

## OVERVIEW OF THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA) (5 U.S.C. § 552), as amended, generally provides that any person has a right, enforceable in court, of access to federal agency records, unless such records (or portions thereof) are protected from disclosure by one of nine exemptions. The FOIA applies to "agency records," i.e. records which have either been generated by the agency itself or over which the agency has custody and control. "Agency records" are distinguished from "personal records," which are created and used only by the preparer in a personal rather than an official capacity.

Requesters under the FOIA must "reasonably describe" the records being sought. A description of a record is sufficient if it enables a professional agency employee familiar with the subject matter to locate the record with a "reasonable amount of effort." Once a record is determined to be both an "agency record" for FOIA purposes and responsive to the request, it must be released unless one of the nine exemptions applies. The exemptions (excluding two that do not apply to Commerce records) are:

- (b)(1) exempts from disclosure classified national security information
- (b)(2) exempts from disclosure records related solely to the internal personnel rules and practices of an agency
- (b)(3) exempts from disclosure information prohibited from disclosure by another statute.
  - An example of such a statute is section 12(c) of the Export Administration Act which protects information concerning export license applications
- (b)(4) exempts from disclosure
  - (1) trade secrets and
  - (2) information which is (a) commercial or financial, (b) obtained from a person *and* (c) privileged or confidential
  - This exemption applies only to information submitted from outside the government. Information which has been voluntarily submitted is confidential if it constitutes information which the submitter would not customarily make available to the public. Information which has been compelled to be submitted is confidential if disclosure is likely to:
    - (1) impair the government's ability to obtain necessary information in the future or
    - (2) cause substantial harm to the competitive position of the person from whom the information was obtained.

- (b)(5) exempts from disclosure internal Federal government documents which are both predecisional and deliberative.
  - In addition, the attorney work-product privilege and the attorney-client privilege have been incorporated into exemption (b)(5).
- (b)(6) exempts from disclosure information about individuals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, so long as that invasion is not outweighed by a public interest in disclosure
- (b)(7) exempts from disclosure records or information compiled for law enforcement purposes

The FOIA requires that any reasonably segregable portion of a record which is not subject to an exemption *must* be released. However, where nonexempt material is so "inextricably intertwined" with exempt material that disclosure would "leave only essentially meaningless words and phrases," the entire record can be withheld. Where disclosure of the nonexempt material might reveal the substance of the exempt material, the entire record can also be withheld.

Requests for information contained in Privacy Act (PA) (5 U.S.C. § 552a) systems of records may be handled under the PA as well as under FOIA. Information about an individual may be subject to disclosure to the individual, but not to other requesters.

A response to a requester which partially or completely withholds information contained in the requested agency records, or states that no responsive records can be located, must contain a notice of the requester's appeal rights to the Office of the General Counsel.

Finally, with regard to fees, the FOIA provides for an agency to charge requesters. The charges will vary depending on who the requestor is: for example, members of the press can only be charged for duplication costs. Fees can be waived or reduced if disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and it is not primarily in the commercial interest of the requester. The ability of the requester to pay assessed fees does not enter into any fee waiver determination.