AMERICAN SOCIETY OF ACCESS PROFESSIONALS
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PRECEDENT-SETTING FOIA LITIGATION: SIGNIFICANT COURT DECISIONS THAT HAVE SHAPED THE FREEDOM OF INFORMATION ACT

I. Timeframe: Freedom of Information Act passed, 1966

A. Segregability

***EPA v. Mink*, 410 U.S. 73 (1973) – The U.S. Supreme Court tells agencies that they must release segregable information from partially exempt documents.**

B. Vaughn indexes

***Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) – U.S. Court of Appeals for the D.C. Circuit holds that an agency must index withheld documents and provide the justification for withholding.**

II. Timeframe: 1974 and 1976 amendments

A. Determining what is "confidential" information under Exemption 4

***National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) – The D.C. Circuit Court of Appeals sets out the tests for whether information provided to the government can be withheld as "confidential."**

***Note: 17 years later, the same court sets out a new test for protecting information that has been "voluntarily" provided: Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992).**

B. Decisional documents and privileged deliberative documents

***NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) – The Supreme Court elaborates on the deliberative process privilege and "final" decisions under Exemption 5.**

C. Open America stays for the government in FOIA lawsuits

***Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976) – The D.C. Circuit fleshes out the procedures for how**

agencies should handle backlogs of FOIA requests (including using "first-in, first-out") and the circumstances under which an agency can obtain a stay of judicial proceedings when sued for "failure to respond" to a request.

Note: An agency's ability to obtain an Open America stay is later restricted by Congress in the 1996 Electronic Freedom of Information Act Amendments.

D. "Glomar" responses

Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) – The D.C. Circuit approves an agency's response of "neither confirm nor deny" under Exemption 1 to a FOIA request for records concerning the Glomar Explorer submarine-retrieval ship. Subsequently in other cases the court accepts "Glomarization" responses under other exemptions.

E. The meaning of "agency" and "agency records"

Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980) – The Supreme Court holds that the Office of the President is not an agency for purposes of FOIA.

Forsham v. Harris, 445 U.S. 169 (1980) – In companion case to Kissinger, the Court explains that an agency must first either create or obtain a record before it becomes an "agency record."

Note: "Agency records" definition is further refined in the Supreme Court's decision in U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989): the record must be under the agency's control at the time of the FOIA request.

F. Exemption 6 threshold ("personnel and medical files and similar files") is broadly interpreted

U.S. Dep't of State v. Washington Post Co., 456 U.S. 595 (1982) – The Supreme Court makes clear that all information that applies to a particular individual is potentially protected under Exemption 6, regardless of the label of the file containing the information.

G. Recompilation of information

FBI v. Abramson, 456 U.S. 615 (1982) – The Supreme Court holds that information that was originally compiled for a law enforcement purpose and then recompiled into a non-law enforcement record can still be protected under Exemption 7.

III. Timeframe: Freedom of Information Reform Act of 1986

A. Release to one is release to all . . .

U.S. Dep't of Justice v. Julian, 486 U.S. 1 (1988) – The Supreme Court recognizes that the one exception to FOIA disclosure rules (such as that the identity of the requester is irrelevant) is the "first-party" requester: the agency should not invoke a FOIA exemption to protect the requester from him/herself.

B. Privacy interests, public interests, and balancing the two

U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) – The Supreme Court gives detailed guidance on determining the privacy interests to be considered under Exemptions 6 and 7(C), on defining the "public interest," and on balancing the interests.

C. When is a source confidential?

U.S. Dep't of Justice v. Landano, 508 U.S. 165 (1993) – The Supreme Court holds that an agency must show specific circumstances that led its Exemption 7(D) source to have an expectation of confidentiality.

D. What is the status of electronic mail messages under the Federal Records Act and the Presidential Records Act?

Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.C. Cir. 1993) – The D.C. Circuit Court of Appeals makes clear that both the electronic and the printed versions of an e-mail message may be a federal record. Agencies may be sued if they do not meet their obligations to manage e-mail records in accordance with the FRA. The courts also may review the President's guidelines for managing presidential records.

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