



UNITED STATES DEPARTMENT *of* JUSTICE

*The Release of Ethics Documents Under
the FOIA and Privacy Act*

Institute for Ethics and Government Summit
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The Freedom of Information Act

The FOIA pertains to federal agency records that exist and can be located in agency files.



Freedom of Information

United States Supreme Court:

“The basic purpose of [the Freedom of Information Act] is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”



FOIA & Ethics: Common Goals

On his first full day in office, President Obama established new transparency and ethics rules.

Transparency + Ethics = Accountability



*Applying FOIA to Ethics: FOIA
Exemptions Commonly Used for
Ethics-Related Documents*



Commonly cited FOIA Exemptions

The most commonly cited FOIA exemptions by agencies government-wide:

- Exemptions 6/7(C) (personal privacy)
- Exemption 7(E) (law enforcement techniques & procedures)
- Exemption 5 (civil discovery privileges)

The most commonly cited FOIA exemptions by OGE:

- Exemption 6
- Exemption 5
- Exemption 3 (records exempted by statute)



Ethics Records Likely to be Requested under FOIA

- Financial disclosure and related records
- Ethics advice and counsel
- Ethics waivers and approvals
- Ethics training records
- Ethics reports and questionnaires
- OGE referrals to the Department of Justice
- Ethics program management materials

Some records are accessible directly through provisions of the Ethics in Government Act of 1978.⁷



*FOIA Exemption 3: Statutory
Prohibitions on Disclosure*



FOIA Exemption 3

- Protects information that has been “specifically exempted from disclosure by statute.”
 - May be an absolute or limited prohibition on disclosure
 - Any statute enacted after October 28, 2009 must specifically cite to 5 U.S.C. § 552(b)(3) to qualify as a withholding statute



Applying Exemption 3 to Ethics Records

Statutes Found to be Applicable to Ethics Records

- 5 U.S.C. app 107(a) (confidential financial disclosure reports)
 - Meyerhoff v. EPA, 958 F.2d 1498, 1500-02 (9th Cir. 1992); Seife v. NIH, 874 F. Supp. 2d 248, 254 (S.D.N.Y. 2012); Concepcion v. FBI, 606 F. Supp. 2d 14, 33 (D.D.C. 2009); Glascoe v. DOJ, No. 04-0486, 2005 WL 1139269, at *1 (D.D.C. May 15, 2005)
 - 5 U.S.C. app. 105 has also been cited by OGE
- 18 U.S.C. 208(d)(1) (conflict of interest waiver determinations)
 - Seife v. NIH, 874 F. Supp. 2d 248, 256 (S.D.N.Y. 2012)



FOIA Exemption 5: The Civil Discovery Privileges



FOIA Exemption 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.”



FOIA Exemption 5

Records covered by Exemption 5
are good candidates for
discretionary release.



Exemption 5 Threshold

Threshold: inter-agency or intra-agency memoranda or letters

- Within or between agencies
- Consultants



The Deliberative Process Privilege

The Deliberative Process Privilege

- a) predecisional
- b) deliberative
- c) facts generally not protected



Other Civil Discovery Privileges

Attorney Work-Product Privilege

- a) prepared by an attorney or under his/her direction
- b) in anticipation of litigation
- c) no temporal limit
- d) facts protected

Attorney-Client Privilege

- a) communication from client to attorney
- b) communication confidential



Applying Exemption 5 to Ethics Records

- E-mails, memoranda, recommendations, notes and approvals related to ethics analyses and waiver requests
- Ethics guidance, opinions, and advice
- Ethics program and training materials
- Ethics-related policies
- Referrals to the Department of Justice



FOIA Exemption 6: Privacy



FOIA Exemption 6

Protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy.



Exemption 6: Threshold

- “Personnel and medical files and similar files”
 - Personnel & medical files = easy to identify
 - What’s a “similar file?”
 - Almost anything else qualifies as a similar file. Courts have found that the “similar file” prong is satisfied where the information pertains to a particular individual.
- A file can exist in any format. NY Times v. NASA (audio recordings can be similar files).



Exemption 6: Privacy Interest

- Living individuals have a privacy interest in not having agencies disseminate personal information about them.
- Privacy encompasses an “individual’s control of information concerning his or her person.”
- Information need not be intimate or embarrassing to qualify for protection.



Privacy Interest

- Privacy interests have been found in personally identifying information such as:
 - a person's name,
 - address,
 - phone number,
 - date of birth,
 - criminal history
 - medical history, and
 - social security number.



Privacy Interest – Glomar Response

When a request seeks records concerning an identifiable individual and the records are of a particularly sensitive nature, it may be necessary to neither confirm nor deny the existence of the records, or “Glomarize.”

- Must be a targeted third party request.
- Cannot acknowledge the very existence of records.
- May need to “bifurcate” a request to process it – separate third party subjects from other subjects.



Privacy Interest of Federal Employees

Per OPM regulation, 5 C.F.R. 293.311, agencies should release:

- Name;
- Present and past position titles and occupational series;
- Present and past grades;
- Present and past annual salary rates performance awards and bonuses;
- Present and past duty stations; and
- Position descriptions, job elements; and performance standards.



“FOIA Public Interest”

- What’s a FOIA public interest?
 - It’s not necessarily what’s of general interest to the public.
 - Disclosure of the information must serve the “core purposes” of the FOIA, to “shed light on an agency’s performance of its statutory duties.” DOJ v. Reporters Committee.

- The agency’s conduct, not the personal conduct of individuals is relevant.



“FOIA Public Interest”

- Neither the identity of the requester nor the private need for the information is given any weight in this determination.
- The public interest must be served by disclosure of the requested information.



Balancing the Interests

- If privacy is not threatened by disclosure, Exemption 6 does not apply.
- If there is a privacy interest but no countervailing FOIA public interest in disclosure, withhold the record.
- If there is a privacy interest and a FOIA public interest, balance.



Balancing the Interests

Factors To Consider In Balancing

- 1) Information concerning the intimate details of a person's life generally deserve protection.
- 2) The passage of time usually serves to increase the privacy interest.
- 3) Agency may consider any adverse consequences disclosure may have on the identified individual.
- 4) Proven allegations of official misconduct, constitute a significant public interest.
- 5) Identities of individuals in law enforcement records are virtually never "very probative of an agency's behavior or performance." SafeCard Services v. SEC.



Balancing the Interests

- One approach: redact personally identifying information and release remainder
- This both protects privacy and reveals government activity



Applying Exemption 6 to Ethics Records

- Financial information and business relationships
- Familial information
- Home and personal addresses and contact information
- Social security numbers, dates of birth
- Gifts and travel information
- Outside activities
- Identities of 278 and 450 filers, and individuals receiving training



*Freedom of Information
Act and Privacy Act
Interface*



Purpose of the Privacy Act

Protect the privacy of the individuals about whom the government maintains records by:

1. Limiting the collection, maintenance, use, and disclosure of personally identifiable information.
2. Allowing individuals to request access to, amendment of, and an accounting of disclosures concerning records about themselves.

General Presumption is Protection



Purpose of the FOIA

- Facilitates government transparency and accountability.
- Provides a means for the public to “know what the government is up to.”
- Permits agencies to protect certain records that fall within any of the nine FOIA exemptions.

General Presumption is Disclosure



Records Covered

Privacy Act

Records must be:

1. About an individual,
2. Stored in a system of records, and
3. Accessed by personal identifier.

FOIA

All agency records.

Privacy Act Record = Agency Record
Agency Record \neq Privacy Act Record



Privacy Act: General Rule

- Generally, agencies cannot disclose Privacy Act records without the prior written consent of the individual.
- Records may be disclosed without prior written consent under certain conditions.



Privacy Act Conditions of Disclosure

All conditions are listed at 5 U.S.C. § 552a(b).
The most commonly encountered conditions include:

(b)(1) Need to know within agency

(b)(2) If required under the FOIA

(b)(3) Routine use published in SORN



Access under Privacy Act and FOIA

- Both the Privacy Act and FOIA provide rights of access to records.
- However, there are differences in the extent of access depending on the statute.



Who has a right of access?

Privacy Act

- U.S. Citizens
- Lawful
Permanent
Residents

FOIA

- U.S. Citizens
- LPRs
- Non-U.S.
Citizens
- Organizations

ANYONE



Privacy Act Exemptions

Ten exemptions limit access under the Privacy Act:

- One special: § 552a(d)(5)
- Agency must publish notice in the Federal Register if they will invoke other exemptions:
 - Two general: § 552a(j)(1)-(2)
 - Seven specific: § 552a(k)(1)-(7)



Processing Requests

1st Party Requests

- Process first under the Privacy Act, then under the FOIA for the greatest disclosure.

3rd Party Requests

- Process only under FOIA



How to Process First Party Requests

1. Does a Privacy Act exemption apply?
 - If **no**, release.
 - If **yes**, continue to FOIA analysis.
2. Does a FOIA exemption apply?
 - If **no**, release.
 - If **yes**, withhold.

Information can only be withheld when both Privacy Act and FOIA exemptions apply.



How to Process Third Party Requests

- Process third party requests for Privacy Act records under the FOIA only.
- Release records if FOIA **requires** disclosure (i.e., no FOIA exemption applies).
 - **No discretionary release** of Privacy Act records.
- Agency generally needs a FOIA request in hand to release Privacy Act records. Bartel v. FAA, 725 F.2d 1403 (D.C. Cir. 1984).



Resources

U.S. Department of Justice, Office of Information Policy (OIP):

- www.justice.gov/oip
- (202) 514-FOIA (3642)
- www.foia.gov



Questions?



Disclosure Under the Ethics in Government Act

Jen Matis
U.S. Office of Government Ethics

Disclosure Procedure for Public Financial Disclosure Reports

Ethics in Government Act (EIGA), 5 U.S.C. app §105(b)(2):

“[A] report may not be made available ... to any person except upon a written application by such person stating:

(A) that person’s name, occupation, and address;

(B) the name and address of any other person organization on whose behalf the inspection or copy is requested; and

(C) that such person is aware of the prohibitions on the obtaining or use of the report.”

- See also 5 CFR §2634.603; OGE/GOVT-1 SORN.

Application for Disclosure (OGE Form 201)

- **EIGA §105(b)(2):** “Any such application shall be made available to the public throughout the period during which the report is made available to the public.”
- Can also use a Form 201 to obtain completed Form 201s.

6 Year Time Limit

EIGA §105(d)(2)(B)

Such report shall be made available to the public for a period of 6 years after receipt of the report.

-Also must make completed Form 201s available for same time period.

EIGA §105(d)(3)

After the relevant time period identified under paragraph (2), the report shall be destroyed unless needed in an ongoing investigation.

See also 5 CFR §2634.603; General Records Schedule 2.8, Item 061.

6 Year Time Limit

- ⇒ Two separate provisions: Requirement to destroy AND limitation on when the report can be made available to the public.
- ⇒ Even if the agency hasn't yet complied with the requirement to destroy, it doesn't mean the report should be released.

Fees

EIGA §105(b)(1) & 5 CFR §2634.603(e):

The agency may require a reasonable fee to recover the cost of reproduction or mailing. A copy may be furnished without charge or at a reduced charge if it is determined that waiver or reduction of the fee is in the public interest.

- OGE issued a regulation setting its fee for reproduction at \$0.15 per page, same as FOIA fees. See 5 CFR part 2604, subpart G.

Confidential Financial Disclosure

EIGA §107(a)(2):

Any information required to be provided by an individual under the subsection shall be confidential and shall not be disclosed to the public.

5 CFR §2634.604: No member of the public shall have access to confidential reports, except pursuant to the order of a Federal court or *otherwise provided under the Privacy Act*. See also OGE/GOVT-2 SORN.

FOIA Requests for Financial Disclosure Reports

- Courts have found that the Ethics in Government Act is an Exemption 3 statute.
- Withhold confidential FD reports in their entirety, *and* any info obtained from confidential FD reports, under Ex. 3 pursuant to EIGA §107.
 - See Meyerhoff v. EPA, 958 F.2d 1498, 1500-02 (9th Cir. 1992); Seife v. NIH, 874 F. Supp. 2d 248, 254 (S.D.N.Y. 2012); Concepcion v. FBI, 606 F. Supp. 2d 14, 33 (D.D.C. 2009); Glascoe v. DOJ, No. 04-0486, 2005 WL 1139269, at *1 (D.D.C. May 15, 2005)

FOIA Requests for Financial Disclosure Reports

- Withhold public FD reports in their entirety under Ex. 3 pursuant to EIGA §105, unless the requester has fulfilled the requirements set forth in that section.
- Suggest explaining the alternative EIGA (Form 201) procedure to the requester, as a matter of good customer service.