American Society of Access Professionals FOIA-Privacy Act Training Workshop
"Historical, Precedent-Setting Litigation and the Impact of FOIA Amendments"
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CASES

1. ***Envtl. Prot. Agency v. Mink*, 410 U.S. 73 (1973), *abrogated by statute*** — ruling, in the context of Exemption 1, that an agency has no obligation to segregate and disclose non-classified portions of otherwise classified documents; further ruling, with respect to Exemption 5, that a court is not obliged to examine records *in camera* if a requester alleges pre-decisional materials contain factual information; abrogated by the 1974 FOIA Amendments, which created an obligation to reasonably segregate non-exempt material from responsive records.

2. ***Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (U.S. Mar. 18, 1974)** — ruling that in litigation an agency must ordinarily provide a sworn, itemized index correlating each withheld document (or portion thereof) with a specific exemption justification in order to even the playing field between the parties and give the court an adequate basis for determining whether to grant an agency's motion for summary judgment.

3. ***Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975)** — describing the interaction between Exemption 5 and the FOIA's proactive disclosure obligations, noting the danger of "secret law," and holding the exemption and deliberative-process privilege cannot apply to "final opinions"; explaining Exemption 5 incorporates the attorney work-product privilege to protect materials prepared by a government attorney in contemplation of litigation and setting strategy for a case.

4. ***Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976)** — ruling that Exemption 2 applies only to "minor or trivial matters" in which there is little or no public interest and thus did not protect information about Ethics Code violations at the Air Force Academy; further holding that Exemption 6 always requires an agency to balance the possible invasion of privacy against the public's interest in disclosure and, in this case, the agency must disclose the requested records in a form that would not lead to any Air Force cadet being individually identified.

5. ***Chrysler Corp. v. Brown*, 441 U.S. 281 (1979)** — in case involving records covered by Exemption 4, ruling that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure" and agencies may discretionarily release records that could be withheld; further ruling that a submitter may sue under the Administrative Procedure Act—but not the Trade Secrets Act—if an agency's disclosure would, among other things, be "not in accordance with law."

6. ***Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976**), ***superseded by statute*** — holding that the district court properly granted an extension of time to the agency when the agency was deluged with requests for information vastly in excess of that anticipated by Congress, and the agency was processing the requests with due diligence on a first-in, first-out basis; superseded, in large part, by the Electronic FOIA Amendments of 1996.

7. ***Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976)** — affirming the CIA's refusal to confirm or deny the existence of records of a CIA connection the *Hughes Glomar Explorer*, a submarine retrieval ship, based on Exemption 1 because doing so would itself divulge classified information.

8. ***Fed. Trade Comm'n v. Grolier*, 462 U.S. 19 (1983)** — confirming that the test under Exemption 5 for the use of civil discovery privileges is whether the records at issue would be "routinely" disclosed "upon a showing of relevance," thus eliminating any distinction between absolute or qualified privileges in the FOIA context; ruling also that the attorney work-product remains exempt regardless of whether the litigation for which it was generated has ended.

9. ***Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989**) — in an Exemption 7(C) case, discussing the scope of the protected personal privacy interests; ruling that, with respect to the required balancing test, an agency may only consider the public interest in knowing what the government is "up to" and thus, if records are not informative of the operations and activities of the agency, there is no public interest in their release; further ruling that agencies may "categorically" weigh public interest; holding that because criminal history rap sheets reveal nothing about the government, they may be withheld.

10. ***Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989)** — in a case involving copies of tax court decisions the agency received in the course of litigation, ruling such decisions were "agency records" because they were (1) "create[d] or obtain[ed]" by the agency and (2) under its "control" at the time of the request; further ruling that despite the records at issue being publicly available elsewhere, albeit on an oft-delayed basis, they were still "improperly" "withheld."

11. ***Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001)** — examining Exemption 5's threshold "inter-agency or intra-agency" requirement, recognizing it should have "independent vitality," and holding that the threshold is not satisfied when documents are created as a result of an agency's relationship with an outside consultant and the consultant is pursuing its own interests rather than the government's, or when it is seeking a benefit from the agency at the expense of competitors.

12. ***Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2003)** — in a case involving records of an investigation into the death of Vince Foster, holding that Exemption 7(C) protects the personal privacy interests of a decedent's surviving family members; further ruling that, at least when a requester attempts to argue the public interest in disclosure outweighs an invasion of personal privacy because disclosure would show government officials acted negligently or otherwise improperly in performing official duties, the requester must produce evidence of impropriety sufficient to convince a reasonable person it occurred.

13. ***Fed. Commc'ns Comm'n v. AT&T, Inc.*, 562 U.S. 397 (2011**) — ruling that Exception 7(C), which protects against the unwarranted invasion of "personal privacy" interests, does not protect the "privacy" interests of corporations.

14. ***Milner v. Dep't of the Navy*, 562 U.S. 562 (2011**) — in a case involving data and maps used to help store explosives at a naval base, greatly narrowing the scope of Exemption 2 by ruling it applies only to records reflecting "internal" "rules and practices" for "personnel"-related issues, *i.e.*, "employee relations and human resources"; eliminating the atextual, judicially created distinction between "Low 2" and "High 2" categories of the exemption.

15. ***Sack v. Dep't of Def.*, 823 F.3d 687 (D.C. Cir. 2016**) — ruling that students can qualify for the "educational institution" fee category because, "[l]ike teachers, students do research, seek background information for paper topics, gather primary documents, write papers, publish, and contribute to the development and dissemination of knowledge within the school and to the outside world"; also holding the OMB Fee Guidelines, in relevant part, conflict with the FOIA.

16. ***Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019)** — invalidating the D.C. Circuit's *National Parks* "substantial competitive harm" test for determining when records are "confidential" for purposes of Exemption 4; ruling instead that information is protected *at least* when it is (1) "customarily and actually treated as private by its owner" and (2) provided to an agency under an assurance of confidentiality.

HIGHLIGHTS FROM KEY LEGISLATIVE ENACTMENTS

1. ***Act of Nov. 21, 1974*, Pub. L. No. 93-502, 88 Stat. 1561 (1974)** — modifying procedural and judicial review provisions, *e.g.*, permitting *in camera* review of classified materials, requiring non-exempt reasonably segregable potions of records be disclosed, providing for public-interest fee waivers, creating the "reasonably described" requirement for requests, defining "agency," and describing required contents of a determination; narrowing the scope of Exemption 1 by requiring records be "in fact properly classified"; also narrowing Exemption 7 by dividing it into six subsections based on specified types of harm.

2. ***Freedom of Information Reform Act*, Pub. L. No. 99-570, 100 Stat. 3207 (1986)** — creating a multi-tiered structure of different fee categories and directing OMB to implement government-wide fee guidelines; creating "exclusions" for narrow criminal law enforcement and intelligence matters; and broadening the protections of Exemption 7 by lessening its harm standard.

3. ***Electronic Freedom of Information Act,* Pub. L. No. 104-231, 110 Stat. 3048 (1996)** — applying many electronic records principles to FOIA operations, *e.g.*, defining "record" to include "an electronic format"; requiring disclosure "in any form or format requested," if "readily reproducible"; providing for multitrack processing; requiring the Department of Justice to provide implementing guidance to agencies and for agencies to report annually on FOIA operations.

4. ***OPEN Government Act*, Pub. L. No. 110-175, 121 Stat. 2524 (2007)** — defining a "requester of the news media" for fee purposes; defining "substantial prevailed" for purposes of the recovery of attorney fees and litigation costs; modifying time limits; expanding the definition of a "record" to include records held by a contractor "for the purposes of records management"; creating NARA's Office of Government Information Services.

5. ***OPEN FOIA Act*, Pub. L. No. 111-83, 123 Stat. 2142 (2009**) — requiring that any future Exemption 3 statute specifically refer to Exemption 3 to be effective.

6. ***FOIA Improvement Act*, Pub. L. No. 114-185, 130 Stat. 538 (2016)** — creating the "Rule of 3" for proactive disclosures; codifying a "foreseeable harm" standard to ensure agencies only withhold information if required by law or the agency reasonably foresees disclosure would harm an interest protected by an exemption; limiting use of the deliberative-process privilege with a 25-year "sunset" provision; requiring creation of a new, consolidated request portal.