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Overview of the Freedom Of Information Act

Note that the Department of Justice plays a major role in FOIA policy/implementation and particularly in litigation. New guidance issued October 12, 2001, by Attorney General Ashcroft uses "sound legal basis" test to defend withholdings.

I. EXEMPTIONS

A. Exemption 1 (classified information)

1. Executive Order 12958 controls
 - a) substantive criteria – three classification levels (C, S, TS) and seven classification categories
 - b) procedural criteria – classification authority and proper markings
 - c) at CIA, the DCI delegated his original classification authority to ≈ 42 officials who, through further delegation and the classification guide, allow remaining employees to be derivative classifiers
2. Duration of classification – 10 years for some newly classified information but most CIA material gets 25-year protection (E.O. 12958 § 1.6)
3. Automatic declassification of some classified information more than 25 years old (E.O. 12958 § 3.4)
4. Classification challenges (E.O. 12958 § 1.9)
5. Courts give great deference to agency expertise
 - a) agency declarations accorded "substantial weight" (*Halperin v. CIA*)
 - b) use of *in camera* declarations to protect information (*Phillippi v. CIA*)
6. "Glomar" response (E.O. 12958 § 3.7(a))
7. Leaks of classified information (E.O. 12958 § 1.2(c))
8. "Mosaic" or compilation principle (E.O. 12958 § 1.8(e))

B. Exemption 2 (internal administrative matters)

1. "Low 2"
 - internal matters of trivial nature and of no significant public interest
 - discretionary disclosure often appropriate because no harm in release
2. "High 2"

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- Distinguish between “Glomar” response and “No records available under the CIA Information Act” response and an Exclusion

III. WAIVER

A. When waiver exists:

1. Release to one -- release to all
2. Official release vs. mistaken release
3. JFK Act, etc. releases must be of exact same document to set a “precedent”

B. When waiver does not exist:

1. Release to another government agency, Congress, GAO
2. Release by Congress (e.g., Church committee report)
3. Sharing records with parties having common interests (*McGilvra v. NTSB*)
4. When required by court order if disclosure limited by protective order
5. Leaked information
6. Similar, not same, information publicly disclosed (*Public Citizen v. Dept. of State*)

IV. DISCRETIONARY DISCLOSURE

- Not considered a waiver (or a precedent) for similar information
- Advantageous in many situations
- New DOJ policy memorandum still allows such disclosures

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