

CENTER FOR NATIONAL SECURITY STUDIES

The New Freedom Of Information Act & National Security Secrecy

What the Act says
How to use it
Where to get help

Project on National Security Secrecy

Who We Are What We Do

The Center for National Security Studies is concerned with the menacing growth of state power in the name of "national security." It sponsors research and publishes reports on policies and practices of national security agencies — including the CIA, the FBI, and the military establishment. It is also working to curtail the present executive branch secrecy system and drastically reduce the secrecy which presently veils national security policies.

The Center is directed by Robert L. Borosage, a Washington attorney, formerly with the Institute for Policy Studies. The Center's Project on National Security Secrecy is headed by William G. Florence and Morton Halperin. Mr. Florence has had twenty-two years of military service and twenty-one more years experience as a civilian employee of the Department of Defense. As a national authority on government secrecy, he has served as consultant to more than five Congressional committees. He has worked with the Committee on Government Secrecy since 1973, and joined CNSS in April 1974. Mr. Halperin is a former Deputy Assistant Secretary of Defense (1967 to 1969). In 1969 he served on Henry Kissinger's staff at the National Security Council. He is currently completing a major study of national security secrecy for the Twentieth Century Fund.

The Project on National Security Secrecy seeks to restore the flow of information so necessary to democratic government. One of the tools to be used is the recently amended Freedom of Information Act. The Center will monitor implementation of the act by national security agencies, and will advise people who want to use it.

The Center is an independent, non-profit, tax-exempt project of The Fund for Peace. It is financed by tax-deductible contributions from private donors and foundations, and receives no government money or support.

An Open Letter from the Director

No lesson of Watergate is clearer than the need to prevent Executive officials from making information secret by merely invoking a claim of "national security." Routine use of the classification stamp has for too long denied all of us access to information crucial to public debate.

In 1974, Congress took a small step towards limiting excessive classification. It amended the Freedom of Information Act over President Ford's veto, making it possible for citizens to ask for classified information and — if refused — to challenge the denial in a court of law.

This pamphlet explains how to use the amended FOIA to gain access to classified documents. Using the Act is not complicated; you need not be an expert to take advantage of it. Anyone — a journalist, a scholar, an activist, an industry executive, a concerned citizen — can request documents and, if denied, take the issue to court. On pages 13, 14, and 15, there are sample letters which you can use as a guide for written requests.

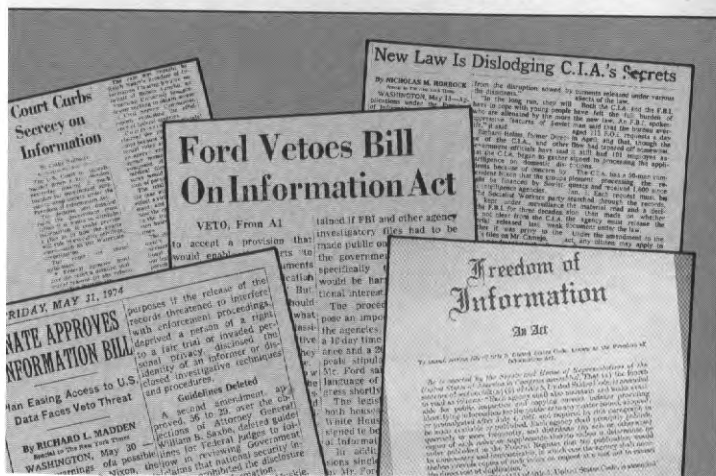
One way in which many people have begun to use the Act is to demand their own files from agencies such as the CIA, the FBI, the IRS, and the Department of Defense. If you have some reason to believe that the government has a file on you, it can be requested. A sample letter for that purpose is found on page 15. Addresses of general use in making FOIA requests are at the back of the pamphlet.

Many of us have been frustrated by our inability to know about — much less influence — the activities of our government. Congress has now given us the opportunity to pry much needed information out of the executive bureaucracy. If we fail to use it, or if we fail to demand that executive secrecy be drastically curtailed, we will have only ourselves to blame.

Sincerely yours,

Robert L. Borosage

Robert L. Borosage, Director
Center for National Security Studies
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-5380



The Freedom of Information Act and National Security Information

In November 1974, Congress amended the Freedom of Information Act over President Ford's veto. These amendments insure the possibility that citizens may acquire documents on *current* national security issues. The revisions of the Act will be important only if the press and the public make use of them.

This pamphlet:

- 1) explains the provisions of the amended Act as they relate to national security information.
- 2) describes how to request documents under the Act.
- 3) offers the assistance of the ACLU Foundation and the Center for National Security Studies to persons seeking to use the Act.

Provisions of the Amended FOIA

1. The Purpose of the FOIA

The Freedom of Information Act [Title 5, U.S. Code, Section 552(b)] *requires* that each Federal Executive Branch agency do four things:

- (1) Publish in the *Federal Register* information regarding its organization, functions, operational procedures, and general rules.
- (2) Make available for public inspection and copying:
 - (a) manuals and instructions that effect a member of the public;
 - (b) final opinions in adjudicated cases; and
 - (c) all policy statements not published in the *Federal Register*.
- (3) Make available for public inspection and copying current indexes of matters referring to items (1) and (2) above.
- (4) *Make any other existing official record available to a person who requests access to it or a copy of it — unless the record is exempt from mandatory disclosure.*

2. Criteria for Withholding Information

The Freedom of Information Act provides that all records in the possession of the Executive Branch must be provided on request — unless specifically exempt from disclosure by the Act. Records and documents classified by executive officials in the name of "national security" are provided with an exemption in subsection (b) (1). (All the exemptions are printed on page 7 of this booklet.)

In the original Act as passed, this subsection exempted information:

Specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.

In interpreting this exemption the Supreme Court in 1973 held that Congress had provided only for very limited judicial review of classified documents (*E.P.A. v. Mink*, 410 U.S. 73 (1973)). Following *Mink*, all that a court could do was to determine if a document was, in fact, classified; it *could not* determine whether the classification was sound or even whether the decision to classify was, in the words of Justice Stewart, "cynical, myopic or even corrupt."

The Supreme Court noted in *Mink* that "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures. . . ."

In 1974 Congress responded to this invitation. The (b) (1) subsection as amended now permits withholding of classified records *only* if they are:

(a) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and

(b) are in fact properly classified pursuant to such Executive order.

The House-Senate Conference Report notes that this revised provision requires that "both procedural and substantive criteria" contained in the Executive order be followed. The relevant order is Executive Order 11652 on "Classification and Declassification of National Security Information and Material" issued by President Nixon on March 8, 1972. The preamble of the Order notes that

There is some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints.

The Order provides that such information shall be classified "Top Secret," "Secret," or "Confidential." To be properly classified under the Order, information must at least fit the criterion of "Confidential," which reads as follows:

The test for assigning "confidential" classification shall be whether its unauthorized disclosure could be reasonably expected to cause damage to the national security. (The order employs "national security" as a shorthand for "national defense and foreign relations.")

An implementing directive issued by the National Security Council on May 19, 1972, provides that:

If the classifier has any substantial doubt as to which security classification category is appropriate, or as to whether the material should be classified at all, he should designate the less restrictive treatment.

Thus, the relevant *minimum substantive criterion* for proper classification appears to be:

No substantial doubt that the release of the information could be reasonably expected to cause damage to the national security.

The Executive Order also provides that information shall be declassified as soon as it no longer fits the criteria for classification. Thus, to withhold information under the (b) (1) exemption, the agency possessing the records must make a determination, at the time of the request, that the information is still properly classified; it cannot rely on a determination made in the past.

Furthermore, for the (b) (1) exemption to apply, the procedures of the Executive Order and implementing directive should have been followed. These include:

1. Limiting classification authority to designated agencies.
2. Indicating on a document whether it is subject to the Declassification Schedule.
3. Indicating on each document the office of origin and the date of classification.
4. "To the extent practicable marking the document to indicate which portions are not classified."

The Order also provides for automatic declassification of information according to a fixed schedule unless it is properly exempt from the schedule.

If the classification requirements of the Order are not met, files may not be withheld under section (b) (1). However, documentary information which is not exempt under subsection (b) (1) of the FOIA may nevertheless be exempt under some other subsection of the Act. Those most likely to be relevant are subsection (b) (3) relating to information exempted from disclosure by statute, which would apply to Atomic Energy information; (b) (5) which exempts intra- and inter-agency memoranda containing only advice on policy matters (the advice would be exempt, but not factual material included in the same memorandum if it were separable); and subsection (b) (7) which exempts "investigatory files compiled for law enforcement purposes," including those relating to "lawful national security intelligence investigations."

Under these exemptions, it should be noted, documents may still be released through agency discretion, unless otherwise prohibited by law. Matters not specifically excepted from disclosure by the FOIA exemptions may *not* be withheld for *any* reason.

FOIA Exemptions

1. Records "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and which are "in fact properly classified pursuant to such Executive order."
2. Matters concerning "internal personnel rules and practices" that do not affect a member of the public.
3. Matters exempt from disclosure by statute.
4. Trade secrets and commercial or financial information that a person has given to the agency and that are privileged or confidential.
5. Inter-agency or intra-agency communications, such as memoranda showing how individual decision-makers within an agency feel about various policy alternatives.
6. Personnel and medical files which could not be disclosed without a "clearly unwarranted invasion" of someone's privacy.
7. Investigatory records compiled for law enforcement purposes (such as files compiled by the F.B.I. in a criminal investigation) -*but only* if the production of such records would (a) interfere with law enforcement, (b) deprive a person of a fair trial, (c) constitute an unwarranted invasion of personal privacy, (d) disclose the identity of a confidential source and, in criminal and lawful national security intelligence investigations, confidential information furnished only by such a source, (e) disclose investigative techniques, or (f) endanger the life or safety of law enforcement personnel.
8. Reports prepared by or for an agency responsible for the regulation or supervision of financial institutions, such as reports prepared by the Securities and Exchange Commission concerning the New York Stock Exchange.
9. Geological and geophysical information and data, including maps, concerning wells. This refers to reports based on explorations by private gas and oil companies.

For further discussion of these exemptions and other provisions of the Act see the ACLU pamphlet, "Your Right to Government Information" (revised ed. January 1975).

3. Requesting a File from an Agency

Description of Record:

The Act provides that upon request by any person an agency shall make a record available, if it is not exempt from release. Under the 1974 amendments, the request must be honored, if it "reasonably describes such records." The original FOIA provided for release of "identifiable" records. In changing the language, Congress indicated that it expects the agency to locate the records requested, if it can do so with a reasonable amount of effort. The agency is not, however, required to furnish information not already contained in a document; the FOIA is in reality a public records law rather than literally an information law.

Partial Exemption:

If parts of a record are exempt from release "any reasonably segregable portion of a record" must be deleted.

Fees:

The Act provides that requests must conform to rules established regarding procedures and fees. Fees are limited to "reasonable standard charges for document search and duplication." Thus no fees may be charged for assessing whether previously classified documents should now be de-classified, in whole or in part. The Act also provides that fees may be reduced or waived when the agency determines that release of the information can be considered as primarily benefiting the general public.

Time Limits:

Under the original Act, agencies often took many months to respond to a request. Recognizing the frequent need for timely release of information, Congress laid out very detailed time limits for responding to requests in 1974 amendments.

The Act provides a limit of a total of thirty working days (40 under some "unusual circumstances") for an agency to respond to an initial request and any appeal that might be made. After that period, an individual requesting records may file suit in a federal District Court to obtain access to a withheld record.

(Note: The time period does not begin until a request reaches the agency's office which has responsibility for the requested record.)

The thirty day time period is divided in two parts. A request for information must be answered within 10 working days. If some part or all of the requested document is denied, an individual must be informed of his right to appeal and be given the name of the person to whom the appeal should be addressed. On appeal, a final determination must be made within 20 working days.

Upon written notice to the requester, either time limit may be extended for a combined total of up to 10 additional days — but only under three specified "unusual circumstances." These are:

- (1) Records are located in separate offices;
- (2) A voluminous amount of material from separate files must be examined; or
- (3) A need to consult with other agencies or components of the same agency. No other circumstances justify a delay.

If a request is denied on appeal — or if no response is made within either specified time period — suit may be filed in federal District Court. A complaint in Court must be answered by the government in 30 days unless the Court grants a delay upon a governmental showing of both exceptional circumstances and a due diligence on the part of the agency.

4. The New Role of Judicial Review

The Act provides that a District Court in the District of Columbia (or the district in which the complainant resides or the records are kept) may, on complaint, order the disclosure of records improperly withheld. The Act reads:

In such cases the court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld, and,

the burden is on the agency to sustain its action.

This means that the government must persuade the Court that the information is properly classified under the Executive order. In order to reach a determination the Court may, if it feels it necessary, examine the disputed documents in secret.

The conference report comments as follows on these provisions:

In *Environmental Protection Agency v. Mink, et al.*, 410 U.S. 73 (1973), the Supreme Court rules that *in camera* inspection of documents withheld under section 552(b)(1) of the law, authorizing the withholding of classified information, would ordinarily be precluded in Freedom of Information cases, unless Congress directed otherwise. H.R. 12471 amends the present law to permit such *in camera* examination at the discretion of the court. While *in camera* examinations need not be automatic, in many situations it will plainly be necessary and appropriate. Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.

...

However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects (sic) might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

In a major FOIA case, decided before the Act was amended, the Court of Appeals for the District of Columbia Circuit spelled out in detail the burden on the government to demonstrate that a particular document or parts of it were, in fact, exempt (*Vaughn v. Rosen*, 489 F.2d 820 (1973)). The Court held that there must be:

(1) a detailed justification for any withholding, not simply a conclusory opinion,

(2) specificity, separation and indexing so that the court could release one or more parts of a document, even if some information in the document is exempt, and

(3) adequate testing, perhaps by the appointment of a special master.

The courts are instructed by the amended Act to expedite hearings in such cases so that the usual lengthy delays encountered by civil litigants may be avoided. If the documents are ordered released, the court may order the government to pay court costs and attorneys' fees. Decisions of the District Court may be appealed by either party.

Using The Act

If you want access to a record related to national security that the government has not released, you should ask for it, preferably in writing.

Written Request:

The first step is to write a letter to the official designated by the agency having the records to receive such requests or, if his identity is not known, to the agency itself. (A list of designated officials for FOIA requests of the major national security agencies is on the back cover.) If you are not sure which agency has the information write to the one most likely; your letter will be forwarded, if necessary.

The letter should begin by indicating that this is a request for information under the Freedom of Information Act as amended (Title 5, U.S. Code, Section 552). The letter should then describe the information requested in as much detail as possible. If known, the location and specific identification of the file or record should be given. However, you should not hesitate to write because you lack information on the whereabouts of the material you seek. You need only "reasonably describe" the records you are requesting. You need not give any reason for requesting the information, but if you have a specific interest you may wish to state it.

The writer should indicate a willingness to pay reasonable fees for locating and copying the requested files. If the documents you are requesting may be particularly voluminous, you can request a cost estimate

before the actual location and copying is performed. You may be able to cut costs by volunteering to view originals rather than paying for copies of all requested documents. You may wish to request a reduction or waiver of these fees on the grounds that release of the information would benefit the general public. If so, you should state the nature of this benefit and summarize any other factors, such as indigency, which might influence a reduction in fees.

The letter should request release of the information within 10 working days, as provided by the amended Act. You may wish to give your telephone number and suggest that matters relating to identification of records, clarification of the scope of the request, and negotiation on the reduction of fees be handled by telephone to save processing time. The letter should indicate that, if any or all of the information is not released, you wish to know what exemption is being relied on. It might also state that if any parts of a document are not exempt they should be forwarded immediately, without prejudice to a right to appeal for the entire document. (A sample letter is on page 15.)

Appeal:

If a written refusal is received, and you are unsatisfied, or if no response is received after 10 working days, an appeal letter should be sent. If you do receive a written rejection, you must appeal before going to court, even if you are confident of a rejection on appeal. If a refusal is received, the letter should advise you of the person to whom an appeal should be addressed. If it does not or if you have not received a letter, the appeal should be addressed to the head of the agency.

The appeal letter should repeat the description of the requested information and indicate that release was denied or that no response was received. It should request a final decision within 20 working days, as provided in the Act. A copy of the previous exchange of letters should be included for the agency's convenience. You may wish in the appeal letter to comment on or refute the reasons for the denial if they have been given to you. In many instances, it may be possible to persuade a senior official to release information which a more junior official has denied you. If you wish to make such a case, you may increase your chances of success by seeking help at this stage. If you intend to go to court if your request is denied, you should so state in your appeal letter. Also, if you believe that a denial of the record is "arbitrary or capricious," you should state this in your appeal letter, since these terms are used in the law and provide for possible administrative sanctions against officials so acting. (Sample letters are on pages 13, 14 and 15).

You may also wish to send copies of your correspondence to the Senate Subcommittee on Administrative Practice and Procedure (Sen. Kennedy, Chairperson) and the House Subcommittee on Government Information (Cong. Bella S. Abzug, Chairperson), which oversee and monitor agency implementation of the FOIA. These subcommittees may be able to assist you in pressing your request with the agency.

Going to Court:

If this appeal is denied, or if no answer to the appeal is received within 20 days — or, at most, 30 days if the agency has informed you of a delay because of unusual circumstances — a suit may be brought in a federal District Court.

At this point, if not earlier, advice should be sought as to how to proceed without counsel or how to obtain counsel.

Getting Help

The Center for National Security Studies has established a joint Project on Freedom of Information in cooperation with the ACLU Foundation. The aim of the Project is to promote the use of the FOIA to obtain the release of information related to national security matters. The Project staff is available to provide assistance at every stage and to arrange for legal assistance through the ACLU Foundation when necessary. The staff will also refer you to other organizations prepared to help.

To enable us to monitor the functioning of the Act in this area, we would appreciate receiving copies of correspondence with agencies requesting national security information under the FOIA.

If you would like more specific information about using the FOIA or help in getting national security information from the Executive Branch, contact:

In Washington:

Morton H. Halperin
Freedom of Information Project
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-5380

In New York:

John H. F. Shattuck
National Staff Counsel
American Civil Liberties Union
22 East 40th Street
New York, N.Y. 10016
(212) 725-1222

SAMPLE Request Letter

Your address
Your phone number
Date

Freedom of Information Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Dear Sir:

This is a request under the Freedom of Information Act as amended (5 U.S.C. §552).

I write to request a copy of the report on CIA domestic activities sent by Mr. William Colby to President Ford on or about January 1, 1975.

To avoid any possible misunderstanding of what is being requested, I enclose a copy of a newspaper story in which Presidential Press Secretary Ronald Nesson states that President Ford has received this report. My request includes any and all appendices, annexes, or other materials attached to the copy of the Report as transmitted to President Ford by Mr. Colby.

As you know, the amended Act provides that if some parts of a file are exempt from release that "reasonably segregable" portions shall be provided. I therefore request that, if you determine that some portions of the requested Report are exempt, you provide me immediately with a copy of the remainder of the Report. I, of course, reserve my right to appeal any such decisions.

If you determine that some or all of the Report is exempt from release, I would appreciate your advising me as to which exemption(s) you believe covers the material which you are not releasing.

I am prepared to pay reasonable costs for locating the requested file and reproducing it.

As you know, the amended Act permits you to reduce or waive the fees if that "is in the public interest because furnishing the information can be considered as primarily benefiting the public." I believe that this request plainly fits that category and ask you to waive any fees.

If you have any questions regarding this request, please telephone me at the above number.

As provided for in the amended Act, I will expect to receive a reply within ten working days.

Sincerely yours,

SAMPLE LETTER

(Request for your files)

Your address
Your phone number
Date

Mr. Clarence Kelley, Director
Federal Bureau of Investigation
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Sir:

This is a request under the Freedom of Information Act as amended (5 U.S.C. §552).

I write to request a copy of all files in the Federal Bureau of Investigation indexed or maintained under my name and all documents returnable by a search for documents containing my name. To assist you in your search, I have indicated my social security number and date and place of birth below my signature.

As you know, the amended Act provides that if some parts of a file are exempt from release that "reasonably segregable" portions shall be provided. I therefore request that, if you determine that some portions of the requested information are exempt, you provide me immediately with a copy of the remainder of the file. I, of course, reserve my right to appeal any such decisions.

If you determine that some or all of the requested information is exempt from release, I would appreciate your advising me as to which exemption(s) you believe covers the information which you are not releasing.

I am prepared to pay costs specified in your regulations for locating the requested files and reproducing them.

As you know, the amended Act permits you to reduce or waive the fees if that "is in the public interest because furnishing the information can be considered as primarily benefiting the public." I believe that this request plainly fits that category and ask you to waive any fees.

If you have any questions regarding this request, please telephone me at the above number.

As provided for in the amended Act, I will expect to receive a reply within ten working days.

Sincerely yours,

Name
Social Security Number
Date of Birth
Place of Birth

(Write -- "Attention: Freedom of Information Act Unit" on envelope)

SAMPLE Appeal Letter

(Simple form)

Your address
Your phone number
Date

Secretary of Defense
Department of Defense
The Pentagon
Washington, D.C. 20301

Dear Mr. Secretary:

This is an appeal pursuant to subsection (a) (6) of the Freedom of Information Act (5 U.S.C. 552).

On _____, I received a letter from _____ of your agency denying my request for information and indicating that an appeal should be directed to you. This letter constitutes that appeal. I am enclosing a copy of my exchange of correspondence with your agency so that you can see exactly what files I have requested and the insubstantial grounds on which my request has been rejected.

I trust that upon examination of my request you will conclude that the information I have requested is not properly covered by exemption (b) (1) of the amended Act and will make the information promptly available.

As provided for in the Act, I will expect to receive a reply within 20 working days.

If you are unable to order release of the requested information, I intend to initiate a lawsuit to compel its disclosure.

Yours sincerely,

Where to Write?

Department of Defense:

Directorate of Freedom of Information
Office of Assistant Secretary of Defense
(Public Affairs)
Room 2C757, Pentagon
Washington, D.C. 20301

Department of State:

Director, Freedom of Information Staff TA/FOI
Room 5835, Department of State
Washington, D.C. 20520

Central Intelligence Agency:

Freedom of Information Coordinator
Central Intelligence Agency
Washington, D.C. 20505

National Security Council:

Staff Secretary
Room 374, National Security Council
Old Executive Office Building
Washington, D.C. 20506

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