

Why Reform the Freedom of Information Act's Exemption B(5)?

It is time for Congress to place some common sense reins around agencies use of exemption B(5) of the Freedom of Information Act (FOIA). Despite Congress' intent for all of FOIA's exemptions to have narrow application, over time agencies have expanded the use of B(5) so that it covers practically anything that is not a final version of a document. Below are a few recent particularly egregious examples of the use of B(5) compiled by the National Security Archive that show the need for Congress to step in on behalf of the public.

- Last year, the Department of State, and the U.S. Agency for International Development [argued to a federal judge that a Presidential Policy Directive instituting increased transparency should be withheld from the public](#) (even though the Administration had released a "fact sheet" largely disclosing what was in the PPD). The Center for Effective Government was forced to file a FOIA lawsuit, which it won.
- The Department of Justice continues to use B(5) to deny the public access to Office of Legal Counsel (OLC) Opinions. These opinions, which, essentially, form a body of law that binds all federal agencies, have played a critical role in authorizing controversial programs, including the Bush-era enhanced interrogation program and the targeted killing programs. In the case of the National Security Agency's bulk collection of telephone call meta-data, OLC Opinions interpreted the law to authorize actions that are far outside the plain reading of the statute. Citizens for Responsibility and Ethics in Washington (CREW) has a [case currently pending in the US District Court](#) arguing that the OLC Opinions *must* be released since the FOIA requires the publication of "statements of policy and interpretation [an] agency has adopted."
- Muckrock, an online service that help FOIA requesters make and manage requests, [reported](#) that The Federal Elections Commission (FEC) attempted to argue that its own guidance on when to apply B(5) is itself exempt from release under B(5) –even though it had already been posted on the FEC's website.
- A [protracted and wholly unnecessary fight](#) over B(5) delayed the release of historic Henry Kissinger notes of telephone conversations, "telcons," for seven years. In 2007, in response to a FOIA request filed in 2001, the State Department relied on B(5) to withhold over 800 historic telcons. Finally, in 2013 the Department of State released a portion of them, including Kissinger's conversations with government and former officials during the Ford Administration. As interesting as the telcons are, they contain no information that ought to have been withheld.
- The CIA, supported by the Department of Justice, is currently using the b(5) exemption to keep secret its history of the 1961 Bay of Pigs Invasion, arguing that it's release "[could confuse the public](#)." As Judge for the US Court of Appeals Judith Rogers explained to U.S. Attorney Mitchell P. Zeff, the CIA and DOJ are attempting to "seek[] ad infinitum protection of drafts." According to an [amicus brief](#) in the case filed on behalf of the National Coalition for History, extending Exemption 5 to decades-old records addressing decades-prior events, would shield a massive number of historically significant government records from public disclosure through FOIA, seemingly indefinitely.

Read more examples and learn more about the need to reform B(5) here: <http://bit.ly/1l7PqRi>