

LEGAL BULLETIN 1.3

Access to Records: F.O.I.A., Privacy

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Update June, 2005

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This legal bulletin will provide a brief overview of both the Freedom of Information Act (FOIA) and the Privacy Act of 1974. The original text may be found in Title 5 of the United States Code, Section §552 (FOIA) and §552a (Privacy Act).

The Freedom of Information Act (FOIA)

The FOIA allows public access to the records of federal government agencies including the agencies, office and departments of the executive branch, independent federal regulatory agencies and corporations controlled by the federal government. It does NOT apply to Congress, the Federal Courts, or the executive office staff. Furthermore, the FOIA only applies to the federal government, although states have enacted similar individual laws. In Pennsylvania, the state counterpart of the federal FOIA is called the Right-to-Know Law.

*** Note: Michigan, Louisiana, Texas, Wisconsin, Virginia, New Jersey, Connecticut and Ohio have all enacted statutes *limiting* prisoners' access to records.

Generally, the FOIA deals with requests for two types of information. An individual can gain access to records about the agency itself as well as records the agency may have regarding individuals.

Exemptions:

The following types of information do NOT have to be disclosed under the FOIA:

- 1) National Security
- 2) Internal rules and practices of the agency
- 3) Information exempted under another statute
- 4) Business information relating to trade secrets or privileged/confidential information (the exemption only applies to information from a person or corporation, not from a government agency)
- 5) Internal government memos (this includes confidential information between clients and attorneys as well as work-product or any information compiled in preparation for a trial)
- 6) Private matters that if released would be an invasion of personal privacy (this includes personnel and medical files)
 - a. Must constitute a "clearly unwarranted invasion"
 - b. Only applies to individuals and not to corporations
 - c. In considering whether or not to disclose the information, the agency will balance the public's right to know against the personal right to privacy. The FOIA favors disclosure.
- 7) Law enforcement investigation materials (Usually all FBI files)
 - a. In order not to disclose information under this exemption, the agency must show that releasing the information would interfere with enforcement proceedings, deprive an individual of the right to a fair trial or impartial jury, constitute an unwarranted invasion of privacy, reveal the identity of a confidential source, disclose investigative techniques, or endanger the life and safety of an individual.
- 8) Records relating to the regulation of financial institutions.
- 9) Geological/geophysical information regarding oil well locations.

However, even if portions of a record are exempt under the FOIA, the nonexempt sections must be disclosed if they are "reasonably segregable" from the rest of the file.

Additionally, in order for a file to be disclosed, the record must already exist and be in possession and control of a particular agency.

1986 Amendments

Amendments made to the FOIA in 1986 specify three instances when an agency does not have to disclose even the existence of a file because the knowledge of its existence would have the same damaging effect of disclosing the actual records. These records include:

1. Files that, if their existence was disclosed, would interfere with a current law enforcement investigation.
 - a. The agency must be able to prove that:
 - i. The investigation involves a possible violation of criminal law
 - ii. There is a reason to believe the subject of the investigation is unaware the investigation is underway.
 - iii. The disclosure of the file's existence would interfere with proceedings.
2. Informant records filed under the informant's name or identifier unless the informant's status has already been officially confirmed.
3. FBI classified files concerning foreign intelligence, counterintelligence, or international terrorism (only applies when both the records and their existence are classified).

The Privacy Act of 1974

The Privacy Act is similar to the FOIA, though there are some important differences. Under the Privacy Act, an individual can obtain his or her own records and can also amend, correct, or delete false information within those records. Only U.S. citizens or permanent resident aliens can access files through the Privacy Act. In addition, only records kept in a "system of records" can be obtained. A "system of records" refers to a group of records from which information is retrieved by an individual's name, social security number, or other indentifying symbol.

When requesting records, you should file under both the FOIA and the Privacy Act. Records that cannot be disclosed under the Privacy Act may be releasable under the FOIA.

Making a Request

The following steps should be used when making a request for records under the FOIA and Privacy Act:

- 1) Find the proper agency that can satisfy your request. You can look up the office in the Code of Federal Regulations (CFR).
- 2) Describe your request specifically as possible and try to limit your request (do not ask for "all files relating to..."). However, it is not necessary to explain why you are requesting the information.
- 3) Include the date and place of individual's birth, his or her social security number or other identifier, any previous names or nicknames, and any previous addresses.
- 4) Keep copies of all correspondence. These copies may be helpful if you need to appeal a denial of your request.
- 5) Remember to apply under both the FOIA and Privacy Act.
- 6) Mark the envelope "Attn: Freedom of Information/Privacy Act Unit."

*** Most agencies will charge a fee to pay for search and duplication costs. However, fees for a limited amount of hours/pages with usually be waived. You can ask the agency to send you a fee schedule or to notify you of the anticipated cost.

The Agency's Response

Officially, agencies must decide within 10 working days whether or not to comply with a request. If they deny your request, they are required to notify you of the reasons for the denial. For example, your requested file might fall under an exemption category or your description of the requested file might be inadequate.

Even if your request is not denied, you may have to wait for a substantial period of time before your request is satisfied. Government agencies are often backlogged with requests and courts usually allow the agencies time extensions to answer them. Most agencies will inform you if there is a delay. If you feel your request is not being dealt

with in a timely manner, you can inquire about the status of your request, attempt to get the agency to commit to a specific release date, or send a letter of appeal.

Appeals

An appeal usually consists of a letter sent to the head of the agency. There is no fee to appeal, and an individual can appeal:

- The denial of a request
- The type or amount of fee
- A response claiming an inadequate description or that no records were found
- The denied part of a request that was partially granted and partially denied

Your letter of appeal should identify the request being appealed using the assigned number of the request (if one exists). You should also include your name and address, and you may want to send the original decision letter as well. Arguments or facts that support a reversal of denial may be submitted, but they are not necessary. Finally, write on the envelope, "Freedom of Information Act Appeal."

Keep in mind that although agencies are technically required to notify you of the decision regarding an appeal within 20 days, they can often be granted extensions, and it might be much longer before you actually hear from them.

As a last resort, you can file a civil appeal in federal court if the agency's response to your request is still unsatisfactory to you. However, if you choose to do so, you must first exhaust your administrative remedies under the FOIA before filing for judicial review. Additionally, your suit must name the agency as the defendant, rather than individual employees. *Petrus v. Bowen*, 833 F. 2d 581 (1987).

Release of Information to Prisoners Through the BOP

The regional Federal Bureau of Prisons (BOP) office frequently is the location in possession of the records of federal prisoners. These records ordinarily travel with the prisoners from one regional office to the next if the BOP transfers a prisoner from one region of the country to another.

The BOP Program Statement § 513.40 [hereafter P.S.] regulates an inmate's access to and review of his or her Central File. Inmates can access their Inmate Central Files without the use of a FOIA request. At any time, a prisoner can submit a request to the proper staff member to review the disclosable information contained in his or her Central File. The information that can be disclosed includes, but is not limited to, documents concerning sentence, detainer, parole, participation in prison programs, classification data, visits, conduct, work, and general correspondence. If a prisoner wishes to access information not considered disclosable, he or she must file a FOIA request. Keep in mind that BOP records are exempt from the Privacy Act so these files may not be able to be amended or corrected by inmates. Requests for records under the Privacy Act will be processed under the guidelines of the FOIA.

Medical records are released according to BOP P.S. § 513.42. Requests for medical files can also be filed through a designated staff member. Disclosable medical records included medical and related data sheets, reports of medical histories, reports of medical examinations, doctors' orders, and medication sheets. These records are usually available for review by inmates. However, medical records containing subjective evaluations (in-patient progress reports, outpatient notes, consultation reports, etc.) must first be reviewed by staff members to determine if their release will harm the inmate or other individuals. If the staff decided not to disclose records, the inmate has the opportunity to submit a request under the FOIA/ Privacy Act to the proper agency.

The BOP recently enacted a regulation prohibiting inmates from obtaining and possessing photocopies of the pre-sentence reports (PSR) and statement of reasons (SOR) from the judgments in criminal cases under BOP P.S. § 513.40a (2)(d)(1). A prisoner will still be able to review a PSR or SOR upon request, however, as required by *United States Department of Justice v. Julian*, 486 U.S. 1 (1988). Inmates who need to review their PSR's before sentencing can possess the reports in order to prepare for sentencing, but cannot retain the copies after sentencing is complete. Additionally, prisoners who need copies of their PSR's or SOR's to file with their court cases should complete an Inmate Request for Certification or Judicial Notice of Pre-sentenced Report and/or Statement of Reasons for (BP-S757.013).

Two forms are attached to this bulletin. The BOP prefers usage of the "Certification of Identity" Form DOJ-

361 when applying to access files. The DC-ADM 003 form should be used by Pennsylvania prisoners when seeking information from the Pennsylvania Department of Corrections (DOC). The Pennsylvania DOC usually prefers attorneys or other outsiders to submit the completed DC-ADM 003 form, since Pennsylvania law now authorizes the DOC to charge a \$15.00 "processing" fee in addition to the price per page for copies. Also note that the DOC is reluctant to relinquish records directly to prisoners on the premise that the records (even medical) still belong to the DOC.

The following agency addresses may also be especially helpful for prisoners:

Freedom of Information/Privacy Act Office
Central Office
Bureau of Prisons
HOLC Building
320 First Street, N.W.
Washington, D.C. 20534

Freedom of Information/Privacy Act Office
Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20535

Freedom of Information/Privacy Act Office
U.S. Parole Commission
5550 Friendship Blvd.
Chevy Chase, MD 20815

U.S. Commission on Civil Rights
1121 Vermont Avenue, N.W. Room 600
Washington, D.C. 20425