



BOSTON | HARTFORD | STAMFORD | NEW YORK | NEWARK | EAST BRUNSWICK | PHILADELPHIA | WILMINGTON | WASHINGTON, DC

## An Overview of the Freedom of Information Act



Bonnie A. Vanzler, Esq.  
NCMA Boston Chapter  
55th Annual March Workshop  
March 16, 2016

# Agenda

- ◆ FOIA statute and policy
- ◆ Statutory exemptions and exclusions
- ◆ Procedures for making and responding to requests
- ◆ Agency appeals and federal FOIA litigation
- ◆ Examples of state public records laws
- ◆ Recent developments regarding a push for transparency in public records
- ◆ Making strategic use of FOIA requests
- ◆ Links to resources, reports, and articles

# The Federal FOIA Statute: 5 U.S.C. § 552

- ♦ **(a)**: “Each agency shall make available to the public information as follows ...”
  - **(a)(1)**: Sets forth items to be published in Federal Register
    - Proactive disclosure of, e.g., description of agency organization, rules of procedure, and general policies
  - **(a)(2)**: Lists items to be made “available for public inspection and copying”
    - Proactive disclosure in the “FOIA Reading Room” of, e.g., final opinions and orders, specific policy statements, and records that “have become or are likely to become the subject of subsequent requests for substantially the same records”
  - **(a)(3)**: Permits requests for records that have not already been made available under (a)(1) and (a)(2)
    - Responsive records to be made “promptly available”

# What Government entities are subject to FOIA?

- ◆ (f)(1): “**Agency**”
  - Any executive department, military department, Government corporation, Gov’t controlled corporation, or other establishment in the Executive Branch, or any independent regulatory agency
  - Also includes components within the Executive Office of the President that “wield substantial authority independent of the President” (e.g., Office of Management and Budget)
- ◆ FOIA does not apply to:
  - State and local governments, foreign governments, municipal entities, courts and other entities of the Judicial Branch, Congress, President, Vice President, Chief of Staff, and presidential transition teams
  - Private contractors/grantees receiving federal awards

# What information is subject to disclosure under FOIA?

- ◆ (f)(2): “**Record**”
  - (A): Any information that would be an agency record subject to the requirements FOIA when maintained by an agency in any format, including electronic format
    - Covers documents made or received by an agency
    - Includes papers, reports, letters, email, films, computer tapes, photographs, sound recordings, etc.
    - Does not cover physical objects and tangible evidence that cannot be reproduced
  - (B): Any info under (f)(2)(A) that is maintained for agency by an entity under Government contract, for purposes of records management
- ◆ Question often is whether agency has “control” over the record
- ◆ FOIA does not apply to “personal records” of agency employees
  - Factors considered: (i) purpose document was created for; (ii) degree of integration into agency’s filing system; and (iii) extent used to conduct agency business

# Who may submit a records request under FOIA?

- ◆ **(a)(3)(A)**: General requirement to make records available to “any person” (includes U.S. citizens & foreign nationals)
- ◆ “Person” not defined under FOIA, but defined under the Administrative Procedures Act as:
  - “an individual, partnership, corporation, association, or public or private organization other than an agency”
- ◆ An attorney or other representative may make a request on behalf of “any person”
- ◆ States and state agencies have been permitted to make FOIA requests (but not federal agencies)
- ◆ **(a)(3)(E)**: Requests for intelligence records cannot be made by foreign governments, international government organizations, or their representatives

# Which agency officials are charged with responsibilities under FOIA?

- ♦ (j), (k): Each agency must designate **Chief FOIA Officer**, a senior official having responsibility for:
  - Ensuring efficiency and compliance with FOIA
  - Monitoring and reporting FOIA performance
  - Recommending changes in agency policy, practice, personnel, and funding to improve implementation
- ♦ (l): Chief FOIA Officer must designate one or more **FOIA Public Liaisons** responsible for:
  - Receiving concerns from requesters and assisting with resolving disputes
  - Assisting with reducing delays
  - Increasing transparency regarding the status of requests

# President Obama's Day One FOIA Memo

Federal Register / Vol. 74, No. 15 / Monday, January 26, 2009 / Presidential Documents

4683

Federal Register

Vol. 74, No. 15

Monday, January 26, 2009

## Presidential Documents

Title 3—

The President

Memorandum of January 21, 2009

Freedom of Information Act

Memorandum for the Heads of Executive Departments and Agencies

*"A democracy requires accountability, and accountability requires transparency."*

*"[FOIA], which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government."*

*"The Freedom of Information Act should be administered with a clear presumption:  
In the face of doubt, openness prevails."*

*"In responding to requests under the FOIA, executive branch agencies ...  
should act promptly and in a spirit of cooperation."*

*"All agencies should adopt a **presumption in favor of disclosure** ...  
The presumption of disclosure should be applied to all decisions involving FOIA."*

THE WHITE HOUSE,  
Washington, January 21, 2009



# U.S. Attorney General FOIA Guidelines



Office of the Attorney General

Washington, D.C. 20530

March 19, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:  THE ATTORNEY GENERAL

SUBJECT: The Freedom of Information Act (FOIA)

*“[The] presumption [of openness under FOIA] has two important implications.”*

*“First, an agency should not withhold information simply because it may do so legally.*

*I strongly encourage agencies to make **discretionary disclosure of information**.*

*An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.”*

*“Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make **partial disclosure**.*

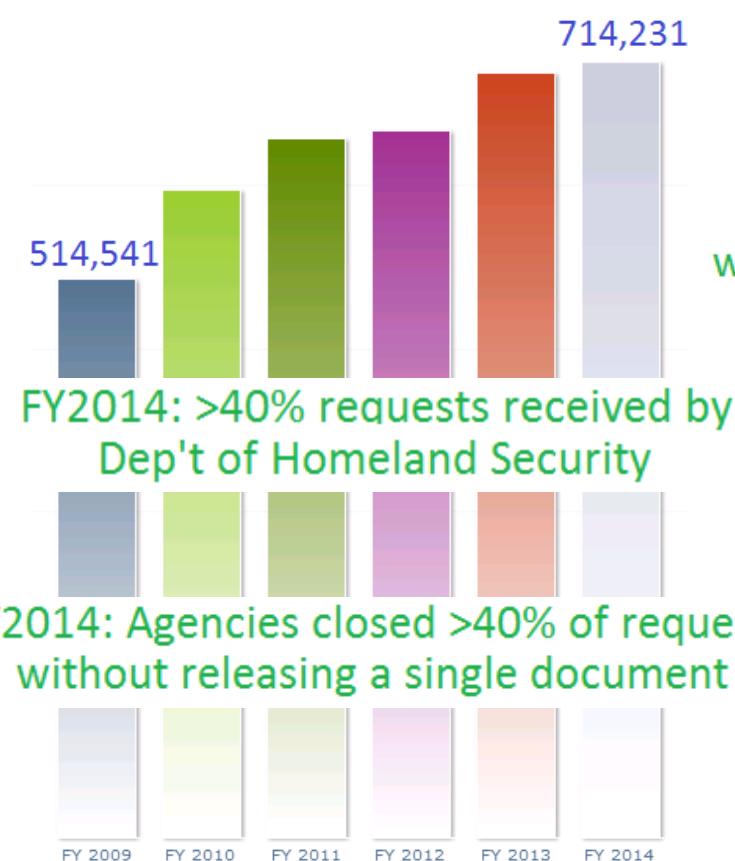
*Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information.”*

# FOIA Policy

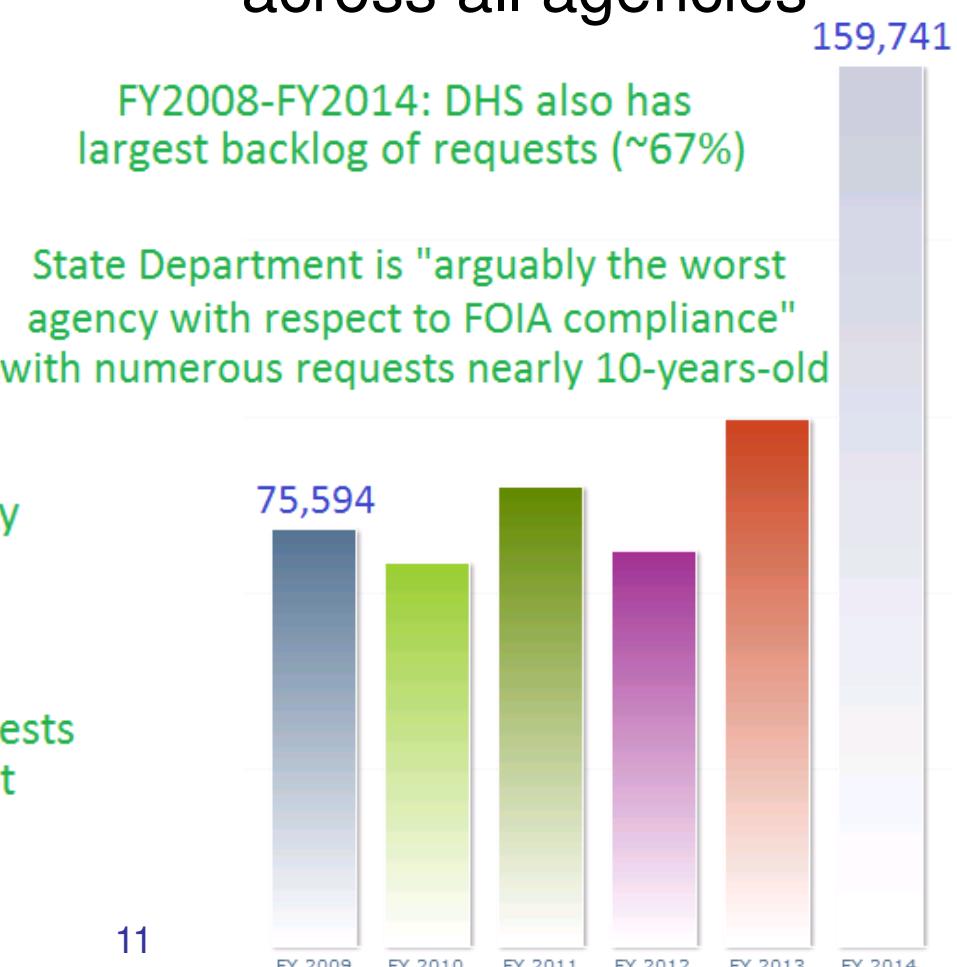
- ◆ Agencies directed to apply a presumption of openness in favor of disclosure in responding to FOIA requests
- ◆ By statute, certain categories of information are not required to be released
  - Rationale: release would be harmful to a significant governmental or private interest
  - Exemptions intended to be narrowly construed
- ◆ In defending an agency's denial of a FOIA request, DOJ applies a "foreseeable harm" standard of review
  - Denial of a FOIA request is appropriate only if:
    - The agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions
    - or The disclosure is prohibited by law

# Recent FOIA Trends: FY2009 – FY2014

- ◆ Total requests received across all agencies



- ◆ Backlog of requests across all agencies



# FY2014 Statistics: FOIA Requests & Costs

	<u>DoD</u>	<u>Air Force</u>	<u>GSA</u>	<u>SBA</u>
<b>Received</b>	61,055	6,526	1,522	1,306
<b>Processed</b>	59,321	6,439	1,508	1,312

"Processed" request: Number of requests where the agency has sent a final response to the requester.

<b>Granted in full</b>	20,888	1,575	573	980
<b>Denied in full</b>				
- Claiming exemptions	3,267	197	34	18
- No records	5,758	869	90	100
- Not reasonably described	581	83	31	8
<b>Backlogged requests</b>	8,444	699	84	0

"Backlogged" request: Number of requests pending beyond FOIA's statutory timeframe for providing a response.

<b>FOIA staff</b> (full time employees & FTEs)	754	167	23	15
<b>Processing costs</b>	\$83,081,035	\$11,604,037	\$3,160,800	\$1,636,885
<b>Fees collected</b>	\$545,415	\$67,677	\$35,837	\$40,748

# **The Nine FOIA “Exemptions” and Three FOIA “Exclusions”**

# “Exemptions” versus “Exclusions”

## ♦ Exemptions

- 9 categories of information that are not required to be released in response to a FOIA request
  - Because release would be harmful to gov’t or private interest
  - Records are “exempt” from disclosure and may be withheld
- ***But remember!*** There is a presumption of access and exemptions should generally be narrowly construed
  - Should not withhold from disclosure just because information technically falls within the scope of an exemption
  - May make discretionary disclosure if no foreseeable harm (and not otherwise prohibited by law)

## ♦ Exclusions

- 3 narrow categories of law enforcement and national security records treated as not subject to FOIA

# Exemption 1

- ◆ 5 U.S.C. § 552(b)(1)
  - *Information that is classified to protect national security*
  - Designed to prevent disclosure of properly classified records that would cause harm to national security interests if publicly released
  - Standard for judicial review of claimed exemption
    - Withholding proper if:
      - Agency's supporting affidavits are reasonably specific
      - and No evidence of bad faith

# Exemption 2

- ◆ 5 U.S.C. § 552(b)(2)
  - ***Information related solely to the internal personnel rules and practices of an agency***
  - Covers internal agency management or trivial “housekeeping” records (“low 2”)
  - Also covers internal agency records that would allow the requester to circumvent laws or regulations or gain an unfair advantage (“high 2”)
    - *E.g.*, agency audit guidelines

# Exemption 3

- ◆ 5 U.S.C. § 552(b)(3)
  - ***Information that is prohibited from disclosure by another federal law***
  - Referred to as the “statutory exemption”
    - Statute must address withholding info from disclosure
  - *E.g.*, CIA operational files, information regarding “critical infrastructure,” personal income tax returns, information relating to export license applications
  - Certain statutes also cover withholding of bid and proposal and/or source selection information ...

# Exemption 3 and Qualifying Government Contracts-Related Statutes

- ◆ **Procurement Integrity Act**, 41 U.S.C. §§ 2101 & 2102
  - Prohibits contractor bid or proposal and source selection information from disclosure **prior to contract award**
  - “Contractor bid or proposal information” includes:
    - Cost or pricing data
    - Indirect costs and direct labor rates
    - Proprietary info re: manufacturing processes, operations, or techniques
  - “Source selection information” includes:
    - Bid prices or proposed costs
    - Source selection and technical evaluation plans
    - Technical and price/cost evaluations
    - Competitive range determinations
    - Offeror rankings

# Exemption 3 and Qualifying Government Contracts-Related Statutes

- ◆ **Prohibition on Release of Contractor Proposals,**  
10 U.S.C. § 2305(g) & 41 U.S.C. § 4702
  - Explicitly shields technical, management, and/or cost proposals from disclosure under FOIA
    - Applies both pre- and post-award
    - Applies to both successful and unsuccessful proposals
    - But does not apply to the extent a proposal is set forth or incorporated by reference in an executed contract
  - 10 U.S.C. § 2305(g) applies to proposals in the possession or control of DoD, Army, Navy, Air Force, Coast Guard, or NASA
  - 41 U.S.C. § 4702 applies to proposals in the possession or control of any executive agency

# Exemption 3 and Qualifying Government Contracts-Related Statutes

- ◆ **Federal Technology Transfer Act,**  
15 U.S.C. § 3710a(c)(7)
  - Explicitly shields from disclosure under FOIA:
    - Trade secrets and commercial or financial information that is privileged or confidential,
      - Which is obtained in the conduct of research or as a result of activities of a non-federal party participating in a cooperative research and development agreement (CRADA)
      - No temporal limit
    - and Information resulting from research and development activities conducted under CRADAs,
      - Which would be considered a trade secret or commercial or financial information that is privileged or confidential had the information been obtained from a non-federal party
      - Limited protection for 5 years after development of information

# Exemption 4

- ◆ 5 U.S.C. § 552(b)(4)
  - *Trade secrets*
  - **and Commercial or financial information obtained from a person that is confidential or privileged**
  - Intended to protect:
    - Agency's interest in obtaining reliable information
    - and Individuals' interest in safeguarding against competitive disadvantage that could result from disclosure of information submitted to an agency
  - “obtained from a person” means protection does not extend to agency-generated information

# Exemption 4: Trade Secrets

- ◆ For purposes of Exemption 4, a “trade secret” is fairly narrowly defined as:
  - A secret, commercially valuable plan, formula, process, or device that is used for making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of innovation or substantial effort
  - vs. typical definition that encompasses virtually any business information that provides a competitive advantage
- ◆ Examples of qualifying trade secrets:
  - Product manufacturing and design information
  - Technical blueprints and drawings

# Exemption 4: Trade Secrets (continued)

- ◆ Factors usually considered in determining whether a trade secret exists:
  - Extent to which the info is known:
    - Outside the business
    - By a business' employees and others involved in the business
  - Extent of measures taken to guard the secrecy of the info
  - Value of the info to a business and its competitors
  - Amount of effort or money expended in developing the info
  - and Ease or difficulty with which info could be properly acquired or duplicated by others
- ◆ Trade secret protection generally not available if info:
  - Has been voluntarily disclosed
  - or Is the subject of general knowledge

# Exemption 4: Commercial or Financial Information

- ◆ Much broader than what qualifies as “trade secret”
- ◆ Information is “commercial or financial” if it relates to business or trade
  - Does the submitter have a “commercial interest” in the information submitted?
  - Examples:
    - Information relating to business decisions, accounting practices, and other internal procedures
    - Financial information, including profit and loss data and sales statistics
    - Customer and supplier lists
    - Employee wage and other employment information
    - Research data and technical designs

# Exemption 4: Confidentiality Requirement

- ♦ Info a person was obligated to furnish to the Government is treated as confidential if its disclosure would likely:
  - Impair the agency's ability to obtain necessary information in the future (**impairment** factor)
    - Would entities not provide such information in the future if it were subject to public disclosure?
  - or Cause substantial harm to the competitive position of the person whose information is sought to be obtained (**competitive harm** factor)
    - Would harm result from the knowledge or use of this information by an entity's competitors?
- ♦ Info voluntarily submitted to the Government is treated as confidential so long as it is not “customarily” disclosed to the public by the submitter

# Exemption 4: Which confidentiality standard applies to bid and proposal information?

- ◆ Seeking a government contract is a voluntary activity
  - But does not mean that any submissions made in connection with seeking a government contract are voluntary
- ◆ Focus is on whether the submission of the information at issue was required for those who chose to participate
  - Submission could be considered “required” if:
    - Required by law, regulation, solicitation provision, or contract term
    - or Required as a condition of doing business with the government
- ◆ Bid and proposal pricing information usually found to be “required” submissions (but watch for “*should*” vs. “*must*” and the particular scope of the agency’s requirement!)
- ◆ Similarly, entering into a government contract is voluntary, but contract submissions are typically viewed as “required”

# Executive Order 12600: Predisclosure Notification Procedure for Confidential Commercial Information

- ◆ “Confidential commercial information” defined as:
  - Records provided to the government that could arguably contain material exempt from release under Exemption 4 because disclosure could reasonably be expected to cause substantial competitive harm
- ◆ Requires agencies to:
  - Allow entities to designate information that could reasonably be expected to cause substantial competitive harm if disclosed
    - Either upon initial submission or when notified that agency may be required to disclose the records in response to a FOIA request
  - Provide notice to submitters of potential disclosure under FOIA
  - Give submitters reasonable period of time to object to disclosure
  - If the agency determines to disclose records, **prior to disclosure**, provide a written explanation why objections are not sustained
    - May trigger “reverse” FOIA action ...

# What if your company's documents may become or are in fact the subject of a third-party FOIA request?

- ◆ **Practice tip!** Proactively put agencies on alert that proposals and other submissions should be treated as exempt from disclosure, by marking as:

*HIGHLY SENSITIVE AND CONFIDENTIAL COMMERCIAL AND FINANCIAL INFORMATION; NOT TO BE DISCLOSED TO THIRD PARTIES PURSUANT TO 5 U.S.C. § 552(b)(4)*

- ◆ **Practice tip!** When justifying withholding of “confidential commercial information” that is the subject of a FOIA request, be sure to argue and explain:
  - That requested material contains competitively sensitive info
  - That requested material is not generally known outside of the company and (*even better!*) is not widely shared within the company by those who do not have a “need to know”
  - Steps taken to guard the secrecy of the information and measures used to keep it out of competitors’ hands

# Exemption 5

- ◆ 5 U.S.C. § 552(b)(5)

- Protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency” (*huh?*)
  - Intended to prevent FOIA from being used to circumvent civil litigation discovery rules
- ***Privileged communications within or between agencies, including:***
  - ***1. Deliberative Process Privilege***
  - ***2. Attorney Work Product Privilege***
  - ***3. Attorney-Client Privilege***
- Agency (or outside consultant working on its behalf) must be the source of the records

# Exemption 5: Deliberative Process Privilege

- ◆ Protects advice, opinions, and recommendations that are part of an agency's decision-making process
- ◆ To invoke the privilege, communication must be:
  - “***Pre-decisional***” (created before adoption of agency policy)
    - May remain “pre-decisional” even if the agency subsequently makes a final decision or decides not to make a final decision
    - vs. “post-decisional” statements of policy and final opinions that implement established policy or explain actions agency has taken
  - and “***deliberative***” (a direct part of the process in making recommendations or issuing opinions on legal/policy matters)
    - Generally does not protect underlying factual information, unless the facts themselves reflect the agency's deliberative process
- ◆ Widely abused and overused exemption  
(culture of “withhold it because you want to”)

# Exemption 5: Applicability to agency evaluation materials?

- ◆ Assigned technical scores and rankings of competing bidders generally treated as:
  - Pre-decisional (to contract award decision)
  - and Deliberative (directly relevant to evaluation process)
- ◆ But contractor performance evaluations (to be considered in future award determinations) may not be considered as the type of policy decision covered by Exemption 5
- ◆ “Draft” documents also usually treated as exempt
- ◆ Better asserted under Exemption 3 and pre-award protection of source selection information under the Procurement Integrity Act

# FY2014 Statistics: Cited FOIA Exemptions

	<b>DoD</b>	<b>Air Force</b>	<b>GSA</b>	<b>SBA</b>
<b>Exemption 3</b> - bid and proposal or source selection information	254*	42**	10***	0

**\* Statutes cited by DoD:**

10 U.S.C. § 2305(g) (proposals in DoD's possession or control, cited 246 times)

41 U.S.C. § 2102 (pre-award proposals and/or source selection information, cited 6 times)

15 U.S.C. § 3710a(c)(7) (information pertaining to research conducted under CRADAs, cited 2 times)

**\*\* Statutes cited by Air Force:**

10 U.S.C. § 2305(g) (proposals in Air Force's possession or control, cited 36 times)

41 U.S.C. § 2102 (pre-award proposals and/or source selection information, cited 6 times)

**\*\*\* Statute cited by GSA:**

41 U.S.C. § 4702 (proposals not incorporated by reference in contract, cited all 10 times)

<b>Exemption 4</b> - trade secrets and commercial or financial info that is confidential or privileged	1,018	168	205	94
<b>Exemption 5</b> - deliberative process, attorney work product, or attorney-client privilege	3,331	488	119	6

# Exemption 6

- ◆ 5 U.S.C. § 552(b)(6)
  - *Personnel, medical, and similar files that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy*
  - Should only be invoked when individual's interest in privacy outweighs public's interest in disclosure
    - Civilian, non-law enforcement personnel generally have no expectation of privacy regarding names, grades, salaries, etc.
  - Does not recognize any privacy interests of businesses, associations, or corporations
  - **Practice Tip!** If request involves info about named or identifiable individuals, briefly explain reason for request and why the public interest in disclosure outweighs any possible invasion of privacy

# Exemption 7

- ◆ 5 U.S.C. § 552(b)(7)
  - *Information compiled for law enforcement purposes, but only if it would:*
    - *Interfere with enforcement proceedings*
    - *Deprive an individual of a fair trial*
    - *Invade personal privacy*
    - *Disclose a confidential informant*
    - *Disclose law enforcement techniques*
    - *Endanger life or physical safety*
  - Covers most types of records related to investigations of crimes or violations of law, if disclosure would interfere with ongoing or potential enforcement proceedings

# Exemption 8

- ◆ 5 U.S.C. § 552(b)(8)
  - *Information that concerns the supervision of financial institutions*
  - Applies generally to reports prepared by federal agencies about the conditions of banks and other federally regulated financial institutions
  - Intended to prevent disclosure of sensitive financial reports or audits that, if made public, could undermine public confidence in individual institutions or the federal banking system

# Exemption 9

- ◆ 5 U.S.C. § 552(b)(9)
  - ***Geological and geophysical information and data, including maps, concerning wells***
  - Intended to prohibit “speculators” from obtaining information about the location of oil and gas wells of private companies
  - Covers information in the possession of the Bureau of Land Management, Federal Energy Regulatory Commission, and Federal Power Commission
  - Rarely invoked or analyzed exception

# FOIA “Exclusions”

- ◆ (c): Carves out three special limited categories of records that are to be treated as altogether not subject to FOIA
  - 1. *Certain records that would impair ongoing criminal law enforcement investigations or proceedings*
  - 2. *Certain records that would threaten to identify confidential informants in criminal proceedings*
  - 3. *Certain law enforcement records maintained by the FBI pertaining to foreign intelligence or counterintelligence or int'l terrorism*
- ◆ Permits an agency to respond to a request seeking excluded records without revealing their existence
  - Standard response (regardless of whether an exclusion is invoked):
    - “*For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of FOIA. This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.*

# **Procedures for Making and Responding to a FOIA Request**

# Minimum Contents of a FOIA Request

- ◆ No specific form that must be used
  - Do not need to state that request is being made under FOIA
- ◆ **(a)(3)(A)**: Must “reasonably describe” requested records
- ◆ **(a)(3)(B)**: Should specify the requested form or format for production (e.g., hard copy or electronic)
  - And physical/email address for sending responsive documents
- ◆ Agency is not required to:
  - Answer questions posed as FOIA requests
  - Create new records, conduct research, or analyze data in response to a FOIA request
  - or Produce any future records that may be responsive to an earlier submitted FOIA request (request may only cover records that exist at the time of the request)

# What does it mean to “reasonably describe” the requested records?

- ◆ Usual standard:
  - Does the request provide someone at the agency who is generally familiar with the subject area with enough information to determine which records are being sought and to locate them with reasonable effort?
- ◆ Requester is not required to:
  - Know or provide the particular document or docket number
  - Cite the specific contract number if requesting information relating to a particular contract
- ◆ If request is unclear, best practice is for the agency to seek clarification from the requester regarding the scope of the request

# Best Practices in Making a FOIA Request

- ◆ **Practice tip!** The request should explicitly state who it is being submitted on behalf of
  - If submitting a request through outside counsel, the request should state that the request is being made on behalf of *ABC Company*
  - **Why?** It impacts who has standing to file suit in the event of future litigation involving the request
- ◆ If there is a cap on the amount of fees you are willing to pay, state a specific limit in your request
  - *E.g., “We are willing to pay fees for this request up to a maximum of \$\_\_. If you estimate that the fees will exceed this amount, please contact me.”*

# Agency Response Requirements

- ◆ (a)(6)(A): Requires substantive response granting or denying request within **20 business days**, in the form of:
  - Producing requested records
  - or Providing written response stating scope of documents to be produced, claimed exemptions for any documents to be withheld, and anticipated date of production
  - Requires more than a simple acknowledgment of receipt
  - 20-day clock begins when a “reasonably described” request is received “by the appropriate component of the agency”
    - Any misdirected requests sent to an office designated to receive FOIA requests are required to be rerouted to appropriate component w/in 10 days
    - No obligation to reroute requests to a different agency
- ◆ **Practice tip!** For a quicker response, address request to particular FOIA office of the agency component believed to have control of the requested records

# Requests for Extension of Time

- ◆ (a)(6)(B): 20-day window for processing request may be extended if “***unusual circumstances***”
  - “Unusual circumstances” if:
    - Need to search for and collect records from separate facilities
    - Need to search for, collect, and examine voluminous materials
    - or Need to consult with another agency
  - Routine backlog of requests does not qualify as “unusual”
- ◆ Agency must provide written notice to requester
  - Explaining circumstances necessitating an extension
  - and Stating date when determination/response is expected
    - If required extension exceeds 10 business days, requester must be allowed an opportunity to modify or narrow scope of request

# Other Timing Considerations

- ◆ Agency may stop the clock on 20-day window:
  - Once, when necessary to obtain additional information
  - As necessary to clarify any fee-related issues
- ◆ Requests are typically processed on first-in, first-out basis
  - But may also “multi-track” requests and respond to relatively simple or expedited requests more quickly than complex requests or requests involving voluminous records (so long as processed in order of receipt within each track)
- ◆ **(a)(7)(A):** Agency required to assign individual tracking number to requests expected to take 10+ days to process
- ◆ **(a)(7)(B):** Agency required to establish telephone line or website for requesters to seek status updates

# Expedited Processing of FOIA Requests

- ◆ (a)(6)(E): Requests may be expedited upon a showing of “*compelling need*”
  - Failure to quickly obtain the records could reasonably be expected to pose an imminent threat to the life or physical safety of an individual
  - or Urgency to inform the public concerning actual or alleged government activity (but only if requester is a person “primarily engaged in disseminating information”)
- ◆ Request for expedited processing must be granted or denied within 10 calendar days
- ◆ When request to expedite is granted, records request must be processed “as soon as practicable”

# FY2014 Statistics: Processing Time

	<u>DoD</u>	<u>Air Force</u>	<u>GSA</u>	<u>SBA</u>
<b>"Simple" requests</b>				
- average number of days	13	13	15	17
- lowest number of days	< 1	< 1	< 1	< 1
- highest number of days	1,345	435	40	67
"Simple" request: Agency anticipates request will involve a small volume of material and/or will be able to be processed relatively quickly.				
<b>"Complex" requests</b>				
- average number of days	97	86	71	
- lowest number of days	< 1	< 1	< 1	N/A
- highest number of days	4,060	997	516	
"Complex" request: Seeks a high volume of material and/or will require additional steps to process (if, e.g., multiple locations must be searched for potentially responsive records).				
<b>"Expedited" requests</b>				
- Average number of days	35	21		
- lowest number of days	< 1	< 1	N/A	
- highest number of days	630	321		N/A
"Expedited" request: When granted, request to be processed "as soon as practicable" ahead of other pending requests.				

# Guidelines for Responding to a FOIA Request

- ◆ Agency must produce non-exempt responsive records
- ◆ Must also produce “reasonably segregable” portions of a partially exempt record after redacting exempt info
  - Except if non-exempt information is so “inextricably intertwined” with exempt information
  - For records released in part, released portions must indicate amount of info withheld and exemption(s) being asserted
    - Unless doing so would harm an interest protected under the applied exemption(s)
- ◆ If request is denied, must provide reason(s) for the denial
  - **(a)(6)(F)**: If denied in full or in part, must make reasonable effort to estimate volume of any information withheld
    - Unless doing so would harm an interest protected under any applied exemption(s)

# Sample Initial Response Acknowledging Receipt of FOIA Request

RECORDS OFFICE



January 21, 2011

[REDACTED]  
McCarter & English Attorneys at Law  
265 Franklin Street  
Boston, MA 02110-3113

RE: FOIA Case No. 2011-FPRO-00342

Dear [REDACTED]

This is an acknowledgement to your Freedom of Information Act (FOIA) request of January 19, 2011, in which you seek access to Postal Service records. Your request was received by this office on January 20, 2011, and assigned FOIA Tracking Number 2011-FPRO-00342.

If you have any questions regarding your request, please contact the Postal Service FOIA Requester Service Center at (202) [REDACTED] between the hours of 8:30 a.m. – 4:30 p.m., Eastern Standard Time.

Sincerely,

[REDACTED]  
[REDACTED]  
Consumer Research Analyst

# Sample Responses Forwarding Request to Appropriate Agency Component

RECORDS OFFICE



January 24, 2011

[REDACTED]  
McCarten & English Attorneys at Law  
265 Franklin Street  
Boston, MA 02110-3113

RE: FOIA Case No. 2011-FPRO-00342

Dear [REDACTED]:

This responds to your Freedom of Information Act (FOIA) request, dated January 19, 2011, in which you seek access to Postal Service records.

"We have conducted a search here at NAVSEA and determined the records are under the cognizance of [REDACTED]. To save time, we have taken the liberty of forwarding [your request] to that activity for action and direct response to you."



DEPARTMENT OF THE NAVY  
NAVAL SEA SYSTEMS COMMAND  
1333 ISAAC HULL AVENUE  
WASHINGTON NAVY YARD DC 20376-2101

April 13, 2015

[REDACTED]  
McCarten & English, LLP  
265 Franklin Street  
Boston, MA 02110

SUBJECT: FREEDOM OF INFORMATION ACT CASE DON-NAVY-2015-005224

Dear [REDACTED]:

This is our final response to your Freedom of Information Act (FOIA) request dated April 10, 2015, in which you seek [REDACTED]

# Sample Response Citing Claimed Exemptions



February 18, 2011

[REDACTED]  
McCarter & English, LLP  
265 Franklin Street  
Boston, MA 02110-3113

RE: FOIA Case No. 2011-FPRO-00342

Dear [REDACTED]:

This is a partial response to your Freedom of Information Act (FOIA) dated January 19, 2011, for ... Your request was forwarded to Supply Management on January, 24, 2011, for response. We have identified 276 pages of records responsive to your request. In response to your request, we are enclosing: [REDACTED]

Of the 276 pages of responsive, record material, 12 pages contain deletions pursuant to FOIA Exemptions 3, 4 and 6. 5 U.S.C. §§ 552(b)(3), (b)(4) and (b)(6).

Taxpayer Identification Numbers (which are sometimes Social Security Numbers) contained in the Contract and the name of the potential vendor contained in the USPS/Vendor Discussion have been redacted pursuant to FOIA Exemptions 3 and 4. 5 U.S.C. §§ 552(b)(3), (b)(4). Exemption 3 applies to information that is exempt from disclosure by another federal law, and is invoked in conjunction with 39 U.S.C. 410(c)(2), the Postal Reorganization Act, which protects information of a commercial nature, which under good business practice would not be disclosed. Exemption 4 permits agencies to withhold "trade secrets and commercial or financial information obtained from a person that is privileged or confidential."

Moreover, private e-mail addresses, unpublished and no longer published telephone and facsimile numbers, and handwritten signatures have been redacted throughout the record material pursuant to FOIA Exemption 6. 5 U.S.C. § 552(b)(6). Exemption 6 permits an agency to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."

# Fees

- ◆ (a)(4)(A): Each agency is required to establish a schedule of fees for processing requests
  - Fees must be limited to “reasonable standard charges” for:
    - Document ***search, review, and duplication*** when requested for commercial use
    - Document ***duplication*** when requested for non-commercial use by educational or noncommercial scientific institution for scholarly or scientific research, or by representative of the news media
    - Document ***search and duplication*** for all other requests

# Fees (continued)

- ◆ Allowable category of fee (search, review, and/or duplication) depends on type of entity making request
- ◆ “Commercial-Use” requester:
  - Seeks records for use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made
    - Focus is on intended use of requested information, not necessarily on the identity of the requester
    - If “commercial use” is not clear from the request itself, agency should seek additional information or clarification
    - Requests submitted by companies and law firms generally regarded as having “commercial” use

# “Search” Fees

- ◆ **(a)(3)(D)**: To “search” means “to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request”
  - General requirement to undertake a search that is reasonably calculated to uncover all relevant documents
  - **(a)(3)(C)**: Must expend “reasonable efforts” in electronic searches, if requested and if requester is willing to pay for it
- ◆ Should include all time spent looking for responsive records
  - Agency may charge fee for search time even if the search fails to locate any responsive and/or non-exempt records
  - But if non-commercial request, cannot charge fees for first 2 hours of search time
- ◆ Searches should be performed in the most efficient and least expensive manner possible

# “Review” Fees

- ◆ Allowed only when request is for commercial use
- ◆ **(a)(4)(A)(iv)**: “Review” fees may be charged for the direct costs incurred during initial examination of a document for the purpose of determining:
  - Whether it must be disclosed
  - and Whether any portions are exempt from disclosure
- ◆ Agency may charge fee for costs of processing documents for disclosure
- ◆ “Review” fees may not include time spent resolving legal or policy issues regarding applicability of exemption(s) and/or processing of appeals

# “Duplication” Fees

- ◆ Agency may charge the reasonable “direct costs” of making copies
  - Hard copies: per-page charge
  - Electronic copies: actual costs of production
  - But if non-commercial request, cannot charge fees for first 100 pages of duplication
- ◆ **(a)(3)(B)**: Agency must honor requester’s choice of form or format if the record is “readily producible” in that form or format with “reasonable efforts” by the agency
- ◆ Agency may also charge a fee for any requested “special services”
  - *E.g.*, certifying records as true copies, sending records via express mail, etc.

## Fees (continued)

- ◆ There is no initial fee required to submit a request
- ◆ **(a)(4)(A)(v)**: Agency may require fees to be paid up front (in advance of processing request) if:
  - The fee is expected to exceed \$250.00
  - or Requestor has previously failed to timely pay (fees generally due within 30 days of billing date)
- ◆ Agency is permitted to require payment before actually releasing processed records

# Fee Waivers

- ◆ **(a)(4)(A)**: Each agency is required to have procedures and guidelines for waiving or reducing fees
- ◆ **(a)(4)(A)(iii)**: Documents should be produced without any charge or at a reduced charge 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”
- ◆ **(a)(4)(A)(viii)**: Agency is prohibited from charging a fee if it fails to timely respond to the request
  - ◆ Unless there were unusual or exceptional circumstances
- ◆ Requester’s inability to pay fees is not a valid basis for granting a fee waiver

# **Agency Appeals and Federal FOIA Litigation**

# Administrative Appeals

- ◆ (a)(6)(A): In the event agency denies request in whole or in part, the requester may file a written appeal for independent review by the head of the agency
  - No required form, format, or filing fee
  - Does not preclude requester from attempting to negotiate with agency regarding scope of production before filing formal appeal
- ◆ Appeal can be made via letter, which:
  - States you are appealing initial decision made on your request
  - Argues why denial of request was improper
  - Attaches copies of all relevant correspondence
- ◆ Final response should advise requester of appeal rights and state applicable filing deadline per agency rules (usually within 30 to 60 days)

# What triggers a requester's right to pursue an administrative appeal?

- ◆ A requester has the right to appeal any “adverse determination” made by the agency
  - Denial of request in full or in part
  - “No records” response
  - Denial of request for fee waiver
  - Denial of request for expedited processing
  - or Failure to comply with any applicable time limits (unless there are “exceptional circumstances” and agency demonstrates it is exercising due diligence)
- ◆ FOIA Public Liaison is available alternative to help resolve disputes before resorting to formal appeal

# Administrative Appeals (continued)

- ◆ Potential grounds for appeal include:
  - Information withheld does not fall within cited exemption, or even if exemption applies, public would benefit from disclosure
  - Wrongful denial of request for fee waiver
  - Improper charging of review fees
    - But only if not seeking documents for commercial use
  - Production improperly limited to paper or hard copy format
    - But only if requested information to be provided electronically and agency maintains the requested information in electronic form
- ◆ Agency must issue a ruling on an appeal within 20 business days (unless extended for “***unusual circumstances***”)
- ◆ If appeal upholds the withholding of documents in whole or in part, agency must advise of right to seek judicial review
  - Should also advise of available mediation services offered by Office of Government Information Services

# FY 2014 Statistics: Administrative Appeals

	<u>DoD</u>	<u>Air Force</u>	<u>GSA</u>	<u>SBA</u>
<b>Received</b>	1,059	210	12	21
<b>Processed</b>	961	186	16	22
<b>"Processed"</b> appeal: Number of appeals where the agency has sent a final response to the requester.				
<b>Affirmed in full</b>	360	28	12	9
<b>Reversed in full</b>	152	16	0	4
<b>Average response time</b>	139 days	402 days	46 days	16 days
<b>Common issues on appeal</b>	Claimed exemptions (esp. 3, 5 & 6) “No records” response Fee dispute	Claimed exemptions (esp. 4, 5 & 6) “No records” response Fee dispute	Claimed exemptions (esp. 4, 5 & 6)	Claimed exemptions (esp. 4, 5 & 6) “No records” response

# FOIA Litigation Following Exhaustion of Administrative Remedies

- ◆ **(a)(4)(B): Subject matter jurisdiction**
  - “On complaint, the district court of the United States ... has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant”
- ◆ **(a)(4)(B): Venue**
  - May file complaint in U.S. District Court in the district where:
    - The plaintiff resides or has principal place of business
    - The agency records are located
    - or in U.S. District Court for the District of Columbia
  - Office of Government Information Services also available as alternative to litigation following unsuccessful agency appeal
- ◆ **6-year statute of limitations**

# FOIA Litigation (continued)

- ◆ To state a claim, must allege an improper withholding of agency records
  - Burden is on agency to demonstrate withholding is proper
- ◆ Whether withholding is “improper” usually focuses on applicability of claimed exemptions
- ◆ Could also question reasonableness of nature and extent of search conducted
  - Agency must show (via detailed declarations) that:
    - Interpretation of scope of request was reasonable
    - and It made a good faith effort using search methods reasonably calculated to uncover the information requested
- ◆ Agency failure to comply with applicable time limits also triggers right to pursue a FOIA action

# Some Peculiarities of FOIA Litigation

- ◆ Named defendant is the agency (not “*v. United States*”)
- ◆ (a)(4)(C): Agency has 30 days to answer complaint
- ◆ *De novo* standard of review
  - Versus “arbitrary and capricious” standard of review under Administrative Procedure Act
- ◆ Judge may examine records at issue *in camera*
  - Versus review based solely on administrative record
- ◆ Cases usually decided on summary judgment because typically dealing with only a legal (not factual) dispute over how FOIA applies to the documents at issue
  - Standard: no genuine dispute as to any material fact and entitlement to judgment as a matter of law

# *Vaughn* Index

- ◆ As mentioned, agency bears the burden of proof
- ◆ “*Vaughn* Index” commonly used to demonstrate that withholding of records was proper
  - Itemized index of:
    - Each withheld document (or portion thereof)
    - Asserted FOIA exemption(s)
    - Justification for nondisclosure / adverse consequence of disclosure
- ◆ Must include enough detail to provide the requester and court with a clear explanation of why the agency regards each responsive document as exempt from disclosure
- ◆ No magic language or universal form
- ◆ No requirement to provide a *Vaughn* Index at the administrative level

# Vaughn Index (continued)

- ◆ Motion to Compel Preparation of a Vaughn Index
  - *“Plaintiff moves the Court for an order requiring Defendant to provide within thirty (30) days an itemized, indexed inventory of every agency record or portion thereof responsive to Plaintiff’s Freedom of Information Act (FOIA) request that Defendant asserts to be exempt from disclosure, accompanied by a detailed written 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).”*

# Does the plaintiff have a right to discovery in a FOIA action?

- ◆ Typically, no
- ◆ Discovery is the exception, not the rule, in FOIA cases
- ◆ When discovery is allowed, is usually limited to documents and information relating to:
  - The scope and parameters of the agency's search
  - The agency's document indexing and classification procedures
- ◆ If agency declarations are not adequately detailed, usually asked to supplement with more detail, rather than requiring discovery
- ◆ Unsupported allegations of bad faith by the agency are usually not sufficient to warrant discovery

# *Trap for the unwary!*

- ◆ Who has standing to file a FOIA action?
  - The person who submitted the FOIA request at the agency level
  - or On whose express behalf the request was made
- ◆ If an attorney submits a FOIA request on behalf of an anonymous client, the client does not have standing to pursue a FOIA action in its own name
- ◆ **Practice tip!** A FOIA request submitted by an attorney must clearly indicate that it is being made “on behalf of” its client for the client to have standing to later assert a FOIA lawsuit against the agency

# Types of Relief Requested

- ◆ Preliminary injunction to enjoin the agency from continuing to withhold non-exempt responsive records
- ◆ Declaratory judgment that agency violated FOIA by failing to adequately respond to a request
- ◆ Disclosure of records improperly withheld
- ◆ Production of a *Vaughn* index for records for which an exemption is claimed
- ◆ Recovery of attorney fees and costs ...

# Potential for Recovery of Attorney Fees

- ◆ (a)(4)(E): Plaintiff may be awarded “reasonable attorney fees and other litigation costs reasonably incurred”
  - If the plaintiff has “substantially prevailed,” meaning:
    - Court enters an order granting relief to the plaintiff
    - Parties enter into an enforceable written agreement
    - or Agency voluntarily changes its position and releases requested documents
  - Court has wide discretion in determining entitlement to recovery of legal fees
  - Generally no recovery for legal fees and costs incurred at the agency / administrative level

# Potential for Disciplinary Action

- ◆ (a)(4)(F): Disciplinary action may be warranted against agency if the court:
  - Orders production of records improperly withheld
  - Assesses attorney fees and costs against agency
  - and Issues a written finding that the circumstances surrounding the withholding raise a question that agency personnel acted “arbitrarily or capriciously”
- ◆ May be imposed against individual officer or employee who was primarily responsible for the improper withholding of records

# “Reverse” FOIA Actions

- ◆ Arises when an entity whose information is the subject of a third-party FOIA request seeks to prevent an agency from releasing its information
  - Agency’s decision to release the information is based on:
    - Determination that none of the FOIA exemptions apply (and disclosure is thus mandatory)
    - or Finding that release is justified in the exercise of agency’s discretion (even though an exemption technically applies)
- ◆ Party seeking to prevent disclosure bears the burden of justifying non-disclosure of the requested information
- ◆ Highly deferential “arbitrary and capricious” standard of review based on administrative record
  - Has agency made a “clear error of judgment”?

# **Examples of State Public Records Laws**

# Massachusetts Public Records Law

- ◆ Mass. G.L. ch. 66, § 10
- ◆ Statutory exemptions at Mass. G.L. c. 4, § 7(26)
- ◆ Written response required within 10 calendar days
- ◆ Oral requests may be made in person
  - But copy of written request is required in order to file an appeal with Supervisor of Records
- ◆ Inquiries into a requester's status or motivation for making its request are expressly prohibited
  - Except if seeking records relating to the security or safety of persons, buildings, utilities, etc.

# Massachusetts Public Records Law (continued)

- ◆ Exemption (d)
  - “*inter-agency or intra-agency memoranda or letters relating to **policy positions being developed** by the agency*”
    - but “*this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based*”
  - Limited privilege for ongoing policy development
  - Intended to avoid the release of materials that could taint the deliberative process if prematurely disclosed

# Massachusetts Public Records Law (continued)

- ◆ Exemption (g)
  - “***trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality***”
    - ***but “this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit”***
  - Does not apply to information submitted in connection with a contract bid/proposal
    - Such information is covered by Exemption (h) ...

# Massachusetts Public Records Law (continued)

## ◆ Exemption (h)

- “***proposals and bids*** to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases”
- and “*inter-agency or intra-agency communications made in connection with an **evaluation process** for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person*”
- Intended to protect the integrity of the bidding process by withholding the release of earlier submitted bids/proposals from other interested parties who could gain a competitive advantage
- Balances agency’s need to review bids/proposals in an insulated environment with public interest in reviewing all evaluative materials once an award decision is made

# Mass. Public Records Law In the News

The Boston Globe

## Mass. among the worst in US for public records access

An 'F' for state on open records

November 9, 2015

- ◆ Center for Public Integrity survey: Massachusetts ranked 40<sup>th</sup>
  - Criticized for state legislature, judiciary, and governor's office being exempt from public access requirements
  - But ranked 1st re: public access to campaign finance records
- ◆ States receiving highest (!?!?) grades for public records access:
  - 1. Iowa C-
  - 2. Utah C-
  - 3. Hawaii C-
  - 4. Pennsylvania D+
  - 5. Rhode Island D

# Proposed Amendments to Mass. Public Records Law

The Boston Globe

## Senate passes public records bill

February 4, 2016

The Boston Globe

## A closer look at the Mass. public records bill

November 19, 2015

- ◆ Proposed changes to Mass. Public Records Law include:
  - Public designation of point-person for handling of requests
  - Required electronic recordkeeping and production response
  - Entitlement to attorney fees for records wrongfully withheld
  - Mandated timeframe for fully responding to a request
    - Senate bill: Maximum of 30 days, with option for one-time 30-day extension
    - House bill: Agencies allowed 60 days, local communities allowed 75 days, with option to seek one-time indefinite extension from Secretary of State
- ◆ First proposed changes in over 40 years!
- ◆ Final version of the bill expected this Summer

# New York Freedom of Information Law

- ◆ N.Y. Public Officers Law, Article 6, §§ 84-90
- ◆ Statutory exemptions at § 87(2)
- ◆ Written response required within 5 business days
- ◆ Does not include provision allowing oral requests
- ◆ Inquiries into a requester's reason for making request or intended use of the record(s) are expressly prohibited
  - Except if seeking a list of names and residential addresses for solicitation or fund-raising purposes

# New York Freedom of Information Law (continued)

- ◆ Exemption (2)(c)
  - May deny access to records or portions thereof that *“if disclosed would impair present or imminent contract awards”*
  - Question is whether (and to what extent) disclosure would “impair” the contracting process
    - Applicability extends to bids/proposals before submission deadline in the interest of maintaining equal playing field
  - Allows for the withholding of pending contract awards until the time negotiations are concluded and the contract is executed

# New York Freedom of Information Law (continued)

- ◆ Exemption (2)(d)
  - May deny access to records or portions thereof that *“are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise”*
  - Question is whether (and to what extent) disclosure would cause competitive harm
  - Factual analysis applied in determining whether information sought qualifies as a “trade secret”

# New York Freedom of Information Law (continued)

## ♦ Exemption (2)(g)

- May deny access to records or portions thereof that “are **inter-agency or intra-agency materials** which are not:
  - [i] statistical or factual tabulations or data;
  - [ii] instructions to staff that affect the public;
  - [iii] final agency policy or determinations;
  - or [iv] external audits, including but not limited to audits performed by the comptroller and the federal government”
- Generally protects records that reflect opinions, advice, and recommendations
- Requires disclosure of ratings assigned by evaluation committee, but allows for the withholding of narrative comments and subjective opinions developed as part of evaluation process

# California Public Records Act

- ◆ Cal. Gov't Code §§ 6250-6276.48
- ◆ Statutory exemptions at § 6254 & §§ 6275-6276.48
- ◆ Written response required within 10 calendar days
- ◆ Request is not required to be made in writing
- ◆ No requirement to state the purpose for making the records request or the intended use of the requested records
  - Except must make certain disclosures and certifications if requesting address of crime victim or person(s) arrested

# California Public Records Act (continued)

- ◆ Exemption § 6254.15
  - “*Nothing in this chapter shall be construed to require the disclosure of records that are any of the following: **corporate financial records** [or] corporate proprietary information including **trade secrets** . . .*”
  - Treatment of competitive proposals is decided on case-by-case basis
    - Usually exempt from disclosure during evaluation and negotiation process
    - but Should be read in conjunction with California Public Contracts Code §§ 10305 & 10342, which provides that bids are generally disclosable for public inspection after bid opening

# **Recent Developments Regarding a Push for Transparency in Public Records**

# Statistics

- ◆ (e): Each agency must annually report various statistics to U.S. Attorney General, including:
  - Number of requests received and processed
  - Number of determinations made not to comply with a request for records, and reasons therefor
  - Claimed exemptions
    - Including specific Exemption 3 statutes relied on
  - Average and range of time to respond to a request
  - Average and range of time to produce documents
  - Number of requests responded to within 20-days
  - Information regarding administrative appeals
  - Information regarding fees collected

# FOIA Oversight

- ◆ (h): National Archives and Records Administration, **Office of Government Information Services** charged with responsibility for:
  - Reviewing agencies' FOIA policies and procedures
  - Reviewing agency's compliance with FOIA
  - Recommending policy changes
  - and Offering mediation services to resolve disputes between requesters and agencies (non-exclusive alternative to litigation)
    - Authority to issue advisory opinion if mediation does not resolve dispute
  - Referred to as “the Federal FOIA ombudsman”
- ◆ (i): **U.S. Government Accountability Office** charged with responsibility for conducting audits of agencies on their implementation of FOIA

# Office of Government Information Services

- ◆ OGIS, *Building a Bridge Between FOIA Requesters & Federal Agencies* (Mar. 2015)
  - Received 880 requests for assistance from FOIA requesters in FY2014
  - Categories of issues in disputes handled by OGIS:
    - Denials: 59% (helping requester understand why material was withheld)
    - Delays: 23%
    - Fees: 2%
    - Other: 16%
  - Recommendations to improve FOIA include:
    - Dispute resolution training for agencies
    - FOIA training for all new employees
    - Review of issues surrounding fees and fee waivers
    - Improved use of FOIAOnline ...





# FOIAOnline

- ◆ First multi-agency FOIA portal, established October 1, 2012
- ◆ Participating agencies:

- Dep't of Commerce (except USPTO)
- Environmental Protection Agency
- U.S. Customs and Border Protection
- Federal Labor Relations Authority
- Merit Systems Protection Board
- National Archives and Records Administration, Office of General Counsel
- Pension Benefit Guaranty Corporation
- Dep't of the Navy (including Marines)
- General Services Administration
- Small Business Administration
- Federal Communication Commission
- Department of Justice, Office of Information Policy



- ◆ Allows log-in as “guest” or “registered user”
  - Guests can search for previously released records
  - Registered users can track pending requests, receive records, communicate with agencies, and file appeals via the portal

**McCARTER  
& ENGLISH**  
ATTORNEYS AT LAW



# Sample Portal Record for Pending Request

## Request Details

Tracking Number : DON-NAVY-2015-005224



## Request Information

Full Name : Under Agency Review

Date Submitted : 04/13/2015

Organization : Under Agency Review

Estimated Date of May 26, 2015  
Completion :

Final Disposition : Undetermined

## Description :

The description of this request is under Agency review.

## Released Records

No records have been released.

**Submitted:** Request has been submitted, but not yet reviewed.

**Evaluation:** Agency is determining whether description of records is sufficient to enable processing.

**Assignment:** Request is being routed to appropriate personnel to search for records.

**Processing:** Search of records is in progress (assessing potential responsive records, making redactions).

**Closed:** Responsive records have been released.

# U.S. House of Representatives Report

- ♦ House Committee on Oversight and Government Reform, ***FOIA Is Broken: A Report*** (Jan. 2016)
  - “*The power of FOIA as a research and transparency tool is fading. Excessive delays and redactions undermine its value. ... On innumerable occasions, agencies have refused to produce documents or intentionally extended the timeline for document production to stymie a request for information.*”
  - Key Findings include:
    - Executive Branch culture encourages an unlawful presumption in favor of secrecy when responding to FOIA requests
    - Pattern of overuse and misapplication of exemptions
    - Agencies create policies that appear to be designed to deter requesters from pursuing requests and create barriers to accessing records
    - Many agencies have abandoned the requirement to make a determination on FOIA requests within the statutory timeframe



# Pending Federal Legislation

- ◆ H.R. 653, **FOIA Oversight & Implementation Act of 2016**
  - Introduced February 2, 2015; Passed January 11, 2016
  - Related Bill: S. 337, FOIA Improvement Act of 2015
  - Would amend FOIA to:
    - Require agencies to make information electronically available
    - Make available copies of records that have been requested 3+ times
    - Require OMB to establish a consolidated online request portal
    - Require agencies to identify the statute relied on under Exemption 3
    - Exempt from disclosure records or information that would adversely affect intelligence sources and methods
    - Limit exemption for agency communications to 25 years after the creation of the records
    - Require mandatory award of attorney fees and costs to prevailing parties in FOIA litigation

# Making Strategic Use of FOIA Requests

# Using FOIA in Connection with Bid Protests

- ◆ Federal
  - To gain information regarding potential protest grounds
  - ***But remember!*** GAO timeliness rule at 4 C.F.R. § 21.2(a)(2)
    - “Protests other than those [challenging a solicitation] shall be filed not later than ***10 days after the basis of protest is known or should have been known*** (whichever is earlier) ...”
- ◆ State
  - In conjunction with filing of state or local protests, particularly when applicable procedures do not have established process for obtaining relevant information
- ◆ Instead of being used defensively, FOIA (and analogous state laws) can also be used proactively as a learning tool to gain insight as to how proposal / performance has been evaluated

# Using FOIA to Assert Contractor Claims

- ◆ As information-gathering tool to:
  - Assess strengths, weaknesses, and viability of potential claims
  - and/or Establish evidentiary basis for claims asserted or challenging Government defenses
  - Unique opportunity for ***pre-litigation discovery!***
- ◆ FOIA may be particularly useful to gather intelligence re:
  - Constructive changes claims
    - To support that authorized official ordered or ratified the change
  - Wrongful contract terminations
    - To uncover factual circumstances leading toward termination decision
  - Agency failure to abide by its own internal rules/policies
- ◆ Keep in mind 6-year statute of limitations under the Contract Disputes Act

# Using FOIA to Assert Contractor Claims (continued)

- ◆ ***Not yet sold on the potential value of FOIA?***
  - Compare breadth of what records may be sought via FOIA against “relevance” standard applied in litigation:
    - “reasonably calculated to lead to the discovery of admissible evidence”
  - Compare FOIA’s presumption in favor of disclosure versus typical resistance toward document discovery
  - Plus, using FOIA to your strategic advantage before pursuing a claim does not preclude:
    - Opportunity to file subsequent FOIA request(s)
    - or Right to seek discovery if do in fact later pursue litigation

# Resources

- ◆ Comprehensive FOIA website and published statistics: [www.foia.gov](http://www.foia.gov)
- ◆ 5 U.S.C. § 552: <https://www.law.cornell.edu/uscode/text/5/552>
- ◆ Executive Order 12600:  
<http://www.archives.gov/federal-register/codification/executive-order/12600.html>
- ◆ U.S. Department of Justice, Office of Information Policy:  
<https://www.justice.gov/oip>
- ◆ Office of Government Information Services:  
<https://ogis.archives.gov/about-ogis.htm>
- ◆ FOIAOnline: <https://foiaonline.regulations.gov/foia/action/public/home>

# Resources (continued)

- ◆ Center for Public Integrity: <http://www.publicintegrity.org/>
- ◆ Massachusetts Public Records Law:  
<http://www.sec.state.ma.us/pre/prereq/reqidx.htm>
- ◆ Mass. Bill H.3858, An Act to Improve Public Records  
(passed by Senate February 4, 2016):  
<https://malegislature.gov/Bills/189/House/H3858>
- ◆ Mass Bill H.3665, An Act to Improve Public Records:  
<https://malegislature.gov/Bills/189/House/H3665>
- ◆ New York Freedom of Information Law:  
<http://www.dos.ny.gov/coog/foil2.html>
- ◆ California Public Records Act:  
[http://www.leginfo.ca.gov/.html/gov\\_table\\_of\\_contents.html](http://www.leginfo.ca.gov/.html/gov_table_of_contents.html)

# Cited Reports and Articles

- ◆ House Committee on Oversight and Government Reform, *FOIA Is Broken: A Report* (Jan. 2016):  
<https://oversight.house.gov/report/freedom-of-information-act-is-broken-a-report/>
- ◆ *Senate passes public records bill* (The Boston Globe Feb. 4, 2016):  
<https://www.bostonglobe.com/metro/2016/02/04/senate-pass-public-records-bill/2ufGEZqqKyxr4poMbHV8SP/story.html>
- ◆ *A closer look at the Mass. public records bill*  
(The Boston Globe Nov. 19, 2015):  
<http://www.bostonglobe.com/metro/2015/11/19/look-massachusetts-public-records-bill/qyLViqugWddw4TU51B2mXK/story.html>
- ◆ *Mass. among the worst in US for public records access*  
(The Boston Globe Nov. 9, 2015):  
<https://www.bostonglobe.com/metro/2015/11/09/mass-ranked-among-worst-public-records-access/6gDDb8uOzwuYWBgA0bDF2L/story.html>

# Questions?

Bonnie A. Vanzler



265 Franklin Street  
Boston, MA 02110

617.449.6501

[bvanzler@mccarter.com](mailto:bvanzler@mccarter.com)