

Support the FOIA Improvement Act of 2014

Congress enacted the Freedom of Information Act to allow the public to request and obtain government records. In doing so, it permitted but did not require the executive branch to withhold information concerning internal government deliberations. Use of that privilege, known exemption 5, has skyrocketed in recent years. Over time agencies have stretched the use of exemption 5 so that it covers practically anything that is not a final version of a document. **We support legislative efforts to rein in the overuse and abuse of exemption 5.**

How the FOIA Improvement Act Reins in Exemption 5

The FOIA Improvement Act is a bipartisan bill that restores the original intent of FOIA in part by requiring agencies to weigh the public's interest in access to a record before deciding whether to withhold it under exemption 5. This amendment brings the standard to withhold information under exemption 5 in line with those of other FOIA exemptions, including the FOIA privacy exemption.¹ The bill also bars the use of b(5) to withhold material that is more than 25 years old.

With respect to the deliberative process and work-product privileges, the FOIA Improvement Act would allow agencies to withhold information under exemption 5 only where the agency interest in protecting the records is not outweighed by a public interest in disclosure.

With respect to the attorney client privilege, the FOIA Improvement Act would allow agencies to withhold information protected by the attorney client privilege where the agency interest in secrecy is not outweighed by a compelling public interest in disclosure. Courts already routinely implement a similar standard in the due process context.

More than 50 organizations signed a letter in support of the Exemption 5 fix.

Current Agency Practice Exemption 5

Despite guidance from the Department of Justice that should have decreased the use of exemption 5, agency invocation of the exemption has skyrocketed; in FY 2013, agencies relied on exemption 5 81,752 times, amounting to 12% of processed requests.

Among the records the government has fought to withhold under exemption 5, sometimes at great expense to taxpayers, are:

- A Presidential Policy Directive instituting increased transparency (even though the Administration had released a "fact sheet" largely disclosing what was in the PPD);
- The Federal Election Commission's guidance on when to apply b(5) (even though it had already been posted on the FEC's website); and

¹ Exemption 6 requires an agency to weigh such factors as the public interest, passage of time, and seniority of an individual.

- A list of unclassified opinions produced by the Office of Legal Counsel in 2013 (any classified material is protected under exemption 1).

Background on FOIA and Exemption 5

Congress strengthened the FOIA in wake of the Watergate scandal in the belief that sunlight is the best disinfectant and that transparency is essential to making the government accountable. FOIA is used by journalists, researchers, activists, and others to better understand what the government is doing and why. It has enabled the public to ferret out waste, fraud, abuse and illegality—and hold agency officials responsible for making bad decisions.

The text of exemption 5 allows, but does not require, agencies to withhold inter- and intra-agency records. This exemption includes the deliberative process, attorney work-product, and attorney client privileges.

FOIA permits the government to unilaterally withhold pre-decisional material. However, in other contexts, the government must strike a balance. For example, in civil discovery, courts routinely balance the interests of the government against the litigant's interest in disclosure. In addition, under the Presidential Records Act, the government may no longer restrict access on the basis material is pre-decisional once twelve years have elapsed since the president served in office.

The Obama administration, through the president's executive order and Attorney General Holder's March 19, 2009 FOIA guidance, directed agencies to implement FOIA with a presumption of disclosure. Department of Justice guidance focuses on Exemption 5 material as particularly appropriate for discretionary release.