Overview of the Freedom Of Information Act

Note that the Department of Justice plays a major role in FOIA policy/implementation and particularly in litigation. New guidance issued October 12, 2001, by Attorney General Ashcroft uses “sound legal basis” test to defend withholdings.

I. EXEMPTIONS

A. Exemption 1 (classified information)

1. Executive Order 12958 controls
   a) substantive criteria – three classification levels (C, S, TS) and seven classification categories
   b) procedural criteria – classification authority and proper markings
   c) at CIA, the DCI delegated his original classification authority to ≈ 42 officials who, through further delegation and the classification guide, allow remaining employees to be derivative classifiers

2. Duration of classification – 10 years for some newly classified information but most CIA material gets 25-year protection (E.O. 12958 § 1.6)

3. Automatic declassification of some classified information more than 25 years old (E.O. 12958 § 3.4)

4. Classification challenges (E.O. 12958 § 1.9)

5. Courts give great deference to agency expertise
   a) agency declarations accorded “substantial weight” (Halperin v. CIA)
   b) use of in camera declarations to protect information (Phillippi v. CIA)

6. “Glomar” response (E.O. 12958 § 3.7(a))

7. Leaks of classified information (E.O. 12958 § 1.2(c))

8. “Mosaic” or compilation principle (E.O. 12958 § 1.8(e))

B. Exemption 2 (internal administrative matters)

1. “Low 2”
   • internal matters of trivial nature and of no significant public interest
   • discretionary disclosure often appropriate because no harm in release

2. “High 2”
• Distinguish between “Glomar” response and “No records available under the CIA Information Act” response and an Exclusion

III. WAIVER

A. When waiver exists:

1. Release to one -- release to all
2. Official release vs. mistaken release
3. JFK Act, etc. releases must be of exact same document to set a “precedent”

B. When waiver does not exist:

1. Release to another government agency, Congress, GAO
2. Release by Congress (e.g., Church committee report)
3. Sharing records with parties having common interests (McGilvra v. NTSB)
4. When required by court order if disclosure limited by protective order
5. Leaked information
6. Similar, not same, information publicly disclosed (Public Citizen v. Dept. of State)

IV. DISCRETIONARY DISCLOSURE

• Not considered a waiver (or a precedent) for similar information
• Advantageous in many situations
• New DOJ policy memorandum still allows such disclosures

Oct. 2001