

INFORMATION LAW

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.
7. Investigatory Records Compiled for Law Enforcement.
8. Reports related to regulation or supervision of financial institutions.
9. Geological and geophysical information.

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.

Asheroff Urges Caution With FOIA Requests

Associated Press

①Draining government records might become more difficult under a Bush administration policy change made a month after the Sept. 11 terrorist attacks.

Attorney General John D. Asheroff directed agency leaders to be cautious in releasing records to journalists and others. He said agencies must "carefully consider" issues such as threats to national security and the effectiveness of law enforcement.

Asheroff also said agencies that legitimately turn down requests made under the Freedom of Information Act will have the backing of the Justice Department.

"Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial and personal privacy interests that could be implicated," Asheroff said in a memo dated Oct. 12 and released yesterday.

The FOIA allows reporters and others to get unclassified government re-

ords that officials otherwise would not release. Journalists have used the law to reveal government wrongdoing and abuses.

Caesar Andrews, editor of GameNet News Service and president of the Associated Press Managing Editors, said public access should not be weakened.

"We certainly understand that during these very volatile and sensitive times, there will be information that needs to be kept classified.

At the same time, given the same volatile environment, there is a tremendous need for the public to have access to certain information. It behooves any holding back," he said.

Asheroff said the Bush administration is committed to complying with the FOIA so Americans "can be assured neither fraud nor government waste is concealed."

He said that must be balanced with other issues, including national security and the protection of justice information.

The attorney general told agency leaders to consult with Justice Department lawyers about significant requests for information.

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