

Implementing FOIA's Statutory Exclusions

September 14th, 2012 Posted by The Office of Information Policy

Today, the Office of Information Policy (OIP) issued guidance to all agencies concerning proper implementation of the exclusion provisions contained in the Freedom of Information Act (FOIA). The guidance requires agencies to take multiple steps to bring greater awareness to the public about the existence and effect of these statutory provisions.

Congress added exclusions to the FOIA in 1986 to protect three narrow categories of particularly sensitive law enforcement records where even revealing the existence of the records could itself cause harm to law enforcement or national security interests.

To take one example, the first exclusion protects against disclosure of a pending criminal law enforcement investigation when there is reason to believe that the target is unaware of the investigation and disclosure of its existence could reasonably be expected to interfere with enforcement proceedings. During this time, the records are not subject to the requirements of the FOIA.

The Department of Justice has examined past practices governing use of exclusions to determine whether there are ways to bring greater accountability and transparency to the existence and use of exclusions in the FOIA without compromising the important national security and law enforcement interests that are at stake. As a result of that review, the department has determined that there are a series of steps that agencies should take going forward that will achieve these goals.

Specifically:

- Agencies will consult with OIP prior to using an exclusion to ensure that the exclusion is warranted and that they are consistently applied.
- Agencies will publicly report each year on the number of times, if any, that an exclusion was used, bringing greater transparency to the use of exclusions.
- Agencies will include on their websites a brief description of the three exclusions to enhance public awareness of their existence.
- Agency components that maintain criminal law enforcement records will include in all their response letters a notification that Congress excluded certain records from the requirements of the FOIA and that the agency's response addresses those records that are subject to the requirements of the FOIA.

Agencies have already begun reporting on their use of exclusions. For the first time ever, the Department of Justice asked agencies to include any use of exclusions in their March 2012 Chief FOIA Officer Reports. Three agencies out of the 99 subject to the FOIA reported using an exclusion during Fiscal Year 2011.

This reporting showed that out of the over 630,000 FOIA requests that the government processed last fiscal year, exclusions were used in only 0.03 precent of the requests. Because of the new reporting requirement, the public can readily see the very limited number of times exclusions were used.

Significantly, the individual notification requirement represents a fresh approach to the handling of exclusions. This approach both informs requesters of the existence of the statutory exclusions in general, but does not acknowledge the existence of any excluded records in response to any specific request.

This new approach will preserve the important law enforcement and national security interests that formed the basis for Congress' inclusion of exclusions in the FOIA over 25 years ago, while at the same time be in keeping with Attorney General Holder's commitment to open government.

For more information, read the full guidance document, Implementing FOIA's Statutory Exclusions Provisions. You can also access this document and other guidance on the OIP Guidance page of our site.

POSTED IN: FOIA Post, Office of Information Policy | PERMALINK