# FOIA and Open Meetings

# Learning Objectives for this Module

## Learn the policy rationales for open records and open meetings laws.

## Learn the basic structure of FOIA.

## Learn how the government handles requests for secret information.

## Learn how the Privacy Act and FOIA interact.

## Learn what is necessary to assure that a record about a private party will not be released under FOIA.

# Reading Assignment

## [Citizens Guide to the Freedom of Information and Privacy Acts 2012](http://biotech.law.lsu.edu/cases/adlaw/foia/Citizens-Guide-on-Using-FOIA.2012.pdf).

## For Open Meetings, pp.26-28. Also p.29 as another view of the Privacy Act: [The Reporters Committee for Freedom of the Press, Federal Open Government Guide 10th Ed (2009)](http://biotech.law.lsu.edu/cases/adlaw/foia/HOW2FOI.pdf)

# Issues to be addressed

## History - Excerpts from President Johnson’s Proclamation on the signing of the original act in 1967

### This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.

### At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available.

### As long as threats to peace exist, for example, there must be military secrets.

### A citizen must be able in confidence to complain to his Government and to provide information, just as he is -- and should be -- free to confide in the press without fear of reprisal or of being required to reveal or discuss his sources.

### Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure.

### Officials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions

## Basic Premise of the Freedom of Information Act

### The public, which includes anyone anywhere, should have access to information held by the federal government unless disclosing the information would injure public or private rights. An agency claim that information should not be released because it fits into an exempt category will be reviewed de novo by the district court. (As a trial de novo, the cases are reviewed by the district court rather than the circuit court.)

#### “However, we believe that a strong presumption against entering or maintaining confidentiality orders strikes the appropriate balance by recognizing the enduring beliefs underlying freedom of information laws: that an informed public is desirable, that access to information prevents governmental abuse and helps secure freedom, and that, ultimately, government must answer to its citizens. Neither the interests of parties in settling cases, nor the interests of the federal courts in cleaning their dockets, can be said to outweigh the important values manifested by freedom of information laws.” Pansy v. Borough of Stroudsburg, 23 F.3d 772, 792 (3rd Cir. 1994)

## Who uses FOIA?

### Reporters

### Businesses

### Lawyers

### NGOs

### Citizens

### Every foreign intelligence service and terrorist organization – there is a large industry centered around DC that will make FOIA requests for clients that wise to remain unnamed. There are probably a few that will take anonymous email requests paid by Bitcoin and returned as encrypted mail to offshore data havens.

## FOIA versus court ordered discovery.

### FOIA

#### The requester does not need any standing/interest in the information requested. There are no limitations on what may be requested, other than the statutory exemptions.

#### Much cheaper and does not require a lawyer.

### Discovery

#### Usually only in litigation – there are extraordinary procedures to preserve transient evidence, but otherwise you need to have filed a lawsuit, which requires both standing and a prima facie case before you can ask for discovery. You are limited to what will lead to admissible evidence and there additional limits on discovery from non-parties.

#### A key strategic limit is that you have to notice the opposing parties of all of your requests and they get copies of whatever you get. You can use FOIA to get information about potential litigation targets without tipping them off.

## The Scope of the FOIA

### The Federal Freedom of Information Act applies to documents held by agencies of the executive branch of the Federal Government. The executive branch includes cabinet departments, military departments, government corporations, government controlled corporations, independent regulatory agencies, and other establishments in the executive branch.

## Who is Exempted?

### The FOIA does not apply to elected officials of the Federal Government, including the President, Vice President, Senators, and Representatives.

#### Papers of ex-presidents are covered to some extent

#### The Presidential Records Act of 1978 governs preservation and control of papers after the term of office.

### The FOIA does not apply to the Federal judiciary and Congress.

## Private Persons

### FOIA does not apply to private parties or state and local agencies, even if they receive Federal contracts or grants.

### Shelby Amendment to the FOIA Regs (not in book)

#### Senator Shelby, at the urging of several business lobbies, successfully extended FOIA to information produced by federally funded research and in the hands of universities. Industry representatives pushed for these so they could attack university research data that agencies such as EPA used for setting pollution limits.

#### This has been limited somewhat by the regs implementing the amendments:

##### <http://biotech.law.lsu.edu/cases/adlaw/foia/R42983.pdf>

## Information or Records?

### The FOIA provides that a requester may ask for records rather than information - think paper, which was what the drafters had in mind. An agency is only required to look for an existing record or document. An agency is not obliged to create a new record to comply with a request. An agency is neither required to collect information it does not have, nor must an agency do research or analyze data for a requester.

### Computer Records

#### When records are maintained in a computer, an agency is required to retrieve information in response to a FOIA request.

##### The process of retrieving the information may result in the creation of a new document when the data is printed out on paper or written on computer tape or disk.

##### Since this may be the only way computerized data can be disclosed, agencies are required to provide the data even if it means a new document must be created.

#### As records are computerized, the distinction between discrete records and information is disappearing.

### Specificity

#### The law requires that each request must reasonably describe the records being sought. This means that a request must be specific enough to permit a professional employee of the agency who is familiar with the subject matter to locate the record in a reasonable period of time.

### Agency Organization of Records

#### What if you ask for all the records about toxic wastes 3 miles from a specific school and the agency only has the data by state and political subdivision?

#### How should you frame requests when you do not know the specific records you need?

## Categories of Requestors

### News and Educational

#### A request for information from a representative of the news media is not considered to be for commercial use if the request is in support of a news gathering or dissemination function.

#### A requester in this category who is not seeking records for commercial use can only be billed for reasonable standard document duplication charges.

### Commercial

#### The second category includes FOIA requesters seeking records for commercial use.

#### Commercial use is not defined in the law, but it generally includes profitmaking activities.

#### A commercial user can be charged reasonable standard charges for document duplication, search, and review.

### Everybody Else

#### People seeking information for personal use, public interest groups, and nonprofit organizations are examples of requesters who fall into the third group.

#### Charges for these requesters are limited to reasonable standard charges for document duplication and search. Review costs may not be charged.

### Small Requests

#### Small requests are free for a requester in the first and third categories. This includes all requesters except commercial users.

#### There is no charge for the first 2 hours of search time and for the first 100 pages of documents.

#### A noncommercial requester who limits a request to a small number of easily found records will not pay any fees at all.

## Making a Request

### Who do you send the request to?

#### There is no central clearinghouse where you can send a request to ask the government for everything about something or someone. (It is likely that NSA does have one of these, at least for people, but they do not share.)

#### You have to track down the agency and department that holds the information and address the letter to that units FOIA officer or to the head of the agency.

##### The envelope containing the written request should be marked ``Freedom of Information Act Request'' in the lower left-hand corner.

### Basic Elements of a Request

#### First, the letter should state that the request is being made under the Freedom of Information Act.

#### Second, the request should identify the records that are being sought as specifically as possible.

#### Third, the name and address of the requester must be included.

### Optional Items

#### Your phone number – email?

#### How much you are willing to pay

#### Why you should get a discount

#### The format you want

#### Reasons for expedited processing

### Fees

#### First, fees can be imposed to recover the cost of copying documents.

#### Second, fees can also be imposed to recover the costs of searching for documents.

#### Third, fees can be charged to recover review costs. Review is the process of examining documents to determine whether any portion is exempt from disclosure.

#### Fee Waivers

##### Fees must be waived or reduced 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.

### How Long Does the Agency Have?

#### Under the 1996 amendments to the FOIA, each agency is required to determine within 20 days (excluding Saturdays, Sundays, and legal holidays) after the receipt of a request whether to comply with the request.

#### The FOIA permits an agency to extend the time limits up to 10 days in unusual circumstances.

### What if They Ignore You?

#### However, as a practical matter, there is little that a requester can do about it. The courts have been reluctant to provide relief solely because the FOIA's time limits have not been met.

### Administrative Appeals of Denials of Documents or Fee Waivers

#### A requester may appeal the denial of a request for a document or for a fee waiver.

#### A requester may contest the type or amount of fees that were charged.

#### A requester may appeal any other type of adverse determination.

#### A requester can also appeal because the agency failed to conduct an adequate search for the documents that were requested.

## Judicial Appeal

### Where do you file?

#### A FOIA appeal lawsuit can be filed in the U.S. District Court in the district where the requester lives.

#### The requester can also file suit in the district where the documents are located or in the District of Columbia.

### What is the Standard for Review?

#### 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.

#### About the only de novo review in adlaw.

### When does the Court Defer to the Agency?

#### 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).

### How Does the Court Decide if the Document is Exempt?

#### In camera review

##### This prevents the plaintiff from being able to attack the claim because he has no information about the documents being withheld

#### Vaughn list (Vaughn v. Rosen, 484 F2d 820 (1974)

##### Agency must list and describe the documents and explain why it is claiming an exemption so that the requesting party can contest the application of the exception.

##### Most important for classified information.

#### The burden of justifying withholding documents is on the government. This makes these proceedings complicated and expensive for the government for the agencies if they are faced with a well-funded opponent. Justice Scalia's believed this would lead to a Taj Mahal of unintended consequences. These claims help clog DC district court.

## FOIA Exemptions

### The statute establishes 9 classes of documents that the agency **may** refuse to produce. This is a discretionary decision unless other law further restricts disclosure. For example, there are additional laws protecting trade secrets and classified materials. The problem arises when the agency is asked for information it holds about private parties. The private party could argue that the agency was acting illegally by releasing the documents. This is called reverse FOIA. (Chrysler Corp. v. Brown) The problem is that the agency has no duty under the statute to give the affected party notice of the pending release.

### E.O. 12600 was issued as a response to the Chrysler v. Brown. E.O. 12600 generally requires agencies to notify private parties who have given confidential commercial information to the government when the information has been requested under the FOIA. In addition, E.O. 12600 gives the person who provided the information a chance to explain to the agency why the information should be withheld. Like most executive orders, E.O. 12600 says that it is not intended to create any judicially enforceable private rights.

## Secret information

### Ordinarily, any proper request must receive an answer stating whether there is any responsive information, even if the requested information is exempt from disclosure. In some narrow circumstances, acknowledgement of the existence of a record can produce consequences similar to those resulting from disclosure of the record itself. For example, admitting the FBI has a record about a confidential informant would give away the identity of the informant. Most of the secret information is related to national security and is classified. This information cannot be released, but even admitting you have it could give away valuable information.

### The exclusions allow an agency to treat certain exempt records as if the records were not subject to the FOIA. An agency is not required to confirm the existence of these records. If these records are requested, the agency may respond that there are no disclosable records responsive to the request.

### Glomar Response

#### A "Glomar" response is an agency's express refusal even to confirm or deny the existence of any records responsive to a FOIA request. This type of response was first judicially recognized in the national security context. (Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (raising issue of whether CIA could refuse to confirm or deny its ties to Howard Hughes' submarine retrieval ship, the Glomar Explorer). Although the "Glomarization" principle originated in a FOIA exemption (1) case, it can be applied in cases involving other FOIA exemptions as well, in particular privacy exemptions (6) and (7)(C). A "Glomar" response can be justified only when the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information. (DOJ memo)

## The Exemptions

### Exemption 1.--Classified Documents

#### The first FOIA exemption permits the withholding of properly classified documents. Information may be classified in the interest of national defense or foreign policy. Classification is a pure executive decision, and is generally unappealable. The government will often refuse to confirm or deny if the record even exists.

### Exemption 2.--Internal Personnel Rules and Practices

#### The second FOIA exemption covers matters that are related solely to an agency's internal personnel rules and practices. Information relating to personnel rules or internal agency practices is exempt if it is a administrative matter that does not affect the public. An internal administrative manual can be exempt if disclosure would risk circumvention of law or agency regulations. In order to fall into this category, the material will normally have to regulate internal agency conduct rather than public behavior - IRS Audit guidelines is a classic example.

### Exemption 3.--Information Exempt Under Other Laws

#### The third exemption incorporates into the FOIA other laws that restrict the availability of information.

##### (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. IRS records are one example

#### This is the real exemption to FOIA - the agency cannot waive non-FOIA protections

### Exemption 4.--Confidential Business Information

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

### Exemption 5.--Internal Government Communications

#### The FOIA's fifth exemption applies to internal government documents that would not be available in litigation against the agency. It includes lawyer client privilege and the "deliberation process or executive privilege" which is the right of government decisionmakers to get advice without fear of it becoming public.

### Exemption 6.--Personal Privacy

#### The sixth exemption covers personnel, medical, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

### Exemption 7.--Law Enforcement

#### The seventh exemption allows agencies to withhold law enforcement records in order to protect the law enforcement process from interference.

### Exemption 8.--Financial Institutions

#### The eighth exemption protects information that is contained in or related to examination, operating, or condition reports prepared by or for a bank supervisory agency such as the Federal Deposit Insurance Corporation, the Federal Reserve, or similar agencies.

### Exemption 9.--Geological Information

#### The ninth FOIA exemption covers geological and geophysical information, data, and maps about wells.

## The Privacy Act - Access to Your Own Records

### The Privacy Act of 1974 provides safeguards against an invasion of privacy through the misuse of records by Federal agencies. In general, the act allows a citizen to learn how records are collected, maintained, used, and disseminated by the Federal Government. The act also permits an individual to gain access to most personal information maintained by Federal agencies and to seek amendment of any inaccurate, incomplete, untimely, or irrelevant information.

### A request for access under the Privacy Act can only be made by the subject of the record. The only exception is for a parent or legal guardian who may request records on behalf of a minor or a person who has been declared incompetent. It is a crime to knowingly and willfully request or obtain records under the Privacy Act under false pretenses.

### In simple terms, you request records about yourself under the Privacy Act and records about others under FOIA.

## Open Meetings Laws

### Sunshine/Open Meeting Acts

#### Why have these laws?

#### What are the benefits?

#### What are the costs?

#### What does a Baton Rouge School Board meeting look like?

#### How does it affect University hiring?

#### State business development?

### State vs. Federal Law

#### State laws generally allow greater access than the federal law, however the LA law has been interpreted to block access to almost all of the records dealing with the governor’s office.

### What is a meeting?

#### Why is this a critical definition?

#### The Moberg case found that the critical definition was whether there was a quorum present of either the governing body or its committees, unless it was a social or chance gathering.

#### Could you set the quorum very high, assuming you could ever get them together when you needed to act?

### How do agencies try to get around Sunshine acts?

#### Work off written documents - remember the exemption for intra-agency memos?

#### Meet in groups that are smaller than a quorum.

#### Have staff do the recommendations, and then rubber stamp the results

### What do you tell your clients?

#### Comply with notice

#### Do not make the decisions at the background sessions

#### Clearly separate them, at least in time.

### Sanctions

#### You can get attorney's fees if you prevail on a claim that a meeting should have been open

#### Federal law does not allow the court to overturn an agency action because a meeting was improperly closed

#### Some states do allow this, plus providing other penalties

# Evaluation Questions

## FOIA

### What is the policy behind FOIA?

### How do you request documents under the FOIA?

### What is the standard for judicial review of denials of FOIA requests?

### How does this support FOIA policy?

### When will the court defer to the agency in the review of FOIA requests?

### How is FOIA different from discovery?

### Why would you use FOIA instead of discovery?

### What does it mean to say that FOIA is about access to records and not to information? How is this changing in the electronic world?

### If a document is covered by one of the nine exceptions, under what circumstances may the agency still release the document?

#### What is necessary to assure that a document will not be released under FOIA?

#### What is reverse FOIA? (*Chrysler* case)

#### What does Ex. Order 12600 require?

#### Why is this critical if a company wants to bring a reverse FOIA challenge?

### What is a *Glomar* response and why is it necessary?

## Sunshine Acts and Open Meetings

### What is the purpose of requiring agency meetings for decisionmaking to be open to the public?

### How can this make it difficult for the agency to conduct business, especially public bodies with elected members such as city councils.

### What are the basic requirements of a typical open meetings act?