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Hot Topics in Federal FOIA[1]

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I. FOIA Basics

The federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 provides a statutory right of access to records in the possession, custody, or control of federal executive branch agencies.

To utilize the Act, a journalist, 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 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."

[1] Adapted from a prior outline jointly prepared by Matt Topic, Loevy & Loevy, and Katie Townsend, Reporters Committee for Freedom of the Press.

- 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": Under D.C. Circuit precedent, this requirement is met if "a professional employee of the agency who [is] familiar with the subject area of the request" can understand what was requested and locate it with a reasonable amount of effort. An agency may use this to deny requests it deems 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." 552 U.S.C. § 552(a)(6)(E). 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. Agencies have different articulations of what needs to be shown, and you should check the agency's regulations and adopt the agency's language in your request. Requests for expedited processing are rarely granted.

Fee Benefits and Fee Waivers

- FOIA limits the fees that can be charged to 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. 5 U.S.C. §552(a)(4)(ii)(II).

- Fee waivers may also be granted. 5 U.S.C. §552(a)(4(i). 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." 5 U.S.C. §552(a)(4)(ii)(III).

Exemptions (and Other Barriers) to Disclosure

- Under FOIA, all documents are presumed to be public unless one of the nine statutory exemptions apply. See 5 U.S.C. §552(b)(1)–(9). Among the most

common exemptions cited to withhold documents are those pertaining to internal agency deliberations, law enforcement investigations, privacy, and national security. The burden is on the agency to establish that an exemption is applicable.

- In addition, in some circumstances, an agency can provide a so-called "Glomar response," in which the agency takes the position that even acknowledging the presence or absence of documents would reveal protected secrets. The agency is required to "tether" its refusal to respond to one of the nine FOIA exemptions. *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009).

Administrative Appeals: If you receive a determination of your request from a FOIA officer, you must administratively appeal that determination prior to filing suit. However, if the agency does not respond to your FOIA request within 20 business days (which is common), you are free to file suit as long as you have not received a determination prior to commencing litigation. Under FOIA, you have a minimum of 90 days to administratively appeal an agency's determination. Always appeal!

- What can you appeal? Anything you believe constitutes an error: the sufficiency of the agency's search for records; the application of exemptions; a Glomar response; and segregability.

Statutory Deadlines, Backlogs, and Delay:

FOIA states that an agency must make a "determination" within 20 business days of receipt of a FOIA request. 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. However, those deadlines are rarely met. It is not uncommon for requesters to wait months to get even a basic determination that the agency has records and is reviewing them for applicable exemptions.

FOIA Resources: foia.wiki (provides case summaries and other information on how best to appeal adverse decisions); The FOIA Project (tracks active FOIA litigation); Muckrock (clearinghouse for FOIA resources and previously released public records); FOIA Mapper (maps government agencies and their records systems).

II. 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, 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, 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.

One important consideration: the FOIA amendments establishing that an agency had to meet the "foreseeable harm" requirement (see below) came into effect after the litigation was commenced and were not addressed by the Court.

U.S. Fish and Wildlife Service v. Sierra Club, 141 S.Ct. 777 (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, specifically, the "deliberative process" privilege, which allows the withholding of predecisional records that are used in agency decision-making. 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; 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.

III. "Foreseeable Harm"

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 that 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*, 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.*, 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 under 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 by the Justice Department—that the provision did not significantly alter an agency's obligations under FOIA.

IV. Hot Topics/Recent Cases of Note

What is an "agency records" for purposes of FOIA?

Behar v. U.S. Department of Homeland Security, 39 F.4th 81 (2d Cir. 2022): Investigative journalist Richard Behar submitted two FOIA requests to the U.S. Secret Service seeking campaign visitor and scheduling records for the period in which then-presidential candidate Donald Trump received Secret Service protection leading up to his inauguration in January 2017. In litigation, the agency identified records responsive to Behar's request but withheld all of them, save two heavily redacted emails, citing FOIA Exemption 7(C), which applies to law enforcement information that implicates personal privacy. The U.S. District Court for the Southern District of New York granted summary judgment in Behar's favor, ordering disclosure of the records. The U.S. Court of Appeals for the Second Circuit reversed. Notably, the panel held that the records were records of the Trump transition team, not "agency records" subject to disclosure under FOIA. The Second Circuit reasoned that the records were not under the agency's "control" because the presidential transition team had indicated an "intent" to the contrary; according to the panel, its conclusion followed from its "recent decision in *Doyle v. DHS*, in which [the Second Circuit] explained that 'agency records' did not include 'information provided by[] a governmental entity not covered by FOIA' when the 'non-covered entity . . . has manifested a clear intent to control the documents, such that the agency is not free to use and dispose of the documents as it sees fit.'"

The Second Circuit denied Behar's petition for rehearing on September 22, 2022. Behar filed a petition for certiorari in the U.S. Supreme Court; the Court denied that petition on May 1, 2023. The Reporters Committee, joined by 21 media organizations, filed an amicus brief in support of Behar's petition for certiorari arguing that the panel's holding departed from established Supreme Court precedent. *See Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989) (setting forth two-part test for determining whether materials are "agency records" within the meaning of FOIA: (1) "an agency must either create or obtain the requested materials" and (2) "the agency must be in control of the requested materials at the time the FOIA request is made. By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties").

What is the creation of a new record?

FOIA requesters regularly are told by agencies that records cannot be released because they would identify individuals, and the release would therefore violate those individuals' privacy. A proposal from the requester that the agency take simple steps to anonymize the records inevitably prompt the agency to say that it is not required to create new records to make the documents disclosable under FOIA.

That issue was front and center for the Second Circuit in *ACLU Immigrants' Rts. Project v. United States Immigr. & Customs Enf't*, 58 F.4th 643 (2d Cir. 2023), a case that resulted in an unusual victory for a FOIA requester.

The ACLU had asked ICE for data about removals, detentions, apprehensions, risk classification assessments, and bonds. The request was made to obtain information that would show how noncitizens face different obstacles at different stages in the immigration process.

ICE relies on so-called "A-Numbers," which are unique identifiers that the agency uses to track noncitizens throughout the system. ICE said releasing the A-Numbers could compromise privacy because a particular person's A-Number may be known by a member of the public who could then learn confidential information about the noncitizen. The ACLU proposed that, if that was the concern, the agency could easily develop anonymous unique identifiers. ICE declined, saying that inserting unique identifiers would constitute the creation of a new record. The district court sided with ICE. The Second Circuit reversed. Citing FOIA's "broad disclosure policy," it found that creation of unique identifiers would serve that policy and not constitute the creation of a new record. The court held that ruling for ICE would create a perverse incentive for agencies to connect disclosable information to exempt information and thwart FOIA's purposes. While it is hard to determine how broadly the Second Circuit's decision might be applied, the ruling provides hope that agencies will be required to make rudimentary changes or additions to records that will allow meaningful access to records like those sought by the ACLU where being able to identify individuals across documents is essential.

V. Legislative Reform Efforts

Exemption 4: The majority opinion in *FMI*, discussed above, 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. That legislation did not pass. It has been reintroduced—most recently in June 2023—but the likelihood of passage is low.

Public interest balancing for discretionary exemptions.

VI. Discussion:

What, if anything, can Congress do to fix a "broken" FOIA system?

Should the courts have broader authority to question classification decisions?

What can be done to revise the "official acknowledgement" doctrine, which is typically held to require release only of the exact same information that has been acknowledged by the government?