



The Freedom of Information Act and Nondisclosure Provisions in Other Federal Laws

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Summary

Congress continues to consider how to balance the federal government's growing need for sensitive or confidential business information, the public's right of access to information about government activities, and the private sector's interest in keeping its sensitive or proprietary information protected from public disclosure. In enacting the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Congress sought to balance the right of the public to know and the need of the government to protect certain information. FOIA's broad provisions favoring disclosure, coupled with the specific exemptions, represent the balance Congress achieved. The federal FOIA is an information access statute enacted in 1966 that applies to agency records of the executive branch of the federal government. FOIA requires that certain types of records be published in the *Federal Register*, that certain types of records be made available for public inspection and copying, and that all other records be subject to request in writing.

Exemption 3 of FOIA provides that in order for a federal law other than FOIA to qualify as a withholding statute, it must require that information be withheld or permit information to be withheld by particular statutory criteria or permit information to be withheld based upon a statutory reference to particular types of information and must specifically cite to Exemption 3. Courts have taken different approaches over whether the withholding criteria in nondisclosure statutes should be construed narrowly, consistent with FOIA's strong preference for disclosure, or broadly, consistent with the deferential standards of administrative law.

Congress has enacted legislative exemptions from FOIA to provide assurance that private information submitted to government agencies will not be disclosed or will only be disclosed in limited situations. Generally, the legislation has exempted covered information from disclosure under FOIA. Congress has recognized that some situations do not fall within FOIA's framework. The proliferation of legislative exemptions from FOIA has resulted in widespread concern that information that needs to be shared will be inappropriately withheld. To respond to these concerns, Congress enacted the OPEN FOIA Act of 2009, P.L. 111-83, which requires that when Congress provides for a statutory exemption to FOIA, Congress must state its intention clearly.

During the 111th Congress, two legislative exemptions from FOIA have been particularly controversial. The first, The Protected National Security Documents Act of 2009, Section 565 of P.L. 111-83, was enacted in response to litigation under FOIA to obtain photographs depicting the alleged mistreatment of detainees in Iraq and Afghanistan. The second, a provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 929I of P.L. 111-203, grants an exemption from FOIA to the Securities and Exchange Commission (SEC) for certain information received from entities it regulates, or information used for other regulatory and oversight activities. The House Financial Services Committee held a hearing on September 16, 2010, on the Dodd-Frank FOIA exemption. The Senate passed S. 3717, sponsored by Senator Leahy, by unanimous consent on September 21, 2010. S. 3717 struck Section 929I of the Dodd-Frank Act, and expressly provides that for purposes of Exemption 8 of the FOIA, the SEC is an agency responsible for the regulation or supervision of financial institutions; and any entity for which the commission is responsible for regulating, supervising, or examining is a financial institution. Exemption 8 provides that FOIA does not apply to matters contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. The House passed S. 3717 on September 23, 2010. This report will be updated as warranted.

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The Freedom of Information Act

The leading treatise on federal information disclosure notes that “[t]he protection of private data submitted to a federal agency has long been a source of considerable controversy.”¹

The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies’ demand for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power. The Freedom of Information Act ... was a response to this concern, but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with government demands for information. For under the FOIA third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought the information would be held in confidence.²

The federal Freedom of Information Act (FOIA) is an information access statute enacted in 1966 that applies to agency records of the executive branch of the federal government.³ FOIA requires that certain types of records be published in the *Federal Register*,⁴ that certain types of records be made available for public inspection and copying,⁵ and that all other records be subject to request in writing. All records not available via publication or inspection, not exempt from disclosure, or excluded from coverage are subject to disclosure.⁶ Disputes over access to requested records may be reviewed in federal court where the burden is on the agency to sustain its action.⁷

FOIA establishes a federal statutory right of access for “any person”⁸ to records of agencies and departments of the executive branch of the U.S. government unless the requested record is specifically exempted from disclosure under one or more of the act’s nine exemptions⁹ or specifically excluded coverage under one of three exclusions for especially sensitive law enforcement matters. Agency records sought are not necessarily disclosed because FOIA has nine exemptions from disclosure for national security, law enforcement, other federal withholding

¹ James T. O’Reilly, *Federal Information Disclosure*, 3rd ed. (2000), p. 389.

² *Chrysler Corp. v. Brown*, 441 U.S. 281, 297 (1979).

³ 5 U.S.C. § 552.

⁴ 5 U.S.C. § 552(a)(1).

⁵ 5 U.S.C. § 552(a)(2). Executive Order 13,392, “Improving Agency Disclosure of Information,” directs agencies to publish popular records directly to their websites. Executive Order 13392, 70 Fed. Reg. 75,373 (Dec. 14, 2005), <http://edocket.access.gpo.gov/2005/pdf/05-24255.pdf>.

⁶ Excluded from the act’s coverage are special categories of law enforcement records related to criminal law investigations or proceedings, informant records, and records maintained by the FBI pertaining to foreign intelligence, counterintelligence or international terrorism. 5 U.S.C. § 552(c)(1), (c)(2), (c)(3).

⁷ 5 U.S.C. § 552(a)(4)(B). For further information on the history of the FOIA, see CRS Report R40766, *Freedom of Information Act (FOIA): Issues for the 111th Congress*, by Wendy R. Ginsberg.

⁸ Excluded are requests for records kept by agencies in the intelligence community made by a foreign government entity. 5 U.S.C. § 552(a)(3)(E).

⁹ Classified national defense and foreign relations information, internal agency rules and practices, information that is prohibited from disclosure by another federal law, trade secrets and other confidential business information, inter-agency or intra-agency communications that are protected by legal privileges, information involving matters of personal privacy, records or information compiled for law enforcement purposes, information relating to the supervision of financial institutions, and geological information on wells. 5 U.S.C. § 552(b).

statutes, confidential business information, personal privacy, and other circumstances.¹⁰ The exemptions permit, rather than require, the withholding of the requested information.¹¹ The Obama Administration has adopted a presumption in favor of disclosure in FOIA decisions.¹² The FOIA guidelines issued by Attorney General Holder counsel that an agency should not withhold information simply because it may do so legally; and that whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure.¹³ “[T]he Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”¹⁴

Exemption 3—Information Exempt by Statute

As originally enacted in 1966, Exemption 3 exempted from mandatory disclosure matters that were “specifically exempted from disclosure by statute.”¹⁵ Basically there were two types of statutes covered by the exemption: mandatory withholding and discretionary withholding statutes. Agency regulations established how to determine which information could be disclosed when discretionary withholding statutes were involved.

Exemption 3 was amended in 1976 to overturn the Supreme Court’s 1975 decision in *Administrator, Federal Aviation Administration v. Robertson*.¹⁶ In *Robertson*, the Court held that a section of the Federal Aviation Act concerning public disclosure of agency reports satisfied the requirements of the former Exemption 3 even if the statute gave an agency broad discretion to determine whether the information should be withheld. Exemption 3 was rewritten to provide that information may be withheld under an Exemption 3 statute when that statute either “(A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue,

¹⁰ According to the Department of Justice the total number of FOIA requests received by all federal departments and agencies during FY2009 was 557,825. The total number of FOIA requests processed during FY2009 was 612,893. Approximately 60% of these requests resulted in the release of either all or some of the requested records. Approximately 407,650 requests were processed for exemption applicability and records were either released in full or in part, or denied in full based on FOIA’s exemptions. Of that 407,650, more than half resulted in full releases of information, and approximately 94% resulted in release of either some or all of the requested information. Fifty-six percent of grants were full grants of all the requested information. The full denials based on exemptions constituted just over 6% of these requests. U.S. Department of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2009*, <http://www.justice.gov/oip/foiapost/2010foiapost18.htm>.

¹¹ See *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (holding that “limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act”).

¹² Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan 21, 2009), available at The White House, “Freedom of Information,” press release, January 21, 2009, http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

¹³ Attorney General Holder’s Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>. Attorney General Holder rescinded Attorney General Ashcroft’s FOIA Memorandum of October 12, 2001, which stated that the Department of Justice would defend decisions to withhold records “unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 552(b)(3).

¹⁶ 422 U.S. 255 (1975).

or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.”¹⁷

To withhold a document under Exemption 3, the agency bears the burden of demonstrating that the statute either requires that the document or documents be withheld without agency discretion¹⁸ or specifically authorizes the agency to use discretion to withhold that type of document.¹⁹ If the information to be withheld falls within the scope and coverage of the federal statute relied upon, the information is properly exempt from disclosure under Exemption 3 of FOIA. The scope of the statute must be examined by a reviewing court to determine whether it qualifies as a withholding statute.

[A] statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. [The court] must find a congressional purpose to exempt matters from disclosure in the actual words of the statute (or at least in the legislative history of FOIA)—not in the legislative history of the claimed withholding statute, nor in an agency’s interpretation of the statute.²⁰

Basic principles of statutory construction are to be used to determine Exemption 3 status.²¹ When resolving an ambiguity about the proper interpretation of a specific statute under Exemption 3, the *Chevron*²² rule of judicial deference applies to the agency’s interpretation of the statute it administers.²³ Substantial weight is to be given to an agency’s claim of Exemption 3 status.

The first subpart of Exemption 3 is often referred to as the “no discretionary release” category. To satisfy this requirement, the statute’s language to withhold must be absolute—for example, stating that the information “shall not be disclosed.” To withhold a document, the agency must show that the document is collected or generated under the agency’s statutory authority, and that the statute contained a mandate that this type of information not be disclosed. For example, the Supreme Court found no discretion within the Census Act’s prohibition against disclosure of census records.²⁴

The second subpart of Exemption 3, commonly referred to as the “particular criteria” category, permits agency discretion on whether to withhold or disclose agency records. An agency has the discretion to disclose if it so chooses but also has authority to withhold. The statute must establish particular criteria for withholding or refer to particular types of matters to be withheld. The statute must provide articulable criteria for the agency to use to determine whether to permit disclosure. The Supreme Court looks for “sufficiently definite standards” in a statute rather than “broad

¹⁷ 5 U.S.C. § 552(b)(3).

¹⁸ See *American Jewish Congress v. Kreps*, 574 F.2d 624 (D.C. Cir. 1978); see also *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610 (9th Cir. 1978).

¹⁹ See *American Jewish Congress v. Kreps*, 574 F.2d 624 (D.C. Cir. 1978).

²⁰ *Reporters Comm. for Freedom of the Press v. DOJ*, 816 F.2d 730, 734 (D.C. Cir.), modified on other grounds, 831 F.2d 1124 (D.C. Cir. 1987), rev’d on other grounds, 489 U.S. 749 (1989).

²¹ See CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name redacted).

²² *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). For further information on the Chevron doctrine, see CRS Report R41260, *The Jurisprudence of Justice John Paul Stevens: The Chevron Doctrine*, by (name redacted).

²³ *Tax Analysts v. I.R.S.*, 117 F.3d 607, 612 (D.C. Cir. 1997).

²⁴ *Baldridge v. Shapiro*, 455 U.S. 345 (1982); see also 13 U.S.C. § 214 (2000).

discretion.”²⁵ The statute must be “the product of congressional appreciation of the dangers inherent in airing particular data and must incorporate a formula whereby the administrator may determine precisely whether the disclosure in any instance would pose the hazard that Congress foresaw.”²⁶

In 2009, Congress passed another substantive amendment to Exemption 3 of FOIA entitled the “OPEN FOIA Act of 2009.”²⁷ The OPEN FOIA Act requires that when Congress provides for a statutory exemption to FOIA, Congress must state its intention to do so explicitly and clearly.²⁸ The OPEN FOIA Act requires that any statute “enacted after the date of enactment of the OPEN FOIA Act of 2009” must “specifically cite to this paragraph [5 U.S.C. § 552(b)(3)].”²⁹ Congress enacted the OPEN FOIA Act of 2009 to address what has been referred to as “exemption creep.” Senate Judiciary Chairman Patrick Leahy, co-sponsor of the OPEN FOIA Act, remarked that

While no one can fairly question the need to keep certain Government information secret to ensure the public good, excessive Government secrecy is a constant temptation and the enemy of a vibrant democracy.... The FOIA exemption commonly known as the “(b)(3) exemption,” requires that Government records that are specifically exempted from FOIA by statute be withheld from the public. In recent years, we have witnessed an alarming number of FOIA (b)(3) exemptions being offered in legislation—often in very ambiguous terms—to the detriment of the American public’s right to know.... The bedrock principles of open Government lead me to believe that (b)(3) statutory exemptions should be clear and unambiguous, and vigorously debated before they are enacted into law. Too often, legislative exemptions to FOIA are buried within a few lines of very complex and lengthy bills, and these new exemptions are never debated openly before becoming law. The consequence of this troubling practice is the erosion of the public’s right to know, and the shirking of Congress’ duty to fully consider these exemptions. The OPEN FOIA Act will help stop this practice and shine more light on the process of creating legislative exemptions to FOIA. That will be the best antidote to the “exemption creep” that we have witnessed in recent years.³⁰

As amended in 2009, Exemption 3 provides,

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute - (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or

²⁵ *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

²⁶ *Sciba v. Board of Governor of Federal Reserve System*, 2005 WL 758260 (D.D.C. 2005), (quoting *Wisconsin Project on Nuclear Arms Control v. U.S. Dept. of Commerce*, 317 F.3d 275, 280 (D.C. Cir. 2003); *American Jewish Congress v. Kreps*, 574 F.2d 624, 628-29 (D.C. Cir. 1978); *Whalen v. U.S. Marine Corps*, 407 F.Supp.2d 54 (D.D.C. 2005)).

²⁷ Section 564 of the Department of Homeland Security Appropriations Act, 2010, P.L. 111-83, 123 Stat. 2142, 2184, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2892enr.txt.pdf.

²⁸ A potential interpretive question may arise, should Congress enact a statute intending to exempt information from disclosure but omitting the required reference to paragraph (b)(3) of FOIA. The legal principal at issue is that one Congress cannot bind a future Congress. See, e.g., *Cooper v. Gen. Dynamics*, 533 F.2d 163, 169 (5th Cir.1976) (holding that one Congress cannot insulate a statute from amendments by future Congresses). As applied to the OPEN FOIA Act, the question for a reviewing court could be whether the absence of the required reference to FOIA paragraph (b)(3) prevents the intended exemption from being effective.

²⁹ The OPEN FOIA Act was based on language proposed by the Senate in conference. The conference language mirrors legislation that the Senate Judiciary Committee favorably reported and the Senate unanimously passed during the 109th Congress, S. 1181.

³⁰ Sen. Patrick Leahy, “Remarks in the Senate,” *Congressional Record*, daily edition, March 17, 2009, p. S3164.

refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.³¹

The agency is required to determine whether the information to be withheld falls within the scope of the nondisclosure statute. Unlike other FOIA exemptions, if the information requested under FOIA meets the withholding criteria of Exemption 3, the information must be withheld.

Courts have taken different approaches over whether the withholding criteria in nondisclosure statutes should be construed narrowly,³² consistent with FOIA's strong preference for disclosure, or broadly, consistent with the deferential standards of administrative law.³³ Numerous statutes have been held by courts to qualify as Exemption 3 statutes.³⁴ In addition, agencies often rely on statutes as a basis for Exemption 3 withholding without a court having determined whether the nondisclosure statute qualifies as an Exemption 3 withholding statute.

Legislative Exemptions from FOIA

Corporations and federal agencies have sought legislative exemptions from FOIA for certain categories of information. Legislative exemptions from FOIA are often referred to as nondisclosure statutes. Private industry has argued that FOIA's exemptions do not provide the certainty of protection needed to assure them that confidential business information voluntarily provided to the government will not be released under FOIA. Agencies have sought or justified

³¹ 5 U.S.C. § 552(b)(3).

³² *Anderson v. HHS*, 907 F.2d 936, 951 (10th Cir. 1990)(taking into account well-established rules that the FOIA is to be broadly construed in favor of disclosure and its exemptions are to be narrowly construed" in determining how to interpret Exemption 3 statute).

³³ See *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 235 (1st Cir. 1994) (finding that, unlike actions under other FOIA exemptions, agency decisions to withhold materials under Exemption 3 are entitled to some deference."); *Aronson v. IRS*, 973 F.2d 962, 967 (1st Cir. 1992)("once a court determines that the statute in question is an Exemption 3 statute, FOIA de novo review normally ends" and "[a]ny further review must take place under more deferential, administrative law standards").

³⁴ The following list includes statutes that courts have found to qualify as Exemption 3 statutes. The Commodity Exchange Act authorizes the withholding of "[D]ata and information that would separately disclose the business transactions of any person" and trade secrets or names of customers gathered in the course of the Commission's investigations under the Commodity Exchange Act. 7 U.S.C. § 12. The Federal Trade Commission Act authorizes the withholding of "[A]ny trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential" and certain investigative materials received by the FTC and "provided pursuant to any compulsory process under this subchapter or which is provided voluntarily in place of such compulsory process." 15 U.S.C. §§ 46(f), 57b-2. The Antitrust Civil Process Act authorizes withholding of "Any documentary material, answers to written interrogatories, or transcripts of oral testimony" provided pursuant to certain civil investigative demands pertaining to antitrust investigations." 15 U.S.C. § 1314(g). The Consumer Product Safety Act authorizes withholding of certain information reported to, or otherwise obtained by, the Consumer Product Safety Commission which either contains or relates to a trade secret or is "subject to section 552(b)(4) of Title 5." 15 U.S.C. §§ 2055(a)(2), 2055(b)(1), 2055(b)(5). The Tariff Act authorizes withholding of certain "information submitted to the administering authority or the [United States International Trade] Commission which is designated as proprietary by the person submitting the information." 19 U.S.C. § 1677f. The Aviation and Transportation Security Act authorizes withholding of information obtained or developed in carrying out security under the authority of the Aviation and Transportation Security Act or under chapter 449 of this title. 49 U.S.C. § 114(s). The Federal Aviation Act authorizes withholding of certain information obtained or developed in ensuring transportation security if disclosure of that information would constitute an invasion of personal privacy, reveal a trade secret or confidential commercial or financial information, or be detrimental to transportation safety. 49 U.S.C. § 40119(b). U.S. Department of Justice, Office of Information Policy, Statutes Found to Qualify under Exemption 3 of the FOIA, April 2010, <http://www.justice.gov/oip/exemption3-april-2010.pdf>.

the enactment of legislative exemptions from FOIA to enable regulated entities “to provide us with access to confidential information without concern that the information will later be made public.”³⁵ Academics, government accountability groups, and some members of the public oppose the creation of legislative exemptions from FOIA on the grounds that such legislative exemptions from FOIA undermine the goals of government accountability and transparency and have “the potential to severely hinder the public’s ability to access critical information related to the oversight activities” of government.³⁶ Agency FOIA decisions are believed by some proponents of legislative exemptions from FOIA to be ambiguous and discretionary.³⁷ Private industry is also concerned about disclosure of confidential business information under state open records laws, and disclosure of sensitive corporate information to competitors.³⁸ These concerns exist notwithstanding protections afforded in the Trade Secrets Act³⁹ and the Critical Infrastructure Information Act.⁴⁰

Proponents of open records and government transparency argue that new exemptions from FOIA jeopardize the public’s ability to obtain information about government and industry practices, cast a shroud of secrecy over government’s functions, and are unnecessary because FOIA’s exemptions adequately protect private information from disclosure.⁴¹ The FOIA exemptions often

³⁵ Letter from Mary L. Shapiro, Chairman, Securities and Exchange Commission, to The Honorable Barney Frank, Chairman, House Committee on Financial Services, July 30, 2010, <http://voices.washingtonpost.com/market-cop/frank.pdf>.

³⁶ Letter from American Library Association, American Association of Law Libraries, and Citizens for Ethics and Responsibility in Washington (CREW), et al. to Senator Christopher Dodd, Chairman, Senate Committee on Banking, Housing and Urban Affairs, August 3, 2010, <http://www.pogo.org/pogo-files/letters/financial-oversight/fo-fra-20100803.html>.

³⁷ Joseph Summerill, “Is it Safe to Provide the Government with Homeland Security Data?,” *The Federal Lawyer*, January 2010, pp. 24, 27.

³⁸ Elizabeth MacDonald, “What SEC Sources Say About FinReg and FOIA,” *EMAC’s Stock Watch*, July 30, 2010, <http://emac.blogs.foxbusiness.com/2010/07/30/what-sec-sources-say-about-finreg-and-foia>.

³⁹ The Trade Secrets Act criminalizes the disclosure of confidential trade secrets information by government employees.

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Federal Housing Finance Agency, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C.1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment. 18 U.S.C. § 1905.

⁴⁰ The Critical Infrastructure Information Act of 2002 (CIIA) addresses the circumstances under which the Department of Homeland Security may obtain, use, and disclose critical infrastructure information voluntarily shared as part of a critical infrastructure protection program. The CIIA was enacted, in part, to respond to the need for the federal government and owners and operators of the nation’s critical infrastructures to share information on vulnerabilities and threats, and to promote information sharing to protect critical assets. The CIIA specifically excludes critical infrastructure information from disclosure under the FOIA. Subtitle B (Sec. 211 et seq.) of title II of P.L. 107-296, 116 Stat. 2150, 6 U.S.C. § 133.

⁴¹ Testimony of David Sobel, Electronic Privacy Information Clearinghouse before the U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Creating The Department of* (continued...)

cited as providing sufficient protection for confidential business information are the exemptions for national security information,⁴² trade secrets and confidential business information,⁴³ law enforcement records,⁴⁴ and bank examination information.⁴⁵ The FOIA exemption for national security information is of relevance to public-private sector information sharing because much of

(...continued)

Homeland Security: Consideration of the Administration's Proposal, 107th Cong., 2nd sess., June 25 and July 9, 2002, Serial No. 107-113 (Washington: GPO, 2002), p. 258.

⁴² Exemption 1 of the FOIA protects from disclosure national security information concerning the national defense or foreign relations of the United States, provided that it has been properly classified in accordance with the requirements of an executive order. Under Executive Order 13526, "Classified National Security Information", the President, Vice President, agency heads and any officials designated by the President, and United States government officials delegated authority may classify information upon a determination that the unauthorized disclosure of such information could reasonably be expected to cause identifiable or describable damage to the national security. Such information must be owned by, produced by or for, or under the control of the federal government, and must include one of the following: military plans, weapons systems, or operations; foreign government information; intelligence activities (including covert action), intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States, including confidential sources; scientific, technological, or economic matters relating to national security; United States government programs for safeguarding nuclear materials or facilities; vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to national security; or the development, production, or use of weapons of mass destruction. Exec. Order No. 13526, 75 F.R. 707 (Jan. 5, 2010).

⁴³ Exemption 4 provides that the FOIA does not apply to matters that are "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. § 552(b)(4). Most exemption 4 cases have involved a dispute over whether the requested information was confidential. If disclosure of the information is likely to either impair the government's ability to obtain necessary information in the future; or to cause substantial harm to the competitive position of the person from whom the information was obtained, the commercial information will be treated as confidential. See, *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). In 1992, in *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-80 (D.C. Cir. 1992) (*en banc*) ("*Critical Mass II*"), *cert. denied*, 507 U.S. 984 (1993), the D.C. Circuit limited the scope and application of *National Parks* to cases in which a FOIA request is made for commercial or financial information a person was *required* to furnish to the government: information is exempt from disclosure if the submitter can show that it does not customarily release the information to the public. The *Critical Mass* voluntary vs. required standard has not been widely adopted. See U.S. Department of Justice, Freedom of Information Act Guide and Privacy Act Overview (May 2009), *available at*, http://www.justice.gov/oip/foia_guide09.htm.

⁴⁴ Exemption 7 provides that FOIA does not apply to matters that are

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, ... , (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual. 5 U.S.C. § 552(b)(7).

⁴⁵ Exemption 8 provides that FOIA does not apply to matters that are "(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8). The Administrative Conference of the United States recognized that "Exemption 8 provides an unusual level of protection to banks and bank regulatory agencies. Except for Exemption 9, dealing with geological and geophysical information, no other FOIA exemption is industry- or agency-specific. In light of the change in the regulatory environment of financial institutions since the passage of FOIA in 1966, the Conference has reviewed whether this broad exemption continues to be justified. The upheaval faced by financial institutions in the last decade and the number of such institutions that have failed makes availability of information relating to the regulation of that segment of the economy of particular interest. A substantial amount of taxpayer money has been spent to alleviate problems relating to financial institutions." See Administrative Conference of the United States, "Recommendation 95-1: Application and Modification of Exemption 8 of the Freedom of Information," 60 *Federal Register* 13692-13697, March 14, 1995.

the threat information is reportedly classified.⁴⁶ The exemption for trade secrets and confidential business information is viewed by some as not providing the certainty of protection that submitters of sensitive or proprietary business information seek. On the other hand, proponents of government access contend that Exemption 4 provides a workable framework to adequately address those concerns.

Congress has increasingly enacted Exemption 3 statutes containing disclosure prohibitions that are specifically directed toward FOIA. Exemption 3 provisions have been included in legislative proposals to encourage the private sector to provide information to the government with the assurance that the information that it has submitted will not be disclosed. In recent years legislative exemptions from FOIA were enacted for information concerning chemical facility security;⁴⁷ chemical-terrorism vulnerability information;⁴⁸ information obtained by the Biomedical Advanced Research and Development Authority (BARDA) to develop drug technologies and vaccines to respond to natural outbreaks and bioterrorism;⁴⁹ animal identification systems;⁵⁰ transportation security;⁵¹ food safety;⁵² securities regulation;⁵³ and critical infrastructure protection.⁵⁴

⁴⁶ Tim Starks, "Cybersecurity: Learning To Share," *CQ WEEKLY*, August 2, 2010, p. 1858.

⁴⁷ The Department of Homeland Security Appropriations Act of 2007, P.L. 109-295, § 550(c), 120 Stat. 1389.

Notwithstanding any other provision of law and subsection (b), information developed under this section, including vulnerability assessments, site security plans, and other security related information, records, and documents shall be given protections from public disclosure consistent with similar information developed by chemical facilities subject to regulation under [the Maritime Transportation Security Act]: Provided, That this subsection does not prohibit the sharing of such information, as the Secretary deems appropriate, with State and local government officials possessing the necessary security clearances, including law enforcement officials and first responders, for the purpose of carrying out this section, provided that such information may not be disclosed pursuant to any State or local law: Provided further, That in any proceeding to enforce this section, vulnerability assessments, site security plans, and other information submitted to or obtained by the Secretary under this section, and related vulnerability or security information, shall be treated as if the information were classified material.

⁴⁸ 6 C.F.R. § 27.400(g).

(1) Except as otherwise provided in this section, and notwithstanding the Freedom of Information Act (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), and other laws, records containing CVI [chemical-terrorism vulnerability information] are not available for public inspection or copying, nor does the Department release such records to persons without a need to know.

⁴⁹ Pandemic and All-Hazards Preparedness Act, P.L. 109-417, 120 Stat. 2831, 2871, 42 U.S.C. § 247d-7e.

(A) The Secretary shall withhold from disclosure under section 552 of title 5, United States Code, specific technical data or scientific information that is created or obtained during the countermeasure and product advanced research and development carried out under subsection(c) that reveals significant and not otherwise publicly known vulnerabilities of existing medical or public health defenses against biological, chemical, nuclear, or radiological threats. Such information shall be deemed to be information described in section 552(b)(3) of title 5, United States Code. (B) REVIEW.—Information subject to non disclosure under subparagraph (A) shall be reviewed by the Secretary every 5 years, or more frequently as determined necessary by the Secretary, to determine the relevance or necessity of continued nondisclosure. (C) SUNSET.—This paragraph shall cease to have force or effect on the date that is 7 years after the date of enactment of the Pandemic and All-Hazards Preparedness Act.

⁵⁰ Congress has considered legislation to exempt producer information gathered through animal disease traceability systems from FOIA. USDA's revised animal traceability framework contemplates continued engagement with Congress and stakeholders on exemption from FOIA. Michael Roberts and Doug O'Brien, *Animal Identification: Confidentiality of Information*, National Agricultural Law Center University of Arkansas Law School, WEMC FS#5-04, 2004. Animal and Plant Health Inspection Service and Veterinary Services, *Questions and Answers: New Animal Disease Traceability Framework*, United States Department of Agriculture, Factsheet, February 2010, (continued...)

Many legislative exemption statutes have been found by courts to qualify as Exemption 3 statutes under FOIA.⁵⁵ Agencies are required annually to list all Exemption 3 statutes utilized in their annual FOIA reports.⁵⁶ Additionally, FOIA requires agencies to include in their annual FOIA reports “the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld.”⁵⁷

Exemption 3 Enactments in the 111th Congress

During the 111th Congress, two legislative exemptions from FOIA have been particularly controversial.

The Protected National Security Documents Act of 2009

Section 565 of P.L. 111-83, The Protected National Security Documents Act of 2009, was enacted in response to litigation under FOIA to obtain photographs depicting the mistreatment or alleged mistreatment of detainees in Iraq and Afghanistan.⁵⁸ It defines a “protected document” as

any record for which the Secretary of Defense has issued a certification stating that disclosure of that record would endanger citizens of the United States, members of the

(...continued)

http://www.aphis.usda.gov/publications/animal_health/content/printable_version/faq_traceability.pdf.

⁵¹ Except as provided in paragraphs (c) and (d) of this section, and notwithstanding the Freedom of Information Act (5 U.S.C. § 552) or other laws, the records and information described in Sec. 1520.7 and paragraph (b) of this section are not available for public inspection or copying, nor is information contained in those records released to the public. (b) Section 1520.7 describes the information that TSA prohibits from disclosure. The Administrator prohibits disclosure of information developed in the conduct of security or research and development activities under 49 U.S.C. § 40119 if, in the opinion of the Administrator, the disclosure of such information would: (1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file); (2) Reveal trade secrets or privileged or confidential information obtained from any person; or (3) Be detrimental to the safety of persons traveling in transportation.... 49 C.F.R. § 1520.3.

⁵² The Secretary shall compile and maintain an up-to-date list of facilities that are registered under this section. Such list and any registration documents submitted pursuant to this subsection shall not be subject to disclosure under section 552 of title 5. Information derived from such list or registration documents shall not be subject to disclosure under section 552 of title 5 to the extent that it discloses the identity or location of a specific registered person. 21 U.S.C. § 350d(a)(4). The Bioterrorism Act of 2002 requires certain members of the food industry to register with the Food and Drug Administration to trace contaminated food.

⁵³ P.L. 111-203.

⁵⁴ Sec. 133. Protection of voluntarily shared critical infrastructure information. Notwithstanding any other provision of law, critical infrastructure information (including the identity of the S.C. § 133. submitting person or entity) that is voluntarily submitted to a covered Federal agency for use by that agency regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose, when accompanied by an express statement specified in paragraph (2) - (A) shall be exempt from disclosure under section 552 of title 5 (commonly referred to as the Freedom of Information Act); ... 6 U.S.C. § 133.

⁵⁵ U.S. Department of Justice, Office of Information Policy, Statutes Found to Qualify under Exemption 3 of the FOIA, April 2010, <http://www.justice.gov/oip/exemption3-april-2010.pdf>.

⁵⁶ 5 U.S.C. § 552(e)(1)(B)(ii).

⁵⁷ Id.

⁵⁸ See *ACLU v. DOD*, 542 F.3d 59 (2d Cir. 2008); vacated by, remanded by *DOD v. ACLU*, 130 S. Ct. 777 (2009).

United States Armed Forces, or employees of the United States Government deployed outside the United States; and is a photograph that was taken during the period beginning on September 11, 2001, through January 22, 2009; and relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States.⁵⁹

The term “photograph” encompasses “all photographic images, whether originals or copies, including still photographs, negatives, digital images, films, video tapes, and motion pictures.”⁶⁰ A certification and a renewal of a certification expires three years after the date on which the certification or renewal is issued. The Secretary of Defense is required to provide Congress timely notice of the issuance of a certification and of a renewal of a certification. The act expressly does not preclude the voluntary disclosure of a protected document.

The Dodd-Frank Wall Street Reform and Consumer Protection Act

A provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), P.L. 111-203, that grants an exemption from FOIA to the Securities and Exchange Commission (SEC) for certain information received from entities it regulates and information used for other regulatory and oversight activities has generated a great deal of controversy.⁶¹ Many questions have been raised regarding the scope and application of Section 929I of the Dodd-Frank Act, Protecting Confidentiality of Materials Submitted to the Commission. Some assert that Section 929I of the Dodd-Frank Act exempts the Securities and Exchange Commission from FOIA. The SEC contends that the provision is necessary in order to obtain confidential or sensitive business information from entities now subject to SEC regulation—hedge funds, private equity funds, and venture capital funds.⁶²

Section 929I provides,

(a) Except as provided in subsection (f), the Commission shall not be compelled to disclose records or information obtained pursuant to section 17(b), or records or information based upon or derived from such records or information, if such records or information have been obtained by the Commission for use in furtherance of the purposes of this title, including surveillance, risk assessments, or other regulatory and oversight activities. (2) TREATMENT OF INFORMATION- For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552. Collection of information pursuant to section 17 shall be an administrative action involving an agency against specific individuals or agencies pursuant to section 3518(c)(1) of title 44, United States Code.

(b) Investment Company Act of 1940- Section 31 of the Investment Company Act of 1940 (15 U.S.C. 80a-30) is amended ...

⁵⁹ P.L. 111-83, § 565.

⁶⁰ *Id.*

⁶¹ Daniel Strauss, “Freedom of Information Act Exemption for SEC Stirs Protests,” *POLITICO*, August 11, 2010, <http://www.politico.com/news/stories/0810/40915.html>.

⁶² Elizabeth MacDonald, “What SEC Sources Say About FinReg and FOIA,” July 30, 2010, at <http://emac.blogs.foxbusiness.com/2010/07/30/what-sec-sources-say-about-finreg-and-foia>.

Limitations on Disclosure by Commission- Notwithstanding any other provision of law, the Commission shall not be compelled to disclose any records or information provided to the Commission under this section, or records or information based upon or derived from such records or information, if such records or information have been obtained by the Commission for use in furtherance of the purposes of this title, including surveillance, risk assessments, or other regulatory and oversight activities. Nothing in this subsection authorizes the Commission to withhold information from the Congress or prevent the Commission from complying with a request for information from any other Federal department or agency requesting the information for purposes within the scope of jurisdiction of that department or agency, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, United States Code, this section shall be considered a statute described in subsection (b)(3)(B) of such section 552. Collection of information pursuant to section 31 shall be an administrative action involving an agency against specific individuals or agencies pursuant to section 3518(c)(1) of title 44, United States Code....

(c) Investment Advisers Act of 1940- Section 210 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-10) is amended ...

Limitations on Disclosure by the Commission- Notwithstanding any other provision of law, the Commission shall not be compelled to disclose any records or information provided to the Commission under section 204, or records or information based upon or derived from such records or information, if such records or information have been obtained by the Commission for use in furtherance of the purposes of this title, including surveillance, risk assessments, or other regulatory and oversight activities. Nothing in this subsection authorizes the Commission to withhold information from the Congress or prevent the Commission from complying with a request for information from any other Federal department or agency requesting the information for purposes within the scope of jurisdiction of that department or agency, or complying with an order of a court of the United States in an action brought by the United States or the Commission. For purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552. Collection of information pursuant to section 204 shall be an administrative action involving an agency against specific individuals or agencies pursuant to section 3518(c)(1) of title 44, United States Code.⁶³

As discussed above, The OPEN FOIA Act requires that when Congress provides for a statutory exemption to FOIA, Congress must state its intention to do so explicitly and clearly. The OPEN FOIA Act requires that any statute “enacted after the date of enactment of the OPEN FOIA Act of 2009” must “specifically cite to this paragraph [5 U.S.C. § 552(b)(3)].” Section 929I does include language identifying the provision as an Exemption 3 statute. The Dodd-Frank Act provides that “[f]or purposes of section 552 of title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.”

Chairman Frank of the House Financial Services Committee scheduled a hearing to consider concerns raised about the on the Dodd-Frank FOIA exemption.⁶⁴ The House Financial Services Committee held the hearing on September 16, 2010, at which SEC Chairman Shapiro testified that some entities subject to examination have resisted sharing potentially sensitive information with the commission in light of concerns in both FOIA and litigation contexts about the

⁶³ P.L. 111-203.

⁶⁴ Frank Announces Hearing on SEC FOIA Provision of Wall Street Reform Law, (August 4, 2010), <http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1353>.

commission's ability to protect certain information from disclosure.⁶⁵ Chairman Frank indicated that a bipartisan effort would be made to limit the SEC's ability to withhold certain records.⁶⁶

The Senate passed S. 3717 by unanimous consent, sponsored by Senator Leahy, on September 21, 2010. S. 3717 struck Section 929I of the Dodd-Frank Act, and expressly provides that for purposes of Exemption 8 of the FOIA, the SEC is an agency responsible for the regulation or supervision of financial institutions; and any entity for which the commission is responsible for regulating, supervising, or examining is a financial institution. Exemption 8 provides that FOIA does not apply to matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."⁶⁷ The House passed S. 3717 on September 23, 2010. Numerous bills were introduced to curtail the impact of the SEC FOIA provision.

The SEC issued guidance on September 15, 2010, on when the FOIA provision may be used.⁶⁸ In summary,

In response to FOIA requests, the Commission will rely on Section 929I only to address situations where the possibility that some of the entities the Commission examines may not be deemed "financial institutions" could limit the application of Exemption 8. In response to discovery requests in non-FOIA cases, the Commission will not rely on Section 929I in any case in which it is a party, and in other cases will invoke Section 929I only with respect to information obtained pursuant to the Commission's examination authority that would be withheld in response to a FOIA request. The Commission will, however, continue to produce documents if the party requesting the documents has demonstrated a "substantial need" for them that outweighs the confidentiality interest of the examined entity.⁶⁹

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⁶⁵ U.S. Congress, House Committee on Financial Services, *Legislative Proposals to Address Concerns Over the SEC's New Confidentiality Provision*, 111th Cong., 2nd sess., September 16, 2010, at <http://financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1353>.

⁶⁶ Malini Manickavasagam, "SEC Staff Gives Guidance on FOIA Provision, House Bill Would Limit Agency Discretion," *United States Law Week*, vol. 79 (September 21, 2010), p. 1349.

⁶⁷ 5 U.S.C. § 552(b)(8).

⁶⁸ U. S. Securities and Exchange Commission, Guidance to Staff on Application of Section 929I of the Dodd-Frank Act, at <http://www.sec.gov/news/section-929i-guidance.htm>.

⁶⁹ *Id.*

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