**MLRC Media Law Conference**

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**Hot Topics in Federal FOIA**

**Matt Topic, Loevy & Loevy  
Katie Townsend, Reporters Committee for Freedom of the Press**

1. **Federal Freedom of Information Act Basics**

FOIA, 5 U.S.C. § 552—passed in 1966—provides a statutory right of access to records in the possession, custody, or control of federal executive branch agencies.

To utilize the Act, a journalists, news organization, or other member of the public need only submit to the agency a written request that “reasonably describes” the records the requester wants. (For information about how to submit a request to a specific agency, check that agency’s FOIA regulations; the [foia.wiki](https://foia.wiki/wiki/Main_Page) can help.)

What counts as an agency?

* “Agency” includes “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency . . . .”
* “‘[T]he President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President’ are not included within the term ‘agency’ under the FOIA.” —*Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980)

NOTE: FOIA only applies to existing “agency records.”

* Requesters cannot ask an agency to create a new record or compile information.
* But all types of documentary information—including papers, reports, letters, email, films, photographs and sound recordings—are “records”; physical objects that cannot be reproduced, however, are not “records[.]”

**Reasonably Describe:** Requirement is met if FOIA officer can understand what was requested and locate it with reasonable effort. Government often uses this to deny requests deemed too broad, but some courts have rejected that as contrary to the statute.

**Expedited Processing**: Expedited processing is available “with respect to a request made by a person primarily engaged in disseminating information” with an “urgency to inform the public concerning actual or alleged Federal Government activity.” If you want to request expedited processing, you must include a statement that the reasons for expedited processing set forth in the request are certified to be true and correct to the best your knowledge and belief. Requests for expedited processing are rarely granted.

**Fee Benefits and Fee Waivers**

* Under FOIA, you are entitled to a fee benefit as a “representative of the news media” if the records are not sought for commercial use; fees are limited to the cost of duplication and you get the first 100 pages free.
* Under FOIA, an agency must grant a request for a fee waiver “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

**Exemptions (& Other Barriers) to Disclosure**

* 5 U.S.C. §552(b)(1)–(9)
* *Glomar*
* 5 U.S.C. § 552(c): Agencies can treat records as being outside the scope of FOIA when they are (1) law enforcement records & subject is not aware of investigation; (2) confidential informant records; (3) FBI records related to intelligence/terrorism matters

**Administrative Appeals:** You must administratively appeal a determination prior to filing suit; however, if the agency simply doesn’t respond to your FOIA request (which is common) you do not need to administratively appeal before filing suit. Under FOIA, you have a minimum of 90 days to administratively appeal an agency’s determination; the agency then has 20 business days to respond. Always appeal!

* What can you appeal? The sufficiency of the agency’s search for records; the application of exemptions; a Glomar response; and segregability.

**Statutory Deadlines, Backlogs, and Delay:**

An agency must make a “determination” within 20 business days of receipt of a FOIA request. That does not mean the agency is required to provide the requested records within that time frame. But it means the agency must: (i) gather and review the relevant documents; (ii) determine and communicate the scope of the documents the agency intends to produce / withhold; and (iii) inform the requester of appeal rights. Records are supposed to be produced “promptly,” which means “days or weeks, not months or years.”

An agency can extend the 20-business day deadline if “unusual circumstances” apply, such as if voluminous records must be searched, if records must be retrieved from various offices, or if several agencies must be consulted.

**Agencies rarely (if ever) comply with FOIA’s statutory deadlines.**

The COVID-19 pandemic exacerbated the problem of delay. A number of agencies—particularly federal law enforcement agencies and other agencies, like the State Department, that require access to classified servers for FOIA processing—put processing operations on hold or, at a minimum, significantly reduced their processing capacity in 2020 as a result of the pandemic. Given the already existing backlog of requests at some of these agencies, the stopping and slowing of processing in response to the pandemic injected even more delay into the system.

**FOIA Resources:** [foia.wiki](https://foia.wiki/wiki/Main_Page)  (provides case summaries and other information on how best to appeal adverse decisions); [The FOIA Project](http://foiaproject.org/) (tracks active FOIA litigation); [Muckrock](https://www.muckrock.com/) (clearinghouse for FOIA resources and previously released public records); [FOIA Mapper](https://foiamapper.com/) (maps government agencies and their records systems).

1. **Key Recent Supreme Court Cases**

***Food Marketing Institute v. Argus Leader Media,* 139 S.Ct. 2356 (2019)**

*FMI* was the first SCOTUS decision interpreting a FOIA exemption since *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259 (2011). *FMI* broadly expanded the scope of the information that may be withheld under [FOIA Exemption 4](https://foia.wiki/wiki/Exemption_4), which permits agencies to withhold “trade secrets and commercial or financial information obtained from a person” that is “privileged or confidential.” 5 U.S.C. § 552(b)(4).

By way of background, pre-*FMI,* many federal circuit courts applied the test announced by the D.C. Circuit in *Nat’l Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Under the *National Parks* test, information is “confidential” for purposes of Exemption 4 only if its disclosure would be likely either (1) “to impair the Government’s ability to obtain necessary information in the future” or (2) “to cause substantial harm to the competitive position” of the person from whom the information was obtained.

*FMI* arose out of a FOIA request submitted by the *Argus Leader*, a South Dakota newspaper, to the USDA for data the agency collected in connection with the federal Supplemental Nutrition Assistance Program (SNAP). *Argus Leader*’s request sought, *inter alia*, annual SNAP redemption data from participating retailers for a five-year period. The USDA withheld that “store-level SNAP data” on the grounds that it qualified as “confidential” under Exemption 4.

*Argus Leader* successfully sued for disclosure in a South Dakota district court. Applying the *National Parks* “competitive harm” test that had been adopted by the Eighth Circuit, the district court concluded that the store-level SNAP data was not “confidential” under Exemption 4 because there was insufficient evidence establishing that disclosure would cause “substantial competitive harm” to the retailers. The Eighth Circuit affirmed.

But the Supreme Court, in a 6-3 [decision](https://supreme.justia.com/cases/federal/us/588/18-481/), held that to be “confidential” under Exemption 4, no showing of *any* competitive harm is necessary, let alone substantial competitive harm. Justice Gorsuch, writing for the majority, applied a plain text reading of the language of the exemption and flatly rejected the *National Parks* test, calling it a relic from a bygone era of statutory construction.

Now, under *FMI*, “where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy,” it qualifies as “confidential”. 139 S. Ct. at 2366. Lower courts have grappled with Exemption 4 claims post-*FMI*, with mixed results for requesters.

***U.S. Fish and Wildlife Service v. Sierra Club*, No. 19-547, 2021 WL 816352 (S. Ct. Mar. 4, 2021)**

A provision of the Endangered Species Act and its implementing regulations require agencies to consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the “Services”) whenever an agency action that may affect a species protected under the Endangered Species Act. As part of that consultation process, the Services are required to prepare a written biological opinion as to whether the proposed agency action is one that poses “jeopardy” or “no jeopardy” to the continued existence of a listed species or critical habitat. If the opinion concludes that the agency action causes “jeopardy,” the Services must propose “reasonable and prudent alternatives”—or RPAs—that would avoid jeopardizing the threatened species.

In 2013, the U.S. Environmental Protection Agency began formally consulting with the Services regarding a proposed change to EPA regulations for power plants’ cooling water intake structures, which can affect marine life. The Services wrote conclusive determinations about the adverse impact the EPA’s proposed changes would have on threatened and endangered species. As a result of those conclusions, the EPA modified its proposed action. In 2014, the Sierra Club filed a FOIA request seeking the Services’ records containing their conclusions as to the then-current action proposed by the EPA. The Services withheld 16 records, citing [FOIA Exemption 5](https://foia.wiki/wiki/Exemption_5), specifically, the [“deliberative” process privilege](https://foia.wiki/wiki/Deliberative_Process_Privilege), and the Sierra Club filed suit. The district court held that 12 of the 16 withheld records were not protected by the deliberative process privilege and ordered the Services to release them. The Ninth Circuit reversed as to three of those 12 records, but otherwise affirmed. On appeal, the Ninth Circuit held that even though certain of the requested biological opinions of the Services were denominated “draft,” they were not predecisional or deliberative and thus could not be withheld under Exemption 5.

On March 4, 2021, the Supreme Court reversed in a 7-2 [decision](https://www.supremecourt.gov/opinions/20pdf/19-547_08m1.pdf); the majority opinion was authored by Justice Barrett. The Court held that the “deliberative process privilege protects the draft biological opinions from disclosure because they are both predecisional and deliberative.” Justice Breyer, joined by Justice Sotomayor, dissented. The Court remanded the case to the district court for further proceedings.

1. **“**[**Foreseeable Harm**](https://foia.wiki/wiki/Foreseeable_Harm_Standard)**”**

The 2016 FOIA Improvement Act amended FOIA to add the so-called foreseeable harm provision, which prohibits agencies from withholding records requested under the Act unless “it reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8).

NOTE: Neither of the two most recent, post-2016 SCOTUS decision interpreting FOIA addressed the foreseeable harm provision; the requests at issue in those cases predated the 2016 change in the law.

Since the foreseeable harm provision was enacted, federal district courts, especially in the D.D.C. and S.D.N.Y. have been interpreting and applying it. And, in *Center for Investigative Reporting v. U.S. Customs and Border Protection*, 2019 WL 7372663 (D.D.C. Dec. 31, 2019), D.D.C. Chief Judge Howell identified “three key principles” that had emerged from the district court case law interpreting the “foreseeable harm” provision to date: (1) “First and foremost, the foreseeable harm requirement imposes an independent, meaningful burden on agencies.” (2) To meet this independent and meaningful burden, an agency must “identify specific harms to the relevant protected interests that it can reasonably foresee would actually ensue from disclosure of the withheld materials,” and “connect the harms in [a] meaningful way to the information withheld.” (3) Agencies “may take a categorical approach” to meeting that burden.

In the first D.C. Circuit case to address the foreseeable harm provision—[*Machado Amadis v*. *Department of State*](https://www.rcfp.org/wp-content/uploads/2020/08/2020-08-21-DC-Cir-Opinion-Machado-Amadis-v.-Department-of-Justice.pdf), the Court raised concerns among FOIA litigators and transparency advocates about the future impact of foreseeable harm. The Court in that case affirmed a district court’s ruling that the State Department had made an adequate showing of reasonably foreseeable harm as to Blitz Forms—forms used by attorneys within the Department to evaluate FOIA administrative appeals. The Court’s foreseeable harm discussion consisted of a mere two paragraphs and, though it can be interpreted narrowly, the panel seemed not convinced that the foreseeable harm provision imposes a “meaningful and independent” burden on agencies.

The D.C. Circuit, however, alleviated many of those concerns in a more recent decision: [*Reporters Committee for Freedom of the Press and The Associated Press v. Federal Bureau of Investigation, et al.*](https://www.documentcloud.org/documents/21015533-2021-07-02-dc-circuit-ruling-in-rcfp-v-fbi), 3 F.4th 350 (D.C. Cir. 2021). At issue in the appeal were certain records regarding the FBI’s 2007 impersonation of an Associated Press journalist, and the fallout within the government after that impersonation was publicly revealed. The records included emails between FBI personnel and then-FBI Director James Comey about his letter-to-the-editor published in *The New York Times* about the incident, drafts of an inspector general’s report and the FBI’s “factual accuracy” comments to that report, drafts of slides concerning undercover operations, and internal FBI emails regarding recommended changes in the approval process for impersonating members of the news media. The FBI cited the [deliberative process privilege](https://foia.wiki/wiki/Deliberative_Process_Privilege) under [Exemption 5](https://foia.wiki/wiki/Exemption_5), to withhold the records. The district court affirmed those withholdings. The D.C. Circuit reversed, in part, and in doing so provided the most expansive and detailed explanation of the foreseeable harm provision from an appellate court to date.

Specifically, the Court affirmed that the provision “imposes an independent and meaningful burden on agencies” seeking to withhold records from the public; “generalized assertions” are not sufficient to meet that burden, nor are “mere speculative or abstract fears, or fear of embarrassment.” The Court articulated the following test that must be satisfied for the government to withhold information under the deliberative process privilege and the foreseeable harm provision:

[T]he foreseeability requirement means that agencies must concretely explain how disclosure “would”—not “could”—adversely impair internal deliberations. … A “perfunctory state[ment] that disclosure of all the withheld information — regardless of category or substance — would jeopardize the free exchange of information between senior leaders within and outside of the [agency]” will not suffice. … Instead, what is needed is a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward. Naturally, this inquiry is context specific.

Applying this test, the Court held that the FBI had failed to justify its withholding of the draft inspector general report, the factual accuracy comments provided to the inspector general by the FBI, and the draft internal slides. The Court’s opinion is a powerful articulation of what the foreseeable harm provision requires and, importantly, it squarely rejects the argument—repeatedly [made](https://storage.courtlistener.com/recap/gov.uscourts.dcd.205521/gov.uscourts.dcd.205521.81.0.pdf) by the Justice Department—that the provision did not significantly alter an agency’s obligations under FOIA.

1. **Current Legislative Reform Efforts**

**Exemption 4**: The majority opinion in *FMI* received bipartisan disapproval. Shortly after it was decided, Republican Senator Chuck Grassley (R-ID) – joined by Sens. John Cornyn (R-TX), Patrick Leahy (D-VT) and Diane Feinstein (D-CA) – introduced legislation that would import *National Parks*’ competitive harm test into the plain language of FOIA’s Exemption 4.

**Public interest balancing for discretionary exemptions.**

**Discussion: What, if anything, can Congress do to fix a “broken” FOIA system?**

1. **Case Study: BuzzFeed’s Lawsuits for Mueller Records**

**Background:** BuzzFeed is a prolific user of FOIA and filed more media FOIA lawsuits than any other outlet during the Trump administration. This included five lawsuits for Mueller-related records.

**Lawsuit #1:** The Mueller Report. FOIA request made March 21, 2019, upon learning that final report had been submitted by Mueller to DOJ. DOJ granted expedited processing but improperly asserted right to “unusual circumstances” extension. Suit filed April 4, 2019, shortly after suit filed by public-interest organization (EPIC); cases were consolidated. Court denied motion for preliminary injunction without prejudice (no irreparable harm) but set case for early status. FOIA-processed report released in May, summary judgment briefing and oral argument summer 2019.

* Court ordered rare *in camera* inspection of the unredacted Report. “The Court has grave concerns about the objectivity of the process that preceded the public release of the redacted version of the Mueller Report and its impacts on the Department's subsequent justifications that its redactions of the Mueller Report are authorized by the FOIA.” *EPIC v. DOJ*, 442 F. Supp. 3d 37, 48 (D.D.C. 2020). “The speed by which Attorney General Barr released to the public the summary of Special Counsel Mueller's principal conclusions, coupled with the fact that Attorney General Barr failed to provide a thorough representation of the findings set forth in the Mueller Report, causes the Court to question whether Attorney General Barr's intent was to create a one-sided narrative about the Mueller Report—a narrative that is clearly in some respects substantively at odds with the redacted version of the Mueller Report.” *Id.* at 49.
* Merits ruling found that Report was not subject to deliberative process privilege because it was not predecisional, upheld exemptions for grand jury, National Security Act, privacy, ongoing investigations, and law enforcement techniques. Multiple exemptions claimed over most material, but some additional release around Stone and Wikileaks.
  + Grand jury: Upheld absolute nature of Rule 6(e) and rejected argument that some further showing of harm should be required and that government must prove that witnesses were not already known. Relatively straightforward application of Rule 6(e). Our arguments were largely to set up appellate issues, though we ended up not pursuing them.
  + Exemption 3/NSA: Upheld based on *in camera* review.
  + Privacy: “Based on the Court's review of the unredacted version of the Mueller Report and the Department's public and ex parte representations to the Court, the Court concludes that, pursuant to Exemption 7(C), the Department has appropriately withheld information relating to the unwitting third parties, the individuals not charged with having committed crimes by the Special Counsel's Office, and the individuals merely mentioned in the Mueller Report. The Department has adequately explained the harms associated with releasing this information “[g]iven the intense public interest surrounding the [Special Counsel's Office's] work as well as the public and media scrutiny, and partisan attacks, that occur when any new fact is made public.” … Furthermore, although the Court acknowledges that the public interest in the Special Counsel's investigation is substantial, the Court finds that the plaintiffs have failed to identify a public interest that would outweigh the individuals’ privacy interest from having their names disclosed.”
  + Investigations/techniques: Straightforward application of deference to agencies.
  + Deliberative process: “[M]ere identities of individuals not charged with having committed crimes in this context are neither predecisional nor deliberative.” “The information withheld by the Department is not predecisional because, as the plaintiffs correctly note, see Leopold Pls.’ Mem. at 46, it is the decision of Special Counsel Mueller.”
* D.C. Circuit appeal pending on whether declination analysis for Don Jr. and other campaign officials is subject to privacy exemption given (1) identities and investigated facts were already disclosed in the Report, (2) investigation involved matters of substantial public interest and the democratic process itself (*CREW v. DOJ*, 746 F.3d 1082 (D.C. Cir. 2014) (Tom DeLay investigation), (3) a reasonable person has to be justified in concluding that something improper “might” have occurred in the investigation given consistent claims of “illegal political witch-hunt” by POTUS (*Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 174 (2004)), and (4) the declination analysis would allow the public to determine whether AG misled the public about the Report.

**Lawsuit #2:** Requests for FBI 302s, all DOJ Mueller records, assorted other Mueller records. No response by deadline, suit filed shortly May 2019. Later consolidated with CNN suit for 302s only.

* Successfully argued for enlarged processing rate for 302s in light of 2020 election (i.e., if entitled to expedited processing, must mean a processing rate higher than non-expedited cases). All 302s (minus handwritten notes and attachments) were released before the election as a result of suit.
* Court upheld assertion of work product over portions of 302s asserted by government.
* Government claimed “all Mueller records” is more volume than entire Library of Congress, so we negotiated a subset.

**Lawsuits #3 and 4:** Various Mueller records, no responses, cases under ongoing production schedules.

* DC courts are typically ordering 250-500 pages per month.

**Lawsuit #5:** Strzok and Page and Mueller Congressional testimony discussions, no response. Records released after suit filed. Court upheld deliberative process claims over our foreseeable-harm challenge.

* Argument we’ve since been developing: no “chilled candor” harm possible where government lawyers owe their agency clients a duty of candor.

**The Declassification Bonus:** We filed emergency motions asking for reprocessing in Report and 302 cases on October 8, 2020, after POTUS tweeted “All Russia Hoax Scandal information was Declassified by me long ago. Unfortunately for our Country, people have acted very slowly[.]” Court ordered DOJ to “file a declaration by the President or an individual who has conferred directly with the President” about whether POTUS intended to declassify. DOJ filed a declaration on October 20 signed by Mark Meadows sweating under oath that POTUS “indicated to me that his statements on Twitter were not self-executing declassification orders and do not require the declassification or release of any particular documents[.]”