I. Introduction

This outline addresses the Freedom of Information Act, the Privacy Act, requests for testimony and documents in litigation not involving the United States ("Touhy" regulations), and the Federal Advisory Committee Act.

II. Freedom of Information Act (FOIA), 5 U.S.C. §552

A. The FOIA is a disclosure statute that promotes open government by letting the public have access to federal agency records (including electronic records), except to the extent that some records are protected from disclosure by nine mostly discretionary exemptions.

B. Implementing Regulations. The statute is implemented by regulations promulgated by each executive branch agency, and those for HHS are at 45 C.F.R. Part 5 (and for FDA at 21 C.F.R. Part 20).

C. Executive Branch Policy. Notwithstanding the statutory exemptions, the policy for several years (1993-2001) has been to release properly requested information unless an agency can articulate a foreseeable harm that would result from disclosure. The Attorney General issued a new policy on Oct 12, 2001 whereby the Department of Justice will defend agency withholding decisions unless they lack a sound legal basis.

D. How does it work?

1. Someone requests a record. HHS treats any request for records as a FOIA request without requiring the requestor to specifically cite the FOIA.

2. FOIA requests must be answered by FOIA officers (every OPDIV has one). By statute, the agency has 20 working days to answer the request. If we do not answer within 20 working days, a requestor can claim constructive exhaustion of administrative remedies and sue the agency for the requested information.

3. When we do answer the request, we are required to release all responsive documents (in the format requested, if readily reproducible). We can charge for certain expenses, depending on the status of the requestor and the amount of work required to answer the request. Fee waivers are available in certain situations. If we claim exemptions, we still have to release any
reasonably segregable portions of records for which exemptions would not apply.

E. Exemptions

1. Classified Records.

2. Internal Personnel Rules and Practices (e.g., audit guidelines).

3. Statutory Exemptions (i.e., statutes that specifically exempt certain types of records from the FOIA).

4. Trade Secrets and Commercial or Financial Information obtained from a person and privileged or confidential.

5. Inter-Agency or Intra-Agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency (i.e., attorney-client privilege, attorney work-product privilege, and deliberative process privilege).

6. Personnel files, medical files, and similar files that would result in a clearly unwarranted invasion of personal privacy.


8. Reports related to regulation or supervision of financial institutions.


F. Why do people sue?

1. Lack of timely response from the agency.

2. Search not deemed adequate.

3. Disagreement over legality of exemptions claimed.

G. Attorney Fees are available if plaintiff substantially prevails

H. Important Litigation note: The agency has only 30 days to answer any properly served complaint under the FOIA (as compared to 60 days with other federal litigation). If you become aware that any HHS office has received a complaint, let someone in Administrative Law Branch know right away.
Within FOIA Requests
Ashcroft Issued Caution

WASHINGTON 17, Sept.

Washington Post Article

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The FOIA Act is designed to ensure that the government is transparent and accountable. However, the act has been repeatedly challenged and limited by courts and other branches of the government. The Department of Justice, under the leadership of Attorney General John Ashcroft, has taken a more aggressive stance in defending the government against FOIA requests. This has led to concerns about the protection of national security and privacy.

The FOIA Act provides for the release of government information to the public, but there are exceptions for classified information and other sensitive data. In recent years, there have been a number of high-profile cases where government agencies have tried to deny access to information that the public is entitled to know.

Ashcroft has defended the government's use of the FOIA act, saying that it is a vital tool for ensuring transparency. However, critics argue that the government is using the FOIA act to stifle public debate and limit access to important information.

The debate over the FOIA act is likely to continue as the government and the public seek to balance the need for transparency with the need to protect national security and individual privacy.