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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

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2. "High 2"

- predominantly internal matters the disclosure of which would risk circumvention of a statute or agency regulation (manuals, testing materials, vulnerability assessments, etc.)
- law enforcement manuals also can fit under Exemption 7(E)

C. Exemption 3 (other federal statutes)

1. The other statute must contain either an absolute prohibition on disclosure, allowing no agency discretion, or
2. it must contain a limited prohibition on disclosure by: referring to particular matters to be withheld or by providing specific criteria for withholding (both National Security Act of 1947 and CIA Act of 1949 fit within this sub-part).
 - These two laws, together with Exemption 3, authorize protecting intelligence sources and methods and the organization, functions, names, official titles, salaries, and number of personnel employed by the Agency.

D. Exemption 4 (commercial/financial information)

1. Trade secrets or commercial or financial information obtained from a person and privileged or confidential
2. *National Parks* test distinguishes between voluntary and required submissions
3. "Submitter notice" (required by E.O. 12600); "Reverse" FOIA lawsuits

E. Exemption 5 (privileged information)

1. Threshold: inter-agency or intra-agency memoranda or letters
2. Deliberative process privilege
 - a) predecisional
 - b) deliberative
 - c) facts generally not protected
 - d) must process "draft" documents

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3. Attorney work-product privilege

- a) prepared by an attorney or under his or her direction
- b) in anticipation of litigation
- c) continues to be protected after litigation finished
- d) facts are protected

4. Attorney-client privilege

- a) communication between client and attorney re legal matter for which client sought advice
- b) communication is confidential

F. **Exemption 6** (personal privacy)

1. Threshold: personnel and medical files and similar files
2. Privacy interest: living individual's interest in controlling dissemination of information about himself/herself
3. Public interest: serves FOIA "core purpose" of shedding light on agency's operations or activities
4. Balancing privacy interest against public interest (*DOD v. FLRA* case)

G. **Exemption 7** (law enforcement information)

- Threshold: records or information compiled for law enforcement purposes; some CIA records can qualify
- Specific harms from disclosure:
 - a) **Exemption 7(A)** (could interfere with open investigations)
 - b) **Exemption 7(B)** (would interfere with fair trial)

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- c) **Exemption 7(C)** (could violate personal privacy in law enforcement records) *DOJ v. Reporters Comm. and Stern v. FBI* cases
 - o privacy interest
 - o public interest
 - o balancing test
 - o "Glomar" response if law enforcement records on living people
- d) **Exemption 7(D)** (could reveal confidential sources)
 - 1) confidential source-identifying information – and, for records compiled for criminal or national security intelligence investigations, information furnished by a confidential source
 - 2) information provided by source if either express or implied confidentiality
 - 3) protection lasts forever
 - 4) but information subject to discretionary disclosure if no harm in release
- e) **Exemption 7(E)** (could disclose investigative techniques and procedures or guidelines for law enforcement investigations/prosecutions)
 - 1) techniques generally unknown to the public
 - 2) guidelines or manuals -- overlap with Exemption 2
- f) **Exemption 7(F)** (could harm safety of individuals)

H. **Exemption 8** (bank records)

I. **Exemption 9** (oil and gas wells)

Remember the duty to release "reasonably segregable" information in all cases.

II. **EXCLUSIONS** -- "No Records" Response

- A. "(c)(1)" Exclusion -- (subject is unaware of existence of records concerning pending criminal law enforcement investigation/proceeding)

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- B. “(c)(2)” Exclusion -- (informant records maintained by criminal law enforcement agency where informant status is not known)
- C. “(c)(3)” Exclusion -- (existence of FBI foreign intelligence, counterintelligence, or international terrorism records classified fact)
 - 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

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