several statutes that do qualify under Exemption 3: It is perhaps most frequently cited as grounds for denying the release of personal income tax returns under a statute designed to protect the privacy of individuals submitting

them to the Internal Revenue Service.⁴¹ The qualifying statute makes it a crime for any “officer or employee” of the United States to disclose any “return or return information” obtained by the employee in connection with his or her government work, unless otherwise authorized to do so by federal law.

The exemption also applies to the rule of federal criminal procedure regarding grand jury information.⁴² The rule has the status of law because Congress amended it in 1977.⁴³ The rule protects from public disclosure the transcripts of federal grand juries and information about witnesses and jurors. It does not protect records not created by the grand jury, except when disclosure of those outside records might reveal the “focus” of the grand jury.

Another oft-cited and court-approved⁴⁴ Exemption 3 statute is a provision of the National Defense Authorization Act for Fiscal Year 1997.⁴⁵ The statute protects unsuccessful bids submitted in response to a government solicitation. If a proposal is not set forth or incorporated into a final agency contract, then it cannot be disclosed.

In 2002, Congress included in the Homeland Security Act an Exemption 3 provision that protects information about “critical infrastructure” voluntarily given to the Department of Homeland Security by members of the private sector.⁴⁶ Such information can include details on power plants, bridges, ports, or chemical plants that have been submitted to Homeland Security as critical infrastructure information.

New exemption three statutes have become a popular way to ensure blocking the release of information. For example Section 1619 of the 2007 Farm Bill blocks the release of geospatial data by the Farm Service Agency. The provision was inserted into the conference report on the bill and became law, undoing a previous court decision that required the release of the data.

These statutes can also be redundant in barring release of information that would otherwise be clearly covered under another FOIA exemption. This is particularly true for privacy. Medical records in the Defense Department are protected under 10 U.S.C. § 1102 but are also likely to be covered by Exemption 6. The Reporters Committee is working to stop the further passage of Exemption 3 statutes in cases such as this.

4. Trade secrets

Exemption 4 intends to protect “trade secrets,” such as customer lists and secret formulas. It also shields sensitive internal commercial information about a company which, if disclosed, would cause the company substantial competitive harm. The exemption covers:

trade secrets and commercial or financial information obtained from a person and privileged or confidential.

A “trade secret” is given a fairly limited meaning: information that is generally not known in the trade, but is commercially valuable, secretly maintained, and is used for the making, preparing, compounding or processing of trade commodities. It must also be the end product of either innovation or substantial effort.⁴⁷

To withhold documents as “commercial or financial information,” the government must be able to prove the information is “confidential.” However, a mere promise of confidentiality to the one who supplied the information does not merit use of this exemption. Courts have said that information is “confidential” only if its disclosure would be likely either (1) “to impair the government’s ability to obtain necessary information in the future” or (2) “to cause substantial harm to the competitive position” of the person from whom the information was obtained.⁴⁸

The exemption may protect information submitted voluntarily to the government even when the government could, but chooses not to, require its submission for regulatory or other purposes, so long as the disclosure would cause the submitter to be less likely to release it voluntarily in the future.⁴⁹

The “substantial competitive harm” test requires the government to show more than just a likelihood that a business might suffer some embarrassment or commercial loss if its records are disclosed. Records that are held to “cause substantial harm” if disclosed include data revealing assets, profits, losses and market shares, as well as detailed information filed to qualify for loans and government contracts.

This exemption applies only to information supplied to the government by individuals or private business firms. Government-prepared documents about a person or private firm based primarily on information the government generates itself or gathers from outside sources generally are not exempt under this provision.

Information that has been publicly disseminated or is readily available from other sources also may not be protected by this exemption.

Additionally, businesses that submit information to the govern-

ment can fight the release of their own information in court under FOIA by filing a “Reverse FOIA” suit. In such suits, the business — which is the plaintiff — argues that because the information is protected by a FOIA exemption, government disclosure would violate the Administrative Procedures Act.

Often, in these cases, the requesters are seeking details, including very specific pricing information, surrounding a government contract. The requesters themselves are frequently companies that lost the bid for the contract.⁵⁰

5. Internal agency memos

This exemption is intended to incorporate material normally privileged in civil litigation. It applies to records that are:

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.

The exemption has been most often used to protect working papers, studies and reports prepared within an agency or circulated among government personnel as they try to reach a decision.

Commonly requested records

Autopsy & coroners’ reports: The Federal Bureau of Investigation may have autopsy photographs or reports as the result of an investigation. If another government agency has conducted the investigation, it would have control of the autopsy records. Courts have held the photographs do not have to be released under FOIA Exemption 6. *Epps v. Dep’t of Justice*, 801 F.Supp. 787 (D.D.C. 1992); *Accuracy in Media v. National Park Service*, 194 F.3d 120 (D.C. Cir. 1999).

Bank records: Several federal agencies supervise banks and collect significant information about them. FOIA Exemption 8 covers primarily the examination reports of banks — but most of a bank’s financial information is public. These records are available online from the Federal Deposit Insurance Corp., the Federal Reserve Board of Governors, the Office of the Comptroller of the Currency (part of the Treasury Department) and the National Credit Union Administration. The Federal Financial Institutions Examination Council is an interagency group designed to make sure bank supervision is uniform among the regulators and also maintains some publicly available information. Some of the most useful information are banks’ call reports and data collected under the Community Reinvestment Act and the Home Mortgage Disclosure Act. Likewise, some of the data reviewed by the Federal Reserve Board of Governors in a contested bank merger is public. *Inner City Press v. Board of Governors of the Federal Reserve System*, 463 F.3d 239 (2d Cir. 2006).

Business records: Privileged or confidential trade secrets and commercial or financial information is covered by Exemption 4. However, several government agencies collect information similar to this, which is public. The Consumer Product Safety Commission has a large electronic reading room, while the Securities and Exchange Commission’s EDGAR database is a collection of all publicly traded companies’ filings with

the SEC. However, businesses that submitted information to the government and don’t want it released under Exemption 4 may sue to stop that release in what is known as a Reverse FOIA suit.

Contracts, proposals and bids: This information is often covered by a statute that falls under Exemption 3. The law is codified at 41 U.S.C. § 253(b)(m) and prohibits the release of contractor proposals that are not incorporated into an agency contract.

Collective bargaining records: Records surrounding the administration and negotiation of a collective bargaining agreement, including manuals, may be covered by Exemption 2. *National Treasury Employees Union v. U.S. Dept. of Treasury*, 487 F.Supp. 1321 (D.D.C., 1980).

Election records: The Federal Elections Commission collects financial information from Congressional and presidential candidates which is available on the agency’s Web site. Information on how members of Congress vote on legislation is available from the House and Senate Web sites.

Gun permits: While the FBI has information on gun permits through the National Instant Criminal Background Check System, this information is not generally available to the public — largely on Exemptions 6 and 7 grounds.

Hospital reports: While medical records are confidential under Exemption 6, the Department of Health and Human Services collects statistical information about patient care. For example, the Hospital Compare database compares quality of care at different hospitals for various conditions. The Center for Disease Control’s database system, WONDER, provides information such as leading causes of death, AIDS, vaccine, cancer and infant death data.

Personnel records: Personnel files are confidential under Exemption 6. However, basic data on executive branch employ-

In 2001, the Supreme Court clearly stated the rule to apply in Exemption 5 cases saying, “To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.”⁵¹

Under this exemption, agencies have the discretion to protect advice, recommendations and opinions that are part of the deliberative and decision-making process. Its purpose is to encourage candor among agency personnel in the writing and reviewing of preliminary policy drafts, letters between agency officials, and staff proposals. The exemption applies to documents generated during the decision-making process, in most cases even after a final agency decision is announced. That is true unless in that final decision the agency clearly adopts the position set forth in one of those planning-stage, or “pre-decisional” documents.

The exemption does not cover purely factual portions of pre-decisional documents. For example, if a long policy memorandum contains advisory recommendations on a proposed federal building project and pricing of construction, the prices must be segregated from the policy portion of the memorandum and released upon request. Also, final opinions and other “post-deci-

sional” documents explaining an agency position are not exempt.

In addition, this exemption incorporates the attorney-client privilege, which protects most communications between an agency and its own attorney or another agency acting as its attorney, such as the Department of Justice. It also incorporates the attorney work-product privilege, which protects documents prepared by an attorney if disclosure would reveal the attorney’s theory of the case or planned trial strategy.

The U.S. Supreme Court has recognized some other privileges under Exemption 5. One is a qualified privilege for government-generated commercial information. Information related to awarding of government contracts may be withheld, so long as the government can show that disclosure would place it at a competitive disadvantage. However, once the contract has been awarded or the offer withdrawn, the government cannot claim this privilege.⁵² (This information may fall under another exemption, however, particularly Exemption 3.) Another privilege protects witness statements given under promise of confidentiality as part of an air crash investigation.⁵³

In 2001, the Supreme Court unanimously reiterated that under Exemption 5 the source of the documents must be a government agency. The Court reasoned that agency consultants might

ees is available from the Office of Personnel Management. Salary information for legislative branch employees is available from Legistorm’s Web site, a free database offered by a technology company.

Police records: There are several law enforcement agencies that may have “police” records. These include the FBI, Drug Enforcement Administration, U.S. Marshall’s Service, Secret Service, INTERPOL-United States National Central Bureau, and the National Park Service rangers.

Accident reports: The National Park Service’s rangers frequently respond to accidents on federal parkways the agency maintains. Those accident reports are available under FOIA, though some information may be redacted.

Arrest records: These are generally not available until a defendant has been charged, when they can be obtained as court records.

Compilations of criminal histories: Rap sheets, and as a consequence felony arrest records, can be categorically withheld under Exemption 6. *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989); *Epps v. Dep’t of Justice*, 801 F.Supp. 787 (D.D.C. 1992).

Confidential informants: These are not released under Exemption 7(d).

Investigatory records: These are generally not disclosed under Exemption 7, which will govern the records regardless of whether the investigation is open or closed.

Police techniques: Training manuals may be available in an agency’s electronic reading room on its Web site. However, both Exemption 7(e) and Exemption 2 will protect these documents.

Prison, parole and probation reports: Prisoner pre-sentence investigation reports used by the Parole Commission or the Bureau of Prisons must be released to prisoners themselves. *Department of Justice v. Julian*, 486 U.S. 1 (1988). Rosters of Bureau of Prison inmates are not released; however, directory information on an inmate can be obtained from the Bureau’s Web site if the inmate’s name is known.

Public utility records: The Federal Energy Regulatory Commission regulates the interstate transmission of natural gas, oil, electricity, natural gas and hydropower projects. Some information, including the agency’s decisions and orders, is available on its Web site.

Real estate appraisals and negotiations: Records regarding public land are not released under Exemption 5. *Government Land Bank v. General Services Administration*, 671 F.2d 663 (1st Cir. 1982).

School and university records: While the federal government doesn’t have the same student records as local institutions, the Education Department’s National Center for Education Statistics has data ranging from average SAT scores for college-bound seniors by race/ethnicity to the poverty rates for school districts with more than 15,000 students.

Vital statistics: The Food and Drug Administration, the Centers for Disease Control and the National Institutes of Health all maintain statistical information on births and deaths in the U.S. For example, the FDA has a database of medical devices that malfunction and the CDC’s National Center for Health Statistics maintains mortality information. Access to these databases is available on the agencies’ Web sites, along with many other databases.

be covered under this provision because they acted like agency employees. But communications from groups (such as the American Indian tribes at issue in that case) who worked in their own interest could not be covered.⁵⁴

This reasoning was extended to protect documents used by the National Energy Policy Development Group, chaired by Vice President Dick Cheney. The key question to consider, the court held in that case, is “whether a document will expose the pre-decisional and deliberative processes of the Executive Branch.”⁵⁵

Indeed, changes in administration policies and attitudes toward FOIA are nowhere more apparent than under Exemption 5, where the clearest case can be made for the discretionary release of records that might technically be covered by an exemption. Prior to the Clinton administration, when the Justice Department directed agencies to stop invoking exemptions where no harm would occur from disclosure, this exemption was routinely used to withhold records. During the Clinton years, agencies generally stopped invoking Exemption 5 unless they made an actual finding that agency personnel who developed the documents would have changed their wording if they had contemplated public disclosure.

However, under the Bush administration, the Justice Department urged agencies to find reasons within the exemptions for denying information. Agencies sometimes refused to give out innocuous information, stating that to do so might obligate them to give out similar information in the future.

Still, the Bush administration policies did not prohibit discretionary releases and the early Obama policies seem to favor them. Requesters who appeal the denial of information that could be subject to discretionary release should note the distinction between information that *can* be withheld and information that *must* be.

6. Personal privacy

The privacy exemption is an important tool for protecting personal information in the government’s hands, but it is overused to block the release of a wider range of government information than necessary. Requesters seeking information about named individuals should craft their requests carefully to maximize the chances they will receive the records.

Some federal agencies use this exemption to block disclosure of information that might identify individuals. However, the exemption should apply only when the individuals’ interests in privacy outweigh the public’s interest in disclosure. The exemption applies to:

personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

To invoke the exemption, agencies must first find that the information is “similar” to personnel and medical files. The mere location of a document in a government file labeled “personnel” or “medical” does not automatically make it exempt. Courts have been especially deferential to agencies when they attempt to show how documents containing information about any individual is “similar” to a personnel or medical file, finding, for instance, that tape recorded voice inflections are “similar files” that could block the release of a recording even when a transcript is available.⁵⁶

After establishing that a file is “similar” to personnel or medical files, an agency must then balance the personal privacy intrusion that would occur from disclosure of the information against the public’s interest in its disclosure.

When requesting information involving individuals, it can be helpful to address the balance of privacy and public interests in

the initial request, spelling out for the agency how public interests served by disclosure outweigh any privacy interests.

Only individuals, not businesses, associations or corporations, can have their privacy intruded upon. But agencies or the courts will find that disclosures about a small group are informative about an individual affiliated with that group. Although dead people do not have privacy rights, the disclosure of information associated with the death of individuals may be found to intrude upon the privacy of survivors by contributing to their grief.

If a federal law or regulation requires disclosure, there is no privacy interest to be considered. For instance, regulations of the Office of Personnel Management, the agency in charge of federal government worker records, make public the following information about past and present employees: names; present and past position titles; present and past grades; present and past annual salary rates including awards and allowances; present and past duty stations; and position descriptions and job standards. That information is public unless its release would interfere with law enforcement programs or severely inhibit agency effectiveness.⁵⁷

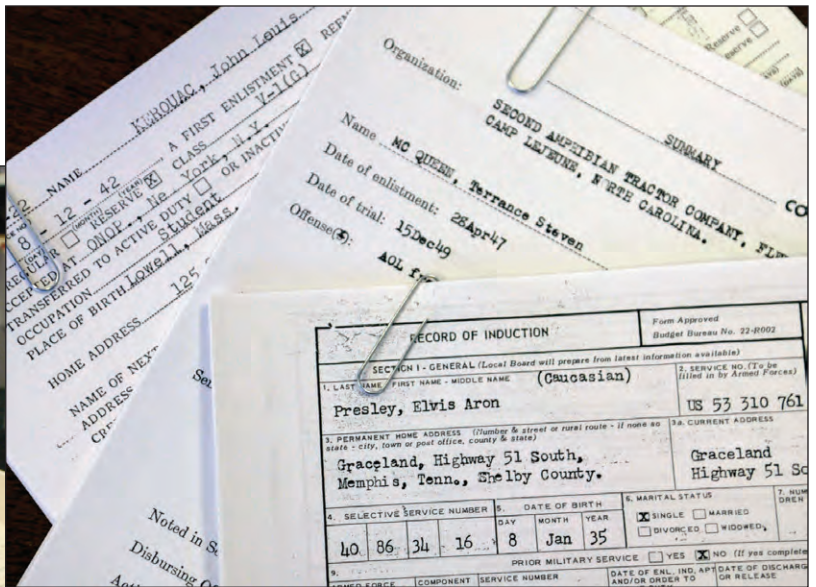
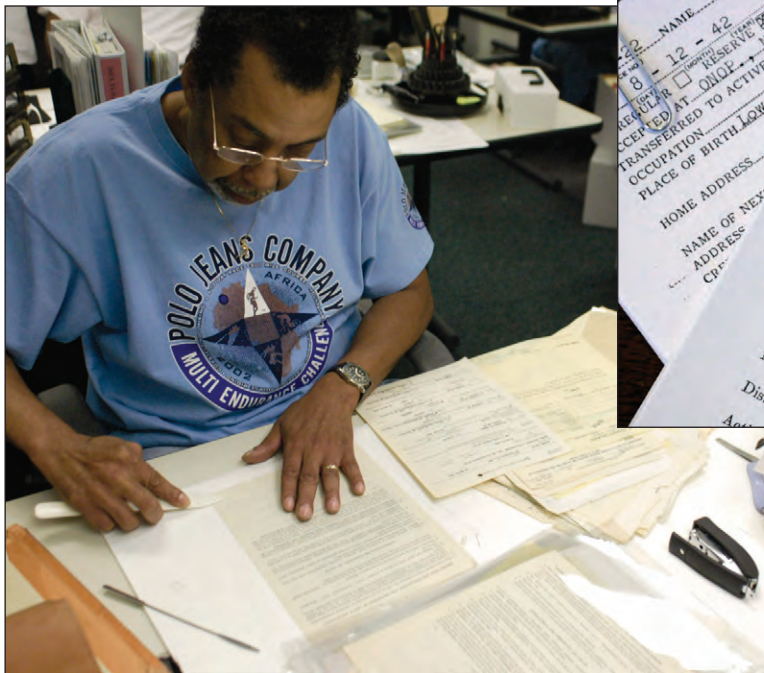
The government cannot use the privacy exemption to protect the privacy of people who agree to the disclosure of their records. Requesters can submit statements from people who agree to waive their privacy interests along with the request. Many agencies, such as the FBI, will require this as a matter of policy. The FBI has a waiver form on its FOIA Web site for this purpose. Generally, the government will honor notarized waivers. In two cases judges have ruled that waivers need not be notarized so long as they include the phrase, “I declare under penalty of perjury that the foregoing is true and correct. Executed on [date].”⁵⁸

Congress intended for the balancing test between privacy and public interests to favor public disclosure. However, in 1989 the Supreme Court skewed the balance in favor of privacy in *Department of Justice v. Reporters Committee for Freedom of the Press*. It ruled that FOIA is only supposed to serve the purpose of letting the public know what the government is “up to.” Therefore, the high court said, the only public interest in disclosure that agencies can consider in the balance is the public’s interest in information about government operations and activities. If the disclosure would reveal nothing about the government, no public interest can be considered in the balance.⁵⁹ That case turned on the privacy arm of the law enforcement exemption (Exemption 7(C)), however. The ruling has been cited extensively in cases that involve Exemption 6 but not 7 (C).⁶⁰

Later, in the 2004 case *National Archives and Records Administration v. Favish*, the Supreme Court distinguished the protections of the law enforcement privacy exemption 7(C), which protects information if it “could reasonably be expected to cause an unwarranted invasion of personal privacy,” from the narrower standard of Exemption 6, which only protects information when disclosure would constitute a “clearly unwarranted” intrusion on personal privacy.⁶¹

In late 1996, Congress specifically rejected the Supreme Court’s rule in the 1989 *Reporters Committee* case. In its findings delineated in the Electronic FOIA Amendments of 1996, Congress said FOIA was intended to serve any purpose — implying it is not solely intended to show what the government is “up to.”⁶² The legislative report adopted by both houses stated that Congress rejected the Supreme Court’s interpretation of its purpose in passing the Act. However, neither the Court nor the executive branch has made any adjustments in enforcing the Act based on this finding.⁶³

How the government makes its decisions and carries out (or fails to carry out) its responsibilities are matters of strong public interest. However, the government does not necessarily disclose records



Robert Taylor puts the finishing touches on the personnel records of novelist Alex Haley, which were displayed at an open house at the National Personnel Records Center in Overland, Mo., June 8, 2005. The National Archives opened 1.2 million military records, including records for John Kennedy, Elvis Presley, and Jackie Robinson, also shown here, to the public for the first time June 11, 2005. AP Photo by Tom Cannam

simply because they might show the agency in a favorable light, exonerate it from the suspicion of wrongdoing or confirm its culpability. To persuade the government that the public has a strong interest in records, it may be useful to describe why the government should be accountable through disclosure of the requested records, or, more importantly, why there is a legitimate suspicion that actions described in the records may be blame-worthy.

A question that often arises in litigation is whether a requester's "derivative use" of information constitutes a valid public interest to be weighed in the balance. Reporters may file FOIA requests for the names and addresses of people who are affected by government action in the hope of contacting them for case histories. The government often denies those requests, claiming that names and addresses, by themselves, impart no information about the government.

However, in an eclectic assortment of cases, courts have ordered names and addresses released, finding that the only way the public can learn about the government action is to locate and interview individuals affected by the action. The Supreme Court in 1991 specifically refused to decide whether derivative uses — later use of the same information for other purposes — would intrude upon privacy.⁶⁴

The U.S. Court of Appeals in Atlanta (11th Cir.) ruled that the public has a right to the addresses of recipients of federal disaster relief funds issued by the Federal Emergency Management Agency following several hurricanes in Florida in 2004,⁶⁵ but held that the names of those individuals are protected, as release would violate their personal privacy rights. FEMA has refused to release similar disaster release records related to recipients of funds from floods that devastated much of the Midwest in 2008, citing the same privacy rationale for both names and addresses of

the recipients.

In 2005, the U.S. Court of Appeals in Denver (10th Cir.) refused to order the release of electronic maps from FEMA.⁶⁶ The Court held the electronic information could be manipulated to reveal flood insurance policy holders' names, addresses, flood risk and insurance information. The agency had already provided the maps in printed form.

If your request involves information about named or identifiable individuals, you may want to briefly explain your reasons for seeking the information and why the public interest in disclosure outweighs any possible invasion of privacy. This will allow the agency to determine whether a potential invasion of privacy that could result from disclosure would be justified or "unwarranted." Similarly, you may want to explain why there is little or no intrusion on privacy. Remember that under FOIA, disclosure to you as a journalist is synonymous with public disclosure. But do not assume the agency will take that for granted.

7. Law enforcement records

This exemption is primarily designed to protect documents when untimely disclosure would jeopardize criminal or civil investigations or cause harm to persons who help law enforcement officials or are otherwise involved in law enforcement matters. The exemption covers:

- records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
 - A. could reasonably be expected to interfere with enforcement proceedings

An inmate of Camp X-Ray is escorted by two guards while other inmates are seen in their cells at the military prison in Guantanamo Bay, Cuba, in this 2002 photo. Several FOIA lawsuits have arisen against the Defense Department for its denials of records pertaining to treatment and identification of Guantanamo detainees. AP Photo by Tomas van Houtryve.



B. would deprive a person of a right to a fair trial or an impartial adjudication

C. could reasonably be expected to constitute an unwarranted invasion of personal privacy

D. could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source

E. would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

F. could reasonably be expected to endanger the life or physical safety of any individual.

Congress significantly expanded the law enforcement exemption in 1986 in response to government complaints that it could not adequately protect confidential sources, ongoing investigations or procedure manuals.

Generally, in order to withhold information, agencies must demonstrate that one of the enumerated harms “could reasonably be expected” to occur.

Agencies need not show that files are investigatory in order to withhold records, but they must show that the documents were compiled for criminal, civil or other law enforcement purposes. In addition, information originally compiled for law enforcement purposes does not lose its Exemption 7 protection merely because it is summarized in a new document created for a non-law enforcement purpose.⁶⁷

Even if documents were originally prepared for a law enforce-

ment purpose, passage of time may have eroded any perceived need for secrecy. Old records may be more readily available than recent records.

The exemption covers most types of records related to investigations of crimes or violations of laws, if disclosure would interfere with ongoing or potential enforcement proceedings. These records include interviews with witnesses, affidavits and notes compiled by investigative officers.

In withholding information under subsection (A), agencies often claim that disclosure will interfere with enforcement proceedings. But the exemption is generally applied when an enforcement proceeding has actually begun, or when there is a “concrete prospect” that an ongoing investigation will lead to an enforcement proceeding. It does not apply to information developed after enforcement proceedings have ended. A trial, conviction or sentencing may free records for disclosure.

In the aftermath of Sept. 11, 2001, a divided appeals court allowed the government to withhold under 7(A) the names of hundreds of detainees and their attorneys and details of the detainees’ arrests and incarceration, because disclosure might affect “national security.”⁶⁸

Subsection (B) primarily concerns prejudicial publicity in criminal, not civil or administrative, proceedings. It cannot be invoked simply to curtail the amount of publicity given to an enforcement proceeding.

As with the Act’s main privacy exemption (Exemption 6), under subsection (C) agencies must balance the degree of intrusion into individual privacy against the public interest in disclosure in deciding whether to withhold information. The only public interest in disclosure that agencies will consider, at least when they are looking at Exemption 7(C), is the public’s interest in government operations and activities. If a requester is seeking law enforcement pictures or other data concerning a mysterious death, survivors may have a right of privacy to be left alone in their grief.⁶⁹ For the public interest to outweigh that privacy interest, the requester must present evidence of government

officials' wrongdoing. The evidence does not have to be "clear evidence," but it must be sufficient to make a reasonable person believe that an impropriety has occurred. (See discussion under Exemption 6.)

The privacy interests that can be protected in law enforcement records are broader than those protected under Exemption 6. In 2004, the Supreme Court found a "survivor's privacy" interest in photographic death images or other data located in law enforcement records. The court also required requesters seeking law enforcement data when privacy interests are at issue to present evidence the government had acted improperly.⁷⁰

This subsection has been used to withhold the identity of an informant who may not technically qualify as a "confidential source" whose identity might be protected by Subsection (D).

Subsection (D) is designed to protect the identities of confidential sources. It applies to people who are expressly promised confidential treatment, but it does not automatically protect sources who do not receive that promise. The Supreme Court ruled that the government may not presume that every source providing information in a criminal investigation is a confidential source. The government must instead look at the nature of the crime investigated and the source's relationship to it in deciding whether a source had a likely expectation of confidentiality.⁷¹

Courts have generally interpreted the provision broadly by holding that it protects the identity of a confidential informant even though the individual is dead and even if the person's status as an informant was known.⁷² The protection extends to information provided by confidential sources in criminal and national security intelligence investigations. If disclosures would not harm the confidential source involved in 7(D), the agency could make discretionary disclosures of information and, as a requester, you may want to point this out in an appeal if the information is withheld. The statute provides that state, local and foreign agencies, and even private institutions, may be considered confidential sources.

Subsection (E) exempts from disclosure "investigative techniques and procedures for law enforcement investigations or prosecutions." This provision has generally been applied only to secret techniques and procedures not well known to the public. Routine scientific tests, like fingerprinting, are not covered. Agencies have some discretion on whether to invoke the first clause of Exemption 7(E) if harm could not occur from release of the information. Guidelines for conducting investigations and prosecutions are exempt if disclosure could reasonably be expected to risk circumvention of the law. This clause is often invoked along with Exemption 2's protection against circumvention of laws. During the Bush administration, it became an important vehicle for shielding information about aspects of the war on terrorism. The government repeatedly contended that terrorists might make use of information about vulnerabilities if it were provided in response to a FOIA request.⁷³

Under subsection (F), information can be withheld if disclosure could reasonably be expected to endanger life or physical safety. Agencies invoke 7(F) most frequently to bar the release of names of law enforcement officers — federal or state — or others mentioned in criminal investigative files. It does not generally protect information that is public in another forum, such as a list of witnesses at trial.

The Defense Department attempted to block the release of photos taken at Abu Ghraib, the notorious Baghdad prison, using Exemption 7(F). However, the U.S. Court of Appeals in Manhattan (2nd Cir.) expressly rejected the argument that release of the prison abuse photos could endanger the lives or physical safety of Americans abroad, stating that without identifying "at least one

individual with reasonable specificity" who might be endangered, exempting records from release under 7(F) was simply not justified.⁷⁴

The 1986 amendments state that some law enforcement records are "excluded" from coverage under FOIA. An agency need not acknowledge that records exist if they concern ongoing, undisclosed criminal investigations; identify confidential informants of a criminal law enforcement agency; or include classified FBI information about foreign intelligence, counterintelligence or international terrorism investigations. To appropriately exclude the records, agencies should tell requesters that they "neither confirm nor deny" their existence, invoking a "Glomar" response. (See discussion of Exemption 1.) However, several agencies view the privilege as allowing them to deny that records exist even if they do, in fact, exist. Because of this, requesters who suspect the use of an exclusion should appeal an agency's claim that records do not exist just as if it had denied them.

Requesters have a right to appeal if they believe the agency has excluded records from FOIA coverage, and the courts have jurisdiction to review an agency's claims under the exclusions. However, in response to a requester's court challenge, agencies will submit secret affidavits justifying secrecy for in-chambers review by the judge, whether or not the records actually exist.

8. Bank reports

This applies mainly to reports prepared by federal agencies about the conditions of banks and other federally regulated financial institutions. It covers records that are:

- 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.

The exemption applies to federal government records of banks, trust companies and investment banking firms and associations. Its purpose is to prevent disclosure of sensitive financial reports or audits that, if made public, might undermine public confidence in individual banks, or in the federal banking system. Traditionally, agencies have invoked the exemption to protect even the records of failed banks, holding that use of the exemption promotes candid disclosures by bank officers. But when Congress gave hundreds of billions of dollars to bail out the savings and loan industry in the late 1980s, it adopted measures to make financial institutions more accountable to the public.

The Federal Deposit Insurance Corporation Improvement Act of 1991 makes public federal written reports on material losses by insured depository institutions, except for customer names.

Agencies have some discretion to disclose some banking information, particularly factual parts of records.

9. Oil and gas well data

This exemption is primarily designed to prohibit speculators from obtaining information about the location of oil and gas wells of private companies. It covers:

- geological and geophysical information and data, including maps, concerning wells.

This provision is rarely used. It covers geological information in files of federal agencies, such as the Bureau of Land Management in the Interior Department, the Federal Energy Regulatory Commission and the Federal Power Commission.

Major U.S. Supreme Court FOIA Cases



[Administrator, Federal Aviation Administration v. Robertson, 422 U.S. 255 \(1975\)](#)

The FAA was permitted to withhold analyses of performance of commercial airlines under a statute which gave the administrator the authority to withhold such information when he felt disclosure was not in the public interest. (Subsequent to this decision, Congress amended Exemption 3 requiring specific language requiring confidentiality.)

[Baldridge v. Shapiro, 455 U.S. 345 \(1982\)](#)

Two sections of the Census Bureau Act (13 U.S.C. §§ 8(b) and 9(a)) qualify as Exemption 3 statutes and prevent the bureau from releasing information collected from respondents, including the addresses used by the bureau to conduct the census.

[Chrysler Corporation v. Brown, 441 U.S. 281 \(1979\)](#)

Businesses that submit documents to the government may sue under the Administrative Procedures Act to challenge an agency's decision to release documents related to them when such documents are requested under FOIA.

[Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102 \(1980\)](#)

The Consumer Product Safety Act requires the CPSC to ensure the accuracy of information about consumer products, if the manufacturer can be identified, prior to releasing any information pursuant to a FOIA request. The CPSC accomplishes this by notifying the manufacturer and giving it an opportunity to correct or challenge any of the requested information.

[Department of the Air Force v. Rose, 425 U.S. 352 \(1976\)](#)

Exemption 2 applies only to information in which there is little or no public interest and thus could not protect information

about Ethics Code violations at the Air Force Academy. Furthermore, Exemption 6 requires an agency to balance the possible invasion of privacy against the public's interest in disclosure, and in this case the Court ordered disclosure of the information in a form which would not lead to any cadet being individually identified.

[Department of the Interior v. Klamath Water Users Protective Association, 532 U.S. 1 \(2001\)](#)

The federal government may not use Exemption 5 to withhold documents created as a result of communications with an outside consultant, when the consultant's relationship with the government has been predicated on the consultant's own interests, rather than the government's interests.

[Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 \(1989\)](#)

In balancing the public's interest in disclosure against the intrusion on personal privacy that would occur from disclosure, an agency can only consider the public's interest in knowing what the government is "up to." If records are not informative on the operations and activities of government, there is no public interest in their release. In applying the balancing test under Exemption 7(C), agencies may "categorically" weigh public interest and privacy. Since criminal history rap sheets reveal nothing about the government, they may be withheld.

[Department of Justice v. Tax Analysts, 492 U.S. 136 \(1989\)](#)

A two-pronged test determines whether material constitutes agency "records": An agency must create or obtain the records and must have them in its possession because of the legitimate conduct of agency business.

[Department of State v. Ray, 502 U.S. 164 \(1991\)](#)

The privacy interest of Haitian deportees in their names and addresses outweighs any public interest that might be served by disclosure to an attorney who hoped to learn if the Haitian government mistreated them on their return. The court refused to decide whether “derivative” uses of names and addresses — later uses for other purposes — could ever serve the public’s interest.

[Department of State v. Washington Post, 456 U.S. 595 \(1982\)](#)

The “similar files” provision of Exemption 6 extends to any information of a “personal” nature, such as one’s citizenship.

[Environmental Protection Agency v. Mink, 410 U.S. 73 \(1973\)](#)

An agency has no obligation to segregate and disclose non-classified portions of otherwise classified documents, and the court is not required to view the documents in camera whenever there is an allegation that pre-decisional materials contain factual information. (Subsequent to this case, FOIA was amended to require agencies to segregate non-exempt material from that which can be protected under an exemption.)

[Federal Bureau of Investigation v. Abramson, 456 U.S. 615 \(1982\)](#)

Records compiled for law enforcement purposes do not lose their exempt status when they are incorporated into records compiled for purposes other than law enforcement.

[Federal Open Market Committee v. Merrill, 443 U.S. 340 \(1979\)](#)

Exemption 5 incorporates a privilege for commercially sensitive documents that are generated by the government. This privilege is similar to the protection provided by Exemption 4 for the commercial information submitted by those outside the government.

[Forsham v. Harris, 445 U.S. 169 \(1980\)](#)

Records in the possession of federal grantees or contractors are not accessible under FOIA, even if the documents relate to the grantee’s contract with a federal agency.

[Federal Trade Commission v. Grolier, 462 U.S. 19 \(1983\)](#)

Exemption 5 is not limited to information that would actually be privileged in any particular litigation, but rather extends to any information which would “routinely” or “normally” not be available to a party in litigation.

[Grumman Aircraft Engineering Corporation v. Renegotiation Board, 421 U.S. 168 \(1975\)](#)

The executive privilege, incorporated through Exemption 5, can protect from disclosure reports prepared by the Renegotiation Board’s Regional Board since they are not “final reports” but rather inter- or intra-agency memos. This ruling is based on the Court’s finding that only the full Board has authority to issue final orders, and these Regional reports are simply used by the full Board to make that decision.

[GTE Sylvania v. Consumers Union, 445 U.S. 375 \(1980\)](#)

GTE Sylvania sued the Consumer Product Safety Commission to stop its release of accident reports to Consumers Union. The

district court issued an order restraining release of the information pending the court’s ruling on the disclosability of the information. Meanwhile CU sued in a different court to compel disclosure. The Supreme Court ruled that while information is under a court order prohibiting disclosure, the agency has no authority to release it, and a requestor may not maintain a lawsuit to compel its disclosure.

[Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 \(1980\)](#)

FOIA does not provide a means by which private citizens can sue to force public officials to return records that they have wrongfully removed from the agency.

[National Archives and Records Administration v. Favish, 541 U.S. 157 \(2003\)](#)

Exemption 7(C) encompasses the personal privacy rights of a deceased individual as well as the related privacy rights of his or her surviving family members. When the public interest in a FOIA request reflects an attempt to show that government officials acted improperly in performing their duties, the requester must produce evidence of such impropriety sufficient to convince a reasonable person in order to overcome the personal privacy rights cited.

[National Labor Relations Board v. Robbins Tire & Rubber Co., 437 U.S. 214 \(1978\)](#)

Exemption 7(A), allowing agencies to withhold investigatory records compiled for law enforcement purposes if disclosure would interfere with enforcement proceedings, does not require the agency to make a specific showing within the context of a particular case. Instead, the agency may demonstrate that disclosure of certain classes of documents (in this case witness statements filed as part of unfair labor practices complaints) would have the effect of interfering with agency enforcement.

[National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132 \(1975\)](#)

Exemption 5 can never apply to the final opinion of an agency, but the exemption does incorporate the attorney work product privilege protecting memos prepared by a government attorney in contemplation of litigation and setting strategy for the case.

[Sims v. Central Intelligence Agency, 471 U.S. 159 \(1985\)](#)

The Director of the CIA has exclusive authority to designate intelligence sources and methods that can be protected from public disclosure under the National Security Act.

[Taylor v. Sturgell, 128 S.Ct. 2161 \(2008\)](#)

Two parties with similar, but not legally related, interests can separately litigate the same claim without resulting in “virtual representation” of one party by the other.

[United States v. Weber Aircraft Corp., 465 U.S. 792 \(1984\)](#)

Exemption 5 incorporates a privilege protecting witness statements given to military personnel in the course of military air crash safety investigations.

Federal Open Meetings Laws

Six years after passing the Freedom of Information Act, Congress enacted the Federal Advisory Committee Act to open up to public oversight the advisory process of executive branch agencies. Since 1972, FACA has legally defined how advisory committees operate and has a special emphasis on open meetings. In 1976 Congress followed with the Government in the Sunshine Act, which requires that certain government agency meetings be open to the public. Modeled after FOIA, the Sunshine Act was intended to promote a transparent government and increase agency accountability.

The Federal Advisory Committee Act

How FACA works

Federal agencies and the White House itself seek advice from a multitude of private sources outside of government. FACA both governs the way these advisory committees function and opens them up to public examination.

FACA specifically applies to advisory committees “established” or “utilized” to advise the president or executive branch agencies. An advisory committee is defined as:

Any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee . . . established or utilized . . . in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the federal government.

The same executive branch agencies covered under FOIA and the Sunshine Act are covered by FACA. Advisory committee records are subject to the same nine exemptions as FOIA.

Under FACA, advisory committee meetings must be open to the public. A committee must provide public notice in the *Federal Register* 15 days prior to the meeting. The notice must include the committee name; the time, place and purpose of the meeting; a summary of the agenda; and if any portion of the meeting is closed, the reason and exemption(s) in the Government in the Sunshine Act that apply. An advisory committee meeting can be closed to the public if the president or an agency head determines that any of the 10 exemptions to the Sunshine Act apply (see below).

The committee must provide access to materials provided to it, including reports, transcripts, minutes, working papers, agendas or other documents unless any of the nine FOIA exemptions would apply. The committees must also keep minutes of their meetings.

The General Services Agency oversees advisory committees and considers at its discretion whether committees continue to carry out their purposes and whether any revisions should be made.

Additionally, the advice must be related to government policy. The law applies to one-time meetings where advice is sought.

Where FACA applies

FACA does not apply to the Advisory Commission on Intergovernmental Relations, the Commission on Government Procurement, the National Academy of Sciences, the Central Intelligence Agency, the Federal Reserve System or the National Academy of Public Administration. It also does not apply to committees composed of full-time officers or employees of the federal government or to the first lady of the U.S.

An American Bar Association advisory committee to the Federal Judiciary that concerns candidates for federal judicial appointments is not an advisory committee under FACA.⁷⁵ Because the committee was not formed by the federal government, not controlled by the Justice Department and received no federal funds, the U.S. Supreme Court held it was not “utilized” as an advisory committee. This decision led to an interpretation that a committee that prepared work product relied upon by a federal agency is an advisory committee under FACA.⁷⁶

FACA does not extend to a committee’s activities beyond its advice to the executive branch.

How to enforce FACA

Unlike FOIA or the Sunshine Act, FACA does not provide an explicit right to sue within the law itself. However, courts have recognized a right of action through lawsuits brought under the Administrative Procedures Act. A complaint for a FACA violation should describe an agency’s noncompliance and the relief requested in the suit.

The Government in the Sunshine Act

How the Sunshine Act works

The Sunshine Act is crucial for journalists who cover national issues. It applies to the same executive branch agencies covered by FOIA, such as the Environmental Protection Agency and the Federal Communications Commission. Since Congress does little to force agencies to comply with the Act’s requirements, journalists operate as government watchdogs to oversee enforcement of the Act. Because they rarely learn of agency meetings beforehand, they often must depend on meeting transcripts required to be kept by the agency rather than on information actually obtained at the meetings.

The open meeting requirement of the Act mandates that, except as provided in the Act’s 10 exemptions, “every portion of every meeting of an agency shall be open to public observation.”

Congress requires agencies to follow a specific procedural process to close or properly open a meeting. To comply with the Act’s openness requirement, an agency must publicly announce the time, place and subject matter of the open meeting at least one week prior to the meeting date. The agency must submit that



At this 2004 public meeting of the Dietary Guidelines Advisory Committee, members Dr. Janet King, center, of the Children's Hospital Oakland Research Institute in Oakland, Calif., and Kathryn McMurray, left, of the Department of Health and Human Services, conferred on a revised food pyramid to guide Americans' eating habits. AP Photo by Linda Spillers

information to the *Federal Register* for publication immediately following public announcement.

In practice, it is unclear what Congress meant when it required that agencies make a “public announcement”; different agencies interpret it in different ways. For example, the Federal Trade Commission posts notices at its office, records the information at a specified voice mail system that journalists and the public can call, publishes notice in the *Federal Register* and maintains a mailing list to notify interested persons by mail. On the other hand, the Environmental Protection Agency sends notice to the *Federal Register* and considers the requirement met. The *Federal Register* is accessible online at www.gpoaccess.gov/fr/.

To close a meeting, a majority of the agency membership must vote to do so under one of the Act's exemptions. Within one day, the agency must publicize this vote. Next, the agency must submit to the *Federal Register* the time, place and subject matter of the meeting along with an indication that the meeting will be closed. The agency's chief legal officer must also publicly certify that he thinks the meeting is closed properly under an appropriate exemption. After the meeting, the agency must retain a transcript, unless the meeting is closed under Exemptions 8, 9(a) or 10, in which case a set of detailed minutes will meet the requirement. The agency must promptly make public the portions of the transcript not exempted. If a court finds the agency improperly closed a meeting, the agency may need to release a full transcript to the public.⁷⁷

If an agency is not subject to FOIA, then it is not subject to the Sunshine Act.⁷⁸ The Sunshine Act does not require an agency to hold meetings for all the decisions it makes; rather, only when an agency hosts a meeting must it be open to the public.⁷⁹

What is an “Agency?”

Under the statutory text, an “agency” is each authority of the United States:

headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the president with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of that agency.

An agency does not include: Congress, the federal courts, governments of U.S. territories, the government of the District of Columbia, agencies composed of representatives of the parties to the disputes determined by the agencies, courts martial and military commissions, or military authority exercised in the field in times of war. In addition, the term “agency” does not include certain government-created financial committees.

Without express exclusion by Congress, a collegial body is not exempt from the Sunshine Act, even if the agency produces “statutory directives inconsistent with the Act's public meeting requirements.”⁸⁰

If a collegial body's "sole function is to advise and assist the President," it is not an "agency" under the Act.⁸¹

If members were not appointed by the president to serve on a board, the board cannot be an "agency."⁸²

Finally, subdivisions of federal agencies, such as executive boards or specific committees, are also subject to the open meeting requirement. However, the rule applies only if the subdivisions are divisions of the collegial body, not boards or committees staffed by outsiders.⁸³

What is a "Meeting?"

The Act defines a meeting as:

the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.

In addition, the Supreme Court added language to the definition of "meeting" in 1984, expanding the definition to include discussions that "effectively predetermine official actions."⁸⁴ Essentially, if enough members of an agency who could pass a vote meet to discuss issues the agency is currently investigating or likely will be investigating, the gathering qualifies as a "meeting" under the Act and can be closed only under a statutory or judicially created exemption.

A "meeting" under the Act does not include a meeting at which only the scheduling of a future meeting is discussed.⁸⁵ "Notational voting" has become an end run around the Act — an agency can take a paper vote without constituting a meeting.⁸⁶

How to enforce the Sunshine Act

Journalists may sue in federal court if an agency has violated either the openness or closure requirements. They can also file suit to remind federal agencies to follow the law. The statute provides any person a right to sue in federal district court. Journalists may use this provision to seek a declaration that an agency is violating the Act, to stop an offending practice within an agency or to force the agency to open meetings. Journalists can also use the federal court system to demand that an agency turn over meeting transcripts. Other discretionary relief may be available under the statute.

Legal action must be brought prior to a scheduled meeting or within 60 days after the meeting occurs.

Exemptions to opening meetings under the Sunshine Act

The Sunshine Act includes 10 exemptions or reasons that the government can refuse to open an agency meeting. Unlike the exemptions to FOIA, there has been very little interpretation of these exemptions in the courts. Most interpretation varies based on individual agency regulations and practices.

Except where an agency finds that the public interest requires otherwise, agencies may close meeting portions "where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to:

(1) Disclose matters ordered confidential by executive order and properly classified as such on the basis of national defense or foreign policy;

(2) Relate solely to internal personnel rules and practices of the agency;

(3) Disclose matters exempted by statute, "provided that 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;

(4) Disclose trade secrets;

(5) Involve criminal accusation or official censure;

(6) Constitute a "clearly unwarranted invasion of personal privacy";

(7) Disclose investigatory records that might interfere with enforcement proceedings, deprive a person of due process, disclose a confidential source, disclose investigative procedures, or endanger the life and safety of law enforcement personnel;

(8) Disclose information regarding regulation or supervision of financial institutions;

(9) Disclose information the premature disclosure of which would (a) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to lead to significant financial speculation in currencies, securities, or commodities, or significantly endanger the stability of any financial institution; or (b) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action;

(10) Specifically concern the agency's issuance of a subpoena, the agency's participation in a civil action, conduct relating to a proceeding of a "particular case of formal agency adjudication," or conduct relating to an agency determination on the record after the opportunity for a hearing."

Courts have most often clarified Exemptions 9(b) and 10. Plaintiffs in these cases have included media organizations, other agencies, private corporations and public interest groups.

Exemption 9(b)

Exemption 9(b) is similar to FOIA's Exemption 5, which exempts internal memos and policy discussions.⁸⁷ However, the FOIA exemption allows closure of "pre-decisional deliberations," which Congress chose not to exempt from the Sunshine Act requirements.⁸⁸

A 9(b) exemption under the Sunshine Act must be analyzed by reference to four concrete examples provided in the House and Senate reports. These examples are an agency: (1) considering an embargo on foreign goods; (2) discussing whether to approve a proposed merger; (3) proposing its strategy for an upcoming collective bargaining with its employees; and (4) contemplating a purchase of real property.⁸⁹

Exemption 10

The most litigated exemption is Exemption 10, which prohibits disclosure of agency participation in civil litigation, conduct involving a particular case of agency adjudication, or conduct otherwise involving a determination on the record after an opportunity for a hearing. Exemption 10 "serves to facilitate the candid exchange of views between client and counsel necessary for effective participation in adversary proceedings."⁹⁰ Closure under Exemption 10 may also be proper when the closed matter is "outside of the actual hearing process," but "clearly" concerns it.⁹¹

In addition, when the agency is required to adjudicate matters, its deliberations should be protected from disclosure under Exemption 10 as a court's would be.⁹²

While an agency may close a portion of a meeting under Exemption 10, the agency may not use the closed portion as an "umbrella to shield from public scrutiny all other topics."⁹³

The Privacy Act

Amid the passage of open meetings and open records laws, the federal government also recognized a citizen's right to avoid improper distribution of data it keeps about them. The 1974 Privacy Act also allows citizens to find out what information the government keeps on them, primarily in order to ensure its accuracy.

How the Privacy Act works

The Privacy Act, like FOIA, is relatively simple to use. Identify the agency that you think may have records about you — such as the FBI, CIA or IRS. Send a request letter giving the agency enough information so it can be sure of your identity and know which files to search. (See the sample letter on page 35.)

For broadest coverage, a request for your own records should invoke both the Privacy Act and FOIA. Agencies cannot rely on exemptions in the Privacy Act to withhold information that would otherwise be available under FOIA. And if a FOIA exemption may apply to a record otherwise available under the Privacy Act, that record must be released under the Privacy Act.

Also, because the Privacy Act only entitles you to see records contained within a “system” of records, FOIA may provide broader access to records. For instance, the Privacy Act does not entitle a requester to have an electronic name search made, but FOIA requires agencies to search electronic as well as paper records in responding to a FOIA request.

It is important to note that the Privacy Act prohibits executive branch agencies from sharing certain personal information about other people. In fact, the Privacy Act is frequently used to deny FOIA requests for information about individuals.

You can request that the agency search its central files in Washington, D.C., as well as regional and local offices throughout the country. FBI headquarters in Washington, D.C., however, will not honor requests for searches of field office files. If you think one of the FBI's 49 field offices has records about you, you must make a separate Privacy Act request directly to that field office.

Unlike FOIA, the Privacy Act does not permit agencies to charge anyone for the time it takes to search for requested records. Duplication fees are charged, however. These are normally at the rate of between 3 and 25 cents per page.

The Privacy Act does not require agencies to process your request within 20 business days, as does FOIA. However, under guidelines issued by the Office of Management and Budget, agencies “should” acknowledge receipt of Privacy Act requests within 10 business days, advising whether the request will be granted, and provide access to the records within 30 business days.⁹⁴

Federal agencies have different requirements for what type of proof of identification must be submitted by Privacy Act requesters. Generally, you can meet all agency requirements, including those of the FBI, by stating your full name, Social Security number and date and place of birth, and having your signature on the request letter notarized. You are not required to have a notary. You may instead write that you swear that you are the undersigned “under penalty of perjury.” It may also be helpful to enclose copies of a standard piece of identification, such as a birth certificate or driver's license.

In addition, you may want to provide other names and nicknames you have used, your history of foreign travel, past home addresses, periods of government employment, participation in political groups, demonstrations, etc. Decide for yourself how much of this type of information you want to provide.

One provision of the Privacy Act of special interest to journalists, authors and scholars prohibits federal agencies from maintaining any records “describing how any individual exercises rights guaranteed by the First Amendment” unless done under authorization of a statute or within the scope of an “authorized law enforcement activity.”⁹⁵

There have been few court cases to date interpreting this provision. It appears, however, that this law prohibits the government from all unnecessary monitoring of the professional activities of members of the press, as well as authors, scholars and researchers. If the government is found to maintain these types of records unlawfully, “in such a manner as to have an adverse effect on an individual,” the Privacy Act permits that individual to file a civil suit against the agency and, in some cases, recover monetary damages and attorney fees.

Journalists needing assistance using the Privacy Act to request records should contact the Reporters Committee at 1-800-336-4243 or by e-mail at hotline@rcfp.org.

How Privacy Act lawsuits affect journalists

When information held by an executive branch agency is made public that “outs” otherwise private citizens, those citizens have a claim against the government for releasing into the public sphere what they believe to be private information about themselves. Journalists often rely on confidential government sources to obtain and report information of public interest that can concern otherwise private individuals, and when those private persons need ammunition for their lawsuits, they may well subpoena reporters to name names.

Nuclear scientist Wen Ho Lee used the Privacy Act to sue for damages after his name was leaked in connection to alleged spying for the Chinese government before any charges had been filed against him. Lee was never charged with any crimes related to espionage and pled guilty only to mishandling of information. Five media organizations agreed to pay him \$750,000, in conjunction with a government settlement of \$895,000, to avoid reporters having to reveal the confidential sources they relied on. Six reporters had been ordered to give testimony about their sources.

In another case, former Army scientist Steven Hatfill's name was leaked to the press as a “person of interest” in the investigation of the 2001 anthrax attacks. In 2003, Hatfill sued under the Privacy Act over repeated leaks of investigative details in the case, also subpoenaing at least 13 journalists to reveal the names of government sources. Hatfill was ultimately cleared and settled with the government in 2008 for \$5.8 million.

The most recent such case involves former U.S. Attorney Richard Convertino, whose name was leaked to the press after the Department of Justice investigated him for alleged misconduct during a Detroit terrorism trial. Convertino sued the Department of Justice under the Privacy Act and sent a subpoena to *Free Press* reporter David Ashenfelter. The reporter refused to testify, arguing that both the First Amendment and the Fifth Amendment privilege him from having to reveal his sources. As of early 2009, Convertino's attorneys were seeking a contempt order against Ashenfelter for his refusal to testify, but the judge had not yet ruled.

Journalists who are subpoenaed in Privacy Act lawsuits should consult an attorney for advice. They may also call the Reporters Committee for assistance at 1-800-336-4243.

Endnotes

- 1 FOIA appears in the United States Code at 5 U.S.C. § 552.
- 2 Memorandum from the Office of the Attorney General to the Heads of Departments and Agencies (Oct. 12, 2001).
- 3 Memorandum from the Office of the Attorney General to the Heads of Departments and Agencies (Oct. 4, 1993).
- 4 The Corporation for Public Broadcasting claims it is not covered by FOIA. However, corporation spokespersons say FOIA requests received by the corporation are voluntarily processed in accordance with FOIA.
- 5 *Forsham v. Harris*, 445 U.S. 169 (1980).
- 6 The Reporters Committee spent a year researching the issue of access to military court dockets and proceedings and released a comprehensive white paper and a reporter's guide available at: www.rcfp.org/militarydockets
- 7 *Bureau of National Affairs v. Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984).
- 8 *Wolfe v. Department of Health and Human Services*, 711 F.2d 1077 (D.C. Cir. 1983).
- 9 *Zemansky v. Environmental Protection Agency*, 767 F.2d 569, 574 (9th Cir. 1985).
- 10 44 U.S.C. § 4101(a)(1).
- 11 Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3248 (1986).
- 12 Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012 (1987).
- 13 *Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), cert. denied, 494 U.S. 1029 (1990).
- 14 See *Nat'l Security Archive v. Dep't of Defense*, above.
- 15 Memorandum from Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice, to the Heads of Federal Agencies (Apr. 2, 1987).
- 16 Director of Public Affairs, U.S. Department of Justice, Room 1128, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530
- 17 *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976).
- 18 28 U.S.C. § 2401(a). The general statute of limitations for civil suits against the federal government is six years.
- 19 28 U.S.C. § 1657.
- 20 *Vaughn v. Rosen (II)*, 523 F.2d 1136 (D.C. Cir. 1975).
- 21 Executive Order No. 12,958, 3 C.F.R. 333 (1995).
- 22 Executive Order No. 13,292, titled "Further Amendment to Executive Order No. 12,958, as Amended, Classified National Security Information," 68 Fed. Reg. 15,315 (March 28, 2003).
- 23 *Associated Press v. Dep't of Defense*, 462 F.Supp.2d 573 (S.D.N.Y. 2006).
- 24 *Phillippi v. Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976).
- 25 32 CFR 2001.33(f)
- 26 *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976).
- 27 Protecting Vulnerability Assessments through Application of Exemption 2, FOIA UPDATES, Vol. X, No. 3 (1989).
- 28 *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003); *Coastal Delivery Corp. v. U.S. Customs Service*, 272 F. Supp. 2d 958 (C.D. Cal. 2003).
- 29 *Moayeddi v. U.S. Customs & Border Prot.*, 510 F. Supp. 2d 73 (D.D.C. 2007); *Elec. Privacy Info. Ctr. v. Dep't of Homeland Security*, No. 04-1625, 2006 U.S. Dist. LEXIS 94615 (D.D.C. Jan. 23, 2007).
- 30 *Maricopa Audubon Society v. U.S. Forest Serv.*, 108 F.3d 1082 (9th Cir. 1997) and *Audubon Soc'y v. U.S. Forest Service*, 104 F.3d 1201 (10th Cir. 1997).
- 31 *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 670 F.2d 1051 (D.C. Cir. 1981).
- 32 50 U.S.C. § 402.
- 33 CIA Information Act of 1984, Pub. L. No. 98-477, 98 Stat. 2009 (1984).
- 34 50 U.S.C. § 403(g).
- 35 50 U.S.C. § 40c-53 (2007) (exempting the National Reconnaissance Office), 50 U.S.C. § 403-5c (exempting the National Geospatial Agency, formerly the National Imagery and Mapping Agency); 50 U.S.C.S. § 432c (exempting the Defense Intelligence Agency); 50 U.S.C.S. § 432b (exempting the National Security Agency).
- 36 *American Jewish Congress v. Kreps*, 574 F.2d 624 (D.C. Cir. 1978).
- 37 *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988).
- 38 49 U.S.C. § 1504; see S. Rep. No. 1178, 94th Cong., 2d Sess. 25 (1976).
- 39 *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 960 F.2d 105 (9th Cir. 1992).
- 40 Pub. L. No. 98-477, 98 Stat. 2209, § 2(c) (amending subsection (t) of the Privacy Act, 5 U.S.C. § 552a(t)).
- 41 26 U.S.C. § 6103; *Zale v. Internal Revenue Serv.*, 481 F. Supp. 486 (D.D.C. 1979).
- 42 Fed. R. Crim. P. 6(e).
- 43 *Fund for Constitutional Gov't v. Nat'l Archives & Records Service*, 485 F.Supp 1 (D.D.C. 1978), *aff'd in part, rev'd in part*, 656 F.2d 856 (D.C. Cir. 1981).
- 44 *Hornbostel v. Department of the Interior*, 305 F. Supp. 2d 21 (D.D.C. 2003).
- 45 41 USC § 253(b)(m).
- 46 6 USC § 133.
- 47 *Pub. Citizen Health Research Group v. U.S. Food and Drug Admin.*, 704 F.2d 1280 (D.C. Cir. 1983).
- 48 *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).
- 49 *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992).
- 50 See, e.g., *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F. 3d 1182 (D.C. Cir. 2004).
- 51 *Dep't of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1 (2001).
- 52 *Fed. Open Market Comm. v. Merrill*, 443 U.S. 340 (1979).
- 53 *U.S. v. Weber Aircraft Co.*, 465 U.S. 792 (1983).
- 54 See *Dep't of Interior v. Klamath Water Users Protective Assn.*, above.
- 55 *Judicial Watch, Inc. v. Department of Energy*, 412 F. 3d 125 (D.C. Cir. 2005).
- 56 *New York Times v. Nat'l Aeronautic and Space Ass'n*, 920 F.2d 1002 (D.C. Cir. 1990)(en banc).
- 57 5 C.F.R. § 293.311.
- 58 *Summers v. U.S. Dep't of Justice*, 999 F.2d 570 (D.C. Cir. 1993).
- 59 *Dep't of Justice v. Reporters Comm.*, 489 U.S. 749 (1989).
- 60 See *Dep't of Justice v. Reporters Comm.*, above.
- 61 *Nat'l Archives and Records Admin. v. Favish*, 124 S.Ct. 1570 (2004).
- 62 Electronic Freedom of Information Act, Public Law No. 104-231 (1996).
- 63 S. Rep. No. 104-272 (1996) (Additional views of Sen. Leahy).
- 64 *Dep't of State v. Ray*, 502 U.S. 164 (1991).
- 65 *News-Press v. U.S. Dept. of Homeland Sec.*, 489 F.3d 1173 (11th Cir. 2007).
- 66 *Forest Guardians v. Fed. Emergency Mgmt. Agency*, 410 F. 3d 1214 (10th Cir. 2005).
- 67 *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615 (1982).
- 68 *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), cert. denied, 124 S.Ct. 1041 (2004).
- 69 See *Nat'l Archives & Records Admin. v. Favish*, above.
- 70 See *Nat'l Archives & Records Admin. v. Favish*, above.
- 71 *Dep't of Justice v. Landano*, 508 U.S. 165 (1993).
- 72 *Kiraly v. Fed. Bureau of Investigation*, 728 F.2d 273 (6th Cir. 1984).
- 73 See *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, above; see also *Coastal Delivery Corp. v. U.S. Customs Serv.*, above.
- 74 *American Civil Liberties Union v. Dep't of Defense*, 543 F.3d 59 (2nd Cir. 2008).
- 75 *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 467 (1989) (holding that the ABA's Standing Committee on the Federal Judiciary is not an advisory committee "utilized by" the Department of Justice and it would be unconstitutional to apply FACA to that committee).
- 76 *Animal Legal Defense Fund v. Shalala*, 104 F.3d 424 (D.C. Cir. 1997), reh'g en banc denied, 114 F.3d 1209 (D.C. Cir. 1997) (finding that a National Academy of Sciences committee was relied upon by a federal agency; subsequently Congress amended FACA to exempt the National Academy of Sciences).
- 77 *Pan Am. World Airways, Inc. v. Civil Aeronautics Bd.*, 684 F.2d 31, 31 (D.C. Cir. 1982) (finding that release of transcripts was the proper remedy under the Act).
- 78 *Rushforth v. Council of Economic Advisers*, 762 F.2d 797, 798 (D.C. Cir. 1978) (finding Congress did not intend an agency to meet to discuss trivial items).
- 79 *Communications System, Inc. v. Fed. Communications Comm'n*, 595 F.2d 797, 798 (D.C. Cir. 1978) (finding Congress did not intend an agency to meet to discuss trivial items).
- 80 *Energy Research Found. v. Defense Nuclear Facilities Safety Bd.*, 917 F.2d 581, 583 (D.C. Cir. 1990) (finding the safety board was an agency under the Act despite contrary recommendations).
- 81 H.R. Rep. No. 1380, at 14-15 (1974) (quoting from *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (ruling under FOIA, from which the Sunshine Act definitions originate)).
- 82 *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 240 (D.C. Cir. 1981).
- 83 *Hunt v. Nuclear Regulatory Comm'n*, 611 F.2d 332, 336 (10th Cir. 1979) (finding the Act did not apply because no member of the commission was a member of the board).
- 84 *Federal Commc'ns Comm'n v. I.T.T. World Commc'ns, Inc.*, 466 U.S. 463, 471 (1984) (finding informal conferences were not meetings of "an agency" for the Act's purposes).
- 85 *Wash. Ass'n for Television & Children v. Federal Commc'ns Comm'n*, 665 F.2d 1264, 1272 (D.C. Cir. 1981).
- 86 *AMREP Corp.*, 768 F.2d at 1178.
- 87 *Wilkinson v. Legal Services Corp.*, 865 F.Supp. 891, 895 (D.D.C. 1994) (finding agency's actions were not protected by Exemption 9(b)) (overruled on other grounds)).
- 88 See *Wilkinson v. Legal Services Corp.*, above.
- 89 See *Wilkinson v. Legal Services Corp.*, above.
- 90 *Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulatory Comm'n*, 789 F.2d 499, 503 (D.C. Cir. 1986) (finding agency properly closed meeting under Exemption 10 even though the involved litigation had already concluded).
- 91 *Shurberg Broad. of Hartford, Inc. v. Fed. Communications Comm'n*, 617 F. Supp. 825, 830 (D.D.C. 1985).
- 92 *Time, Inc. v. U.S. Postal Service*, 667 F.2d 329, 334 (2d Cir. 1981) (holding that Exemption 10 allowed for the closure of a meeting at which the United States Postal Service board of governors considered recommendations from the postal rate commission).
- 93 *Philadelphia Newspapers, Inc. v. Nuclear Regulatory Comm'n*, 727 F.2d 1195, 1200 (D.C. Cir. 1984) (finding entire meeting could not be closed under a narrowly construed Exemption 10).
- 94 See *Dep't of Justice v. Reporters Comm.*, above.
- 95 See *Nat'l Archives & Records Admin. v. Favish*, above.

Sample materials

FOIA Request Letter

Your address
Day time phone number
Date

Freedom of Information Office
Agency
Address

FOIA Request

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of *(here, clearly describe what you want. Include identifying material, such as names, places and the period of time about which you are inquiring. If you think it will help to explain what you are looking for, attach news clips, reports and other documents describing the subject of your research.)*

(Optional:) I would like to receive the information in electronic *(or microfiche)* format.

I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed $\$(state amount)$. However, please notify me prior to your incurring any expenses in excess of that amount.¹

(Suggested request for fee benefit as a representative of the news media:) As a representative of the news media I am only required to pay for the direct cost of duplication after the first 100 pages. Through this request, I am gathering information on *(subject)* that is of current interest to the public because *(give reason)*. This information is being sought on behalf of *(give the name of your news organization)* for dissemination to the general public. *(If a freelancer, provide information such as experience, publication contract, etc., that demonstrates that you expect publication.)*

(Optional fee waiver request:) Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities.²

If my request is denied in whole or part, please justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as a journalist *(or author, or scholar)* and this information is of timely value, I would appreciate your communicating with me by telephone, rather than by mail, if you have questions regarding this request.³

(If you are a reporter or a person who is "primarily engaged in disseminating information," and your request concerns a matter of "compelling need," a request for expedited processing may be honored. If so, include the next three paragraphs.⁴)

Please provide expedited processing of this request which concerns a matter of urgency. As a journalist, I am primarily engaged in disseminating information.

The public has an urgent need for information about *(describe the government activity involved)* because *(establish the need for bringing information on this subject to the public's attention now.)*

I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief. I look forward to your reply within 20 business days, as the statute requires.

Thank you for your assistance.

Very truly yours,

Your signature

An interactive version of this letter is available on our Web site: www.rcfp.org/foialetter

1. Agencies may not consider your request properly filed unless you state something about the fees — either your willingness to pay or your request for a fee waiver. If you set an amount up front, the agency will begin to process your request, and you can retain some control over the ultimate amount you will have to pay.
2. You may wish to address each criterion for waiver listed on pages 8 and 9, except that, as a representative of the news media you need not show how you will use the information to contribute to public understanding or that its use is noncommercial. An author may show how ultimately the information will be available to the public.
3. It is always a good idea to call the agency's FOIA office several days after your request is mailed, to be sure of its arrival and to talk directly with the officer processing your request and obtain your tracking number. Quite often you can resolve any minor problems concerning your request at that time and avoid delays.
4. In addition: If your request is to the Department of Justice or any of its components, such as the FBI, and your request concerns a matter of "widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," you should explain why your request meets these criteria in a request for expedited processing addressed to the Director of Public Affairs, U.S. Department of Justice, Room 1128, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001. At the end of this request you should state: I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

FOIA Appeal Letter

Your address
Daytime phone number
Date

Agency Administrator
Agency
Address

FOIA Appeal

Dear Administrator:

This is an appeal under the Freedom of Information Act, 5 U.S.C. § 552.

On *(date)* I made a FOIA request to your agency for *(brief description of what you requested)*. On *(date)*, your agency denied my request on the grounds that *(state the reasons given by the agency)*. Copies of my request and the denial are enclosed.

(When the agency delays:) It has been *(state number)* business days since my request was received by your agency. This period clearly exceeds the 20 days provided by the statute, thus I deem my request denied. A copy of my correspondence and the postal form showing receipt by your office are enclosed.

The information which I have requested is clearly releasable under FOIA and, in my opinion, may not validly be protected by any of the Act's exemptions.

(Here, insert legal and "public policy" arguments in favor of disclosure, if you wish.)¹

I trust that upon re-consideration, you will reverse the decision denying me access to this material and grant my original request. However, if you deny this appeal, I intend to initiate a lawsuit to compel disclosure.²

As I have made this request in the capacity of a journalist *(or author, or scholar)* and this information is of timely value, I would appreciate your expediting the consideration of my appeal in every way possible. In any case, I will expect to receive your decision within 20 business days, as required by the statute.

Thank you for your assistance.

Very truly yours,

Your signature

An interactive version of this letter is available on our Web site: www.rcfp.org/foialetter

1. You are not required to make legal or policy arguments to support your appeal; if you simply state "I appeal" the agency will review the documents and the justifications given in the original denial. However, it is usually a good idea to try to persuade them to release the information. See pages 13-23 for further information on any of the specific exemptions cited by the agency in their denial of your original request. The descriptions contained there should suggest arguments you can make to counter the agency's assertions.

2. Don't include this as an idle threat. But if you do intend to follow up with a lawsuit, say so. Often the agency will more closely consider its position when it knows it will have to defend it in court soon.

FOIA Complaint

UNITED STATES DISTRICT COURT
FOR *(the district where you are filing)*

YOUR NAME,)
)
 your complete address)
 your telephone number)
)
 Plaintiff,) Civil Action No. _____
 v.)
)
 NAME OF AGENCY)
 WITHHOLDING FILES,)
)
 agency address)
)
 Defendant

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, to order the production of agency records, concerning *(insert very brief description of what you requested)*, which defendant has improperly withheld from plaintiff.

2. This court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a) (4) (B).

3. Plaintiff, *(your name)*, is a news reporter *(or researcher, author, bist employed by (name of newspaper, station, university)* and is the requester of records which defendant is now withholding. Plaintiff has request information for use in a news story *(broadcast, book, etc.)* and prompt re of the information is *(essential to meeting a deadline for publication; important b the immediate public interest in this information, etc.)*¹

4. Defendant (name of agency) is an agency of the United States has possession of the documents that plaintiff seeks.

Page Two

5. By letter dated *(date)*, plaintiff requested access to *(brief summary of request)*. A copy of this letter is attached as Exhibit 1.

6. By letter dated *(date)*, plaintiff was denied access to the requested information on the grounds that it was exempt from disclosure under Exemption *(fill in the numbers)*, 5 U.S.C. §§ 552(b) *(fill in numbers)*. A copy of this letter is attached as Exhibit 2.

7. By letter dated *(date)*, plaintiff appealed the denial of this request. A copy of this letter is attached as Exhibit 3.

8. By letter dated *(date)*, plaintiff's appeal was denied. A copy of this letter is attached as Exhibit 4.

9. Plaintiff has a right of access to the requested informa- tion under 5 U.S.C. § 552(a) (3), and there is no legal basis for defen- dant's denial of such access.

WHEREFORE, plaintiff requests this Court:

- (1) Order defendant to provide access to the requested documents;
- (2) Expedite this proceeding as provided for in 28 U.S.C. § 1657;
- (3) Award plaintiff costs and reasonable attorneys fees in this ac- tion, as provided in 5 U.S.C. § 552(a) (4) (E); and
- (4) Grant such other and further relief as may deem just and proper.

Respectfully submitted,

Your signature _____
Your name
Your address

Dated: *(date)*

An interactive version of this letter is available on our Web site: www.rcfp.org/foialetter

1. Only include this material if it is factually relevant in your case. It will be necessary to prove "good cause" to convince the Court to expedite consid- eration of your case. If expedited processing is not necessary in your case, omit this sentence and paragraph (2) from the request for relief.

Sample Vaughn Motion

(may accompany your complaint)

UNITED STATES DISTRICT COURT
FOR *(the district where you have filed)*

YOUR NAME,

Plaintiff,

v.

AGENCY YOU ARE SUING,

Defendant.

PLAINTIFF'S MOTION TO COMPEL
PREPARATION OF A VAUGHN INDEX

Plaintiff *(your name)* moves this Court for an order requiring Defendant *(name of agency)* to provide within 30 days after service of the Complaint in this action, an itemized, indexed inventory of every agency record or portion thereof responsive to Plaintiff's request which Defendant asserts to be exempt from disclosure, accompanied by a detailed justification statement covering each refusal to release records or portions thereof in accordance with the indexing requirements of Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

Respectfully submitted,

Your signature

Name
Address

Dated: *(date)*

An interactive version
of this letter is available
on our Web site:
www.rcfp.org/foialetter

Sample Request Letter for your own files under FOIA and the Privacy Act

*Your address
Daytime phone number
Date*

FOIA/Privacy Act Office
*Agency
Address*

FOIA/Privacy Act Request¹

Dear FOIA/PA Officer:

Pursuant to both the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, I seek access to and copies of all records about me which you have in your possession.

To assist with your search for these records, I am providing the following additional information about myself: **full name, Social Security number, date and place of birth.** (Here also list whatever additional personal data you don't mind revealing to the agency, such as other names used, former places of residence, foreign travel, government and other employment, political activities, etc.)

If you determine that any portions of these documents are exempt under either of these statutes, I will expect you to release the non-exempt portions to me as the law requires. I reserve the right to appeal any decision to withhold information.

I agree to pay reasonable fees incurred in the copying of these documents up to the amount of \$(**amount**). If the estimated fees will be greater than that amount, please contact me by telephone before such expenses are incurred.

If you have any questions regarding this request, please contact me by telephone. Thank you for your assistance. I will look forward to receiving your prompt reply.

Very truly yours,

Your signature

*(You must have your
signature notarized)*

An interactive version of this letter is available on our Web site:
www.rcfp.org/foialetter

1. You may be entitled to additional information about yourself through the Privacy Act. When you are seeking personal information from government files, invoke both the Privacy Act and the Freedom of Information Act.

Statutes:

Freedom of Information Act

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects

a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, 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.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, 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. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity 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. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge

reduced below the fees established under clause (ii) 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 requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[D] Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the

findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(C) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the

agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are--

(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;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that 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;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) 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;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) 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; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending

at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any 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; and

(2) "record" and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA officer of each agency shall, subject to the authority of the head of the agency--

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

Government in the Sunshine Act

§ 552b. Open meetings

(a) For purposes of this section--

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly deter-

mines that such portion or portions of its meeting or the disclosure of such information is likely to--

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that 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;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose 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;

(9) disclose information the premature disclosure of which would--

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to

implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to the Congress regarding the following:

(1) The changes in the policies and procedures of the agency under this section that have occurred during the preceding 1-year period.

(2) A tabulation of the number of meetings held, the exemptions applied to close meetings, and the days of public notice provided to close meetings.

(3) A brief description of litigation or formal complaints concerning the implementation of this section by the agency.

(4) A brief explanation of any changes in law that have affected the responsibilities of the agency under this section.

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.



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Web site: www.rcfp.org

In addition to a Web version of this guide and an interactive FOIA request letter generator, our site includes our State Open Government Guide, our “Secret Justice” guides to openness issues in the state and federal courts, and much more.

Hotline: (800) 336-4243

Journalists with questions about FOIA or any aspect of media law can talk to our attorneys. We do not have the staff resources to provide assistance to non-journalists, but anyone engaged in distributing news to the public in any format should feel free to call us, or e-mail us at hotline@rcfp.org.