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Freedom of Information Act (In)Applicability to Government Contractors

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FOIA (In)Applicability to Government Contractors

Abstract

Question: Does the federal Freedom of Information Act apply to private, for-profit government contractors performing governmental work?

Answer: The FOIA is constructed in a way that enables private contractors doing the government's work to be effectively exempted. The FOIA law neither names nor specifically exempts contractors. Rather, their effective immunity derives from judicial and administrative interpretations of certain provisions of the law. A review of the case law and court rulings available from the DOJ manual indicates that in a majority of the cases, courts have found that contractors are not subject to FOIA requests.

Background:

Much of the government's work today, particularly at the federal level, is performed by private contractors. But, unlike government agencies whose work is subject to public scrutiny under the Freedom of Information Act (FOIA), the private contractors who are performing the federal government's work can legally operate in secrecy because they are generally not covered by the FOIA.

This exclusion from FOIA coverage matters greatly. Government-by-contractor is the norm today. It appears, based on research by Paul Light and others, that that we may already be in the situation where the majority of government at the federal level is contracted out to private businesses.

The secrecy afforded private contractors may not be an issue if a contractor is mowing the grass in a public park. But it's a serious infringement on democracy and the constitutional rule of law when contractors have decisional authority and policy-development roles, which many do.

This immunity from public access has not been widely reported, nor is it generally recognized. A few authorities on public access to government information (e.g., Verkuil¹) have mentioned that contractors are exempt from FOIA. But it is hard to find documentation of how contractors are able, legally, to avoid FOIA coverage.

This paper summarizes the gaps in FOIA that allow private contractors to avoid coverage. The purposes of the paper are to: 1) raise the issue in hopes of making it more widely known; 2) sketch the statutory and legal backdrop that enables government contractors to hide behind this shield of secrecy.

¹ Paul R. Verkuil, *Outsourcing Sovereignty; Why Privatization of Government Functions Threatens Democracy and What we Can do About It*; Cambridge Univ. Press, 2007.

Findings:

The FOIA is constructed in a way that enables private contractors doing government work to be effectively exempted.² The FOIA law neither names, nor specifically exempts contractors. Rather, their effective immunity derives from judicial and administrative interpretations of certain provisions of the law.

As Paul Verkuil writes, in *Outsourcing Sovereignty*³,

[FOIA] does not reach documents in the hands of private contractors who are doing the work of the government. By analogy to the state action requirement, the FOIA “agency” requirement has an exempting force that makes it harder for the public to learn what its private agents are doing. (p 90)

But, what is the “exempting force” that affords private contractors effective exemption?

It is difficult to find many sources that address head-on and comprehensively the question of whether private-for-profit contractors are covered by FOIA, and if not, why not. So, it is necessary to answer the question largely by inference from sources that address FOIA applicability in general.

The principal sources reviewed to answer the overall question of FOIA applicability to contractors were:

- Department of Justice FOIA procedural manuals (2013 and 2004)
- Hammitt, Harry. "Privatization: Its Impact on Public Record Access." *National Freedom of Information Coalition*.

² Note that this paper is concerned with private contractors who are doing the work of the government. It is not concerned with contractors who “maintain records on behalf of government agencies”. Those types of contractors are covered by FOIA. But that is beside the point of this paper because they are not performing the government’s work. Nor is the debate about whether contractors are performing “inherently governmental functions” the concern of this paper. The reality is that private contractors are doing inherently governmental work. See for example Dan Guttman, “Who’s Doing Work for the Government?: Monitoring, Accountability and Competition in the Federal and Service Contract Workforce”, Senate Committee on Governmental Affairs, March 6, 2002, <https://www.gpo.gov/fdsys/pkg/CHRG-107shrg79883/html/CHRG-107shrg79883.htm> ; accessed April 2016: “...a large and substantial portion [of the contractor ‘shadow government’] is doing what we would call the basic work of government, drafting rules, plans, policies and budgets, writing statutorily required reports to the Congress, interpreting and enforcing laws, dealing with citizens seeking government assistance and with foreign governments, managing nuclear weapons complex sites and serving in combat zones, providing the workforce for foreign aid nation building, and selecting and managing other contractors in the official workforce itself.” Also see Janine R. Wedel, “Federalist No. 70: Where Does the Public Service Begin and End?,” *Public Administration Review* Vol. 71, Supplement to Volume 71: The Federalist Papers Revised for Twenty-First-Century Reality, December 2011, pp. S118-S127; and Alfred C. Aman, Jr. & Joseph C. Dugan (2017) “The Human Side of Public-Private Partnerships: From New Deal Regulation to Administrative Law Management,” *Iowa Law Review*; 102/3. .

³ Verkuil, Op cit.

- Feiser, Craig D. (1999) "Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law," *Federal Communications Law Journal*.
- See Sources list, below, for details.

The U.S. Department of Justice (DOJ) 2013 procedural manual on processing of FOIA requests contains the broad statement that “courts have held that private citizens and corporations, and non-profit organizations are not subject to the FOIA” (p.8, [Department of Justice Guide to the Freedom of Information Act Procedural Requirements](#)).

But, beyond that broad statement, the question of whether private contractors, specifically, are covered by FOIA turns on interpretations of the terms “agency”, “records” and “control” as they are used in the FOIA.

As the DOJ manual explains, “Agency ‘control’ is the predominant consideration in determining whether records generated or maintained by a government contractor are ‘agency records’ under the FOIA.”

Here is the pertinent explanation from the manual:

“In *DOJ v. Tax Analysts*, [1989] The Supreme Court has articulated a basic, two-part test for determining what constitutes "agency records" under the FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. Inasmuch as the "agency record" analysis typically hinges upon whether an agency has "control" over a record, courts have identified four factors to consider when evaluating agency "control" of a record: "(1) the intent of the document's creator to retain or relinquish control over the record[]; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record systems or files." Agency "control" is the predominant consideration in determining whether records generated or maintained by a government contractor are "agency records" under the FOIA. The FOIA's definition of "record" expressly provides that the term includes information that qualifies as a record under the FOIA and "is maintained for an agency by an entity under government contract, for the purposes of records management." [Emphasis added]. (p.10-13, [DOJ 2013 Procedural Requirements](#))

As the DOJ manual suggests, the interpretation of whether private contractors are covered by FOIA has been largely derived from case law.

Our review of the case law and court rulings available from the DOJ manual indicates that in a majority of the cases, courts have found that contractors are not subject to FOIA requests. I.e., within the current framework of law and court rulings, contractor records are not accessible to the general public unless those documents are already in possession of a government agency or in rare circumstances where a court rules that the government agency was working closely enough with the contractor to so that the government agency had constructive control.

In a majority of cases, courts have found that contractors are not subject to FOIA requests

See the section below that lists the relevant court cases in the DOJ manual.

The case that has received the most attention in documents reviewed for this paper is “Forsham v. Harris” (1980). However, that case narrowly pertains to research data produced under a research *grant* (i.e., not a contract). But the case did seem to set a precedent for exclusion from FOIA coverage based on an interpretation of “agency record”.

The case concerned an FOIA request for raw data from the University of Pittsburgh, which conducted scientific research funded by the DHHS. In this case, according to a report by the National Freedom of Information Coalition (NFIC),

The Supreme Court ruled that to be considered an “agency record,” an agency must have custody or control of the record, which, for all practical purposes, meant that it must have physical possession. Ruling that records of the study were not subject to FOIA because they were never in the possession of the agency, the Court also indicated an agency had no legal obligation to retrieve records to which it had a legal right in order to respond to an FOIA request. (Hammitt, n.d.)

The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999 partly overruled Forsham and tightened FOIA applicability somewhat. But this is not directly relevant to the question of private contractors, because the 1999 Omnibus legislation applied only to grants to institutions of higher education, hospitals, and nonprofit institutions (Department of Justice, 2004).

In an extensive analysis of FOIA, Feiser (1999) looked at both administrative and judicial interpretations of “agency” and “record” and found that private contractors do not meet the “threshold requirements” to be covered by FOIA. He notes that “by privatizing...government can avoid the disclosure requirements under the FOIA” and concludes that “in an age of privatization of governmental services in the name of efficiency, the Act needs to be adapted to ensure that its original purpose remains sound.”

Other sources reviewed for this paper, but that have only tangential relevance, are:

In *United States v. Orleans*, The Supreme Court ruled that grantees (contractors are not mentioned) must have conducted their work under the, “extensive, detailed, and virtually day-to-day supervision” of the government agency in order to be considered government actors (p. 8, [DOJ 2013 Procedural Requirements](#)).

Steinzor and Shapiro (2006) in their paper, “The People’s Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism”, write that “[t]he information covered by FOIA includes documents (broadly defined) generated by the government, or by private-sector actors, so long as they are in the possession (or custody) of the government” (Steinzor & Shapiro, 114).

So, ultimately, considerations of agency control and possession of records appear to be the deciding factor for courts in evaluating whether private contractor records that were created and are held by the contractors, are subject to FOIA requests. Thus, a contractor’s records submitted to and in possession of a government agency are subject to FOIA requests, provided that there are no claimed exemptions.

In the event that a contractor’s records are requested from a government agency that has control of them, there are still exemptions to disclosure that a contractor can claim (see Appendix for full list of exemptions). Exemption 4, for example, allows an exemption for “trade secrets,” such as customer lists and secret formulas. It also shields sensitive internal commercial information about a company which, if disclosed, would cause the company substantial competitive harm.” (RCFP, Federal Open Government Guide). The firm may also file a reverse-FOIA lawsuit if the agency decides to release the documents.

Notable court cases concerning an FOIA request for contractor records appear to be *Burka v. HHS* and *Chicago v Dept. of Health and Human Services*. The NFIC report summarizes,

Robert Burka requested a data tape pertaining to a survey on teen smoking conducted by a contractor. Finding that the tape was an agency record, the court noted that the agency had considerable supervision over the contract and exercised significant control over the contractor’s use of the data. The agency also relied on the data to set agency policy. In a subsequent case, *Chicago Tribune v. Dept. of Health and Human Services*, 1997 U.S. Dist. LEXIS 2308 (N.D. Ill.1997), the court relied on *Burka* in finding the National Cancer Institute had exercised such significant supervisory control over a contractor’s review of the findings of a faulty breast-cancer study that the records qualified as agency records even though they were not in the physical possession of the agency. However, in *Gilmore v. Dept. of Energy*, 4 F. Supp. 2d 912 (N.D. Cal. 1998), the court concluded that even though the Department of Energy exercised significant oversight over the operations of Sandia National Laboratory, it did not qualify as an agency for purposes of FOIA because the Energy Department did not exercise day-to-

day control over its operations. The *Burka* case remains good law, but there have been no further developments extending coverage to contractors based on the extent of agency supervision. (Hammitt, n.d.)

Conclusion

Looking at the evidence above, it is clear that FOIA is not constructed to allow access to contractor records that are in the contractor's possession. In a very few rare cases, a court has decided that certain records should be released because of an agency's significant supervision and control of contractor records, but the FOIA law cannot be reliably depended upon to offer the same level of transparency for private contractor work that it provides for government agency work.

Appendix

Freedom of Information Act

Following is the relevant language from [the statute](#):

- 1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and
- 2) 'record' and any other term used in this section in reference to information includes—
 - a) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and
 - b) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

Court Cases Relevant to FOIA and Contractors

Sources:

[2013 Department of Justice Guide to the Freedom of Information Act Procedural Requirements](#)

[2004 Department of Justice Guide to Procedural Requirements](#)

Contractors Covered by FOIA

- “Burka, 87 F.3d at 515 (finding data tapes created and possessed by contractor to be agency records because of extensive supervision exercised by agency, which evidenced "constructive control")” (Footnote 64, pg 11, [DOJ 2013 Procedural Requirements](#))
- “Chi. Tribune Co. v. HHS, No. 95-C-3917, 1997 WL 1137641, at *15-16 (N.D. Ill. Mar. 28, 1997) (finding that notes and audit analysis file created by independent contractor are agency records because they were created on behalf of (and at request of) agency and agency "effectively controls" them)” (Footnote 65, pg 12, [DOJ 2013 Procedural Requirements](#))
- “Hercules, Inc. v. Marsh, 839 F.2d 1027, 1029 (4th Cir. 1988) (holding that army ammunition plant telephone directory prepared by contractor at government expense, bearing "property of the U.S." legend, is agency record)” (Footnote 65, pg 12, [DOJ 2013 Procedural Requirements](#))
- “Los Alamos Study Group v. DOE, No. 97-1412, slip op. at 4 (D.N.M. July 22, 1998) (determining that records created by contractor are agency records because government contract "establishes [agency] intent to retain control over the records and to use or dispose of them as they see fit" and agency regulation "reinforces the conclusion that [agency] intends to exercise control over the material)” (Footnote 65, pg. 12, [DOJ 2013 Procedural Requirements](#))

Contractors Not Covered by FOIA

- “Gilmore v. DOE 4 F. Supp. 2d 912, 919-20 (N.D. Cal. 1998) (finding that privately owned laboratory that developed electronic conferencing software, for which government owned nonexclusive license regarding its use, is not "a government-controlled corporation" as it is not subject to day-to-day supervision by federal government, nor are its employees or management considered government employees)” (Footnote 46, pg. 7, [DOJ 2013 Procedural Requirements](#))
- “Missouri v. U.S. Dep't of Interior, 297 F.3d 745, 750 (8th Cir. 2002) (holding that "[t]he provision of federal resources, such as federal funding, is insufficient to transform a private organization into a federal agency")” (Footnote 46, pg. 7, [DOJ 2013 Procedural Requirements](#))
- “Pub. Citizen Health Research Group v. HEW, 668 F.2d 537, 543-44 (D.C. Cir. 1981) (stating that medical peer review committees are not agencies under FOIA)” (Footnote 46, pg. 7, [DOJ 2013 Procedural Requirements](#))
- “Irwin Mem'l Blood Bank v. Am. Nat'l Red Cross, 640 F.2d 1051, 1057 (9th Cir. 1981) (determining that American National Red Cross is not an agency under FOIA)” (Footnote 46, pg 7, [DOJ 2013 Procedural Requirements](#))
- “Leytman v. N.Y. Stock Exch., No. 95 CV 902, 1995 WL 761843, at *2 (E.D.N.Y. Dec. 6, 1995) (relying on Indep. Investor Protective League v. N.Y. Stock Exch., 367 F. Supp. 1376, 1377 (S.D.N.Y. 1973), to find that although "[t]he Exchange is subject to significant federal regulation...it is not an agency of the federal government")” (Footnote 46, pg 7, [DOJ 2013 Procedural Requirements](#))
- “Rogers v. U.S. Nat'l Reconnaissance Office, No. 94-B-2934, slip op. at 7 (N.D. Ala. Sept. 13, 1995) (observing that "[t]he degree of government involvement and control over [private organizations which contracted with government to construct office facility is] insufficient to establish companies as federal agencies for purposes of the FOIA”).” (Footnote 46, pg 7, [DOJ 2013 Procedural Requirements](#))
- “See Henderson v. Office & Prof'l Employees Int'l Union, 143 F. App'x 741, 744 (9th Cir. 2005) (finding that "district court properly dismissed [FOIA claim] because union and union representative are not 'agencies' and therefore cannot be held liable under the FOIA")” (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- “Rutland v. Santander Consumer USA, Inc., No. 11-15250, 2012 WL 3060949 (E.D. Mich. July 26, 2012) (finding private corporation not subject to FOIA) (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- Montgomery v. Sanders, No. 07-470, 2008 WL 5244758, at *6 (S.D. Ohio Dec. 15, 2008) (analyzing defense contractor's relationship with agency and finding that contractor is not "government-controlled corporation" subject to FOIA)” (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- Judicial Watch v. Fed. Hous. Fin. Agency, 646 F. 3d924, 928 (D.C. Cir. 2011) (“[W]here an agency has neither created nor referenced a document in the 'conduct of its official duties,' the agency has not exercised the degree of control required to subject the

document to disclosure under FOIA" (quoting Tax Analysts, 492 U.S. at 145)" (Footnote 64, pg 11, [DOJ 2013 Procedural Requirements](#))

- "Reich v. DOE, 784 F. Supp. 2d 15, 21-23 (D. Mass. 2011) (applying control factors to conclude that contractor's constraints placed on documents and lack of reliance and integration render report not agency record), aff'd on reh'g, 811 F. Supp. 2d 52 (D. Mass. 2011)" (Footnote 64, pg 11, [DOJ 2013 Procedural Requirements](#))
- "Amer. Small Bus. League v. SBA, 623 F. 3d 1052, 1053 (9th Cir. 2010) (reasoning that wireless provider's records were not agency records because no evidence supported that agency "extensively supervised or was otherwise entangled with [provider's] production and management of the records")" (Footnote 66, pg 13, [DOJ 2013 Procedural Requirements](#))
- "Ctr. for Medicare Advocacy v. HHS, No. 3:10cv645, 2011 WL 2119226, at *3 (D. Conn. May 26, 2011) (concluding that records maintained by sponsors of Medicare Advantage Plans under Medicare Part C are not agency records because they are not considered as such under agency regulations, nor are they created, obtained, or controlled by agency)" (Footnote 65, pg 13, [DOJ 2013 Procedural Requirements](#))
- "Tax Analysts v. DOJ, 913 F. Supp. 599, 607 (D.D.C. 1996) (finding that electronic legal research database contracted by agency is not an agency record because licensing provisions specifically precluded agency control), aff'd, 107 F.3d 923 (D.C. Cir. 1997) (unpublished table decision)" (Footnote 65, pg 13, [DOJ 2013 Procedural Requirements](#))
- "Rush Franklin Publ'g, Inc. v. NASA, No. 90-CV-2855, slip op. at 10 (E.D.N.Y. Apr. 13, 1993) (finding that computer tape maintained by contractor is not an agency record in absence of agency control)" (Footnote 65, pg 13, [DOJ 2013 Procedural Requirements](#))
- "Lewisburg Prison Project, Inc. v. Fed. Bureau of Prisons, No. 86-1339, slip op. at 4-5 (M.D. Pa. Dec. 16, 1986) (holding that training videotape provided by contractor is not an agency record)." (Footnote 21, [DOJ 2004 Procedural Requirements](#))
- "Folstad, 1999 U.S. Dist. LEXIS 17852, at *8 (finding that if agency "is no longer in possession of the documents, nothing in the FOIA requires the agency to obtain those documents from the private [banking] institution)" (Footnote 104, [DOJ 2004 Procedural Requirements](#))
- "ExxonMobil v. Dept. of Commerce, 828 F. Supp. 2d 97, 105-106 (D.D.C. 2011) (concluding that where agency served in "a limited, ministerial role" on behalf of Trustee Council, did not appropriate funds to private researchers, and studies were not conducted on agency's behalf, research data are not agency records)" (Footnote 67, pg 13, [DOJ 2013 Procedural Requirements](#))

Grantees/Non-Profits/Higher Education

- "In *Forsham v. Harris*, the Supreme Court held that private grantees receiving federal financial assistance are not agencies subject to the FOIA. The Court reasoned that private grantees are not subject to the FOIA because Congress "exclud[ed] them from the definition of 'agency,' an action consistent with its prevalent practice of preserving grantee autonomy."⁴⁷ The Court observed that private grantees are not converted to

government actors "absent extensive, detailed, and virtually day-to-day supervision." (pg 7-8, [DOJ 2013 Procedural Requirements](#))

- "See OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926 (Oct. 8, 1999) (codified at 2 C.F.R. § 215.36(d)(1)(2012)); see also *Am. Chemistry Council, Inc. v. HHS*, No. 12-1156, 2013 WL524447, at *5 (D.D.C. Feb. 13, 2013) (noting that Circular A-110's requirements impose "a dual responsibility upon agencies . . . [n]ot only must they produce their own responsive 'records,' but they must also request 'research data' from the grantees of the pertinent federally funded research study"); FOIA Update, Vol. XIX, No. 4, at 2 (discussing grantee records subject to FOIA under Circular A-110's definition of "research data")" (Footnote 68, pg 13, DOJ Procedural Requirements) (https://www.whitehouse.gov/omb/circulars_a110)
- "Id. at 180 (citing *United States v. Orleans*, 425 U.S. 807, 818 (1976)). But see OMB Circular A-110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 64 Fed. Reg. 54,926 (Oct. 8, 1999) (requiring agencies to make research data available to public through FOIA in response to "request for research data relating to published research findings produced under an award that were used by the [government] in developing an agency action that has the force and effect of law")" (Footnote 48, pg 8, [DOJ 2013 Procedural Requirements](#))

The following is from the [Freedom of Information Act Guide](#), May 2004:

Agencies also should be mindful of the "agency record" status of research data generated through federal grants. The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999,⁽³⁴⁾ which partly overruled the longstanding Supreme Court precedent of *Forsham v. Harris*,⁽³⁵⁾ made certain research data generated through federal grants subject to the FOIA.⁽³⁶⁾ In *Forsham*, the Supreme Court held that data generated and maintained by private research institutions receiving federal grants are not "agency records" subject to the FOIA, and that a grantor agency is not obligated to demand such data in order to respond to any FOIA request for them.⁽³⁷⁾ This statutory provision, however, required the Office of Management and Budget to revise its Circular A-110 (the regulatory publication by which OMB sets the rules governing grants from all federal agencies to institutions of higher education, hospitals, and nonprofit institutions) so that "all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act."⁽³⁸⁾ The final revised version of Circular A-110 requires agencies to respond to FOIA requests for certain grantee research findings by obtaining the requested data from the grantee and processing it for release to the requester.⁽³⁹⁾ (In accordance with OMB's statutory authority over such matters, questions concerning the processing of FOIA requests for grantee research data should be directed to OMB's Office of Information and Regulatory Affairs, Information Policy and Technology Branch, at (202) 395-7856.)

Not Clearly Applicable (But may be)

(Cited in relevant footnotes in the DOJ Procedural Requirements guide to FOIA)

- “See generally *Sangre de Cristo Animal Prot., Inc. v. DOE*, No. 96-1059, slip op. at 3-6 (D.N.M. Mar. 10, 1998) (holding that records that agency neither possessed nor controlled and that were created by entity under contract with agency, although not agency records, were accessible under agency regulation, 10 C.F.R. § 1004.3 (currently 2011), that specifically provided for public availability of contractor records).” (Footnote 65, pg 13, [DOJ 2013 Procedural Requirements](#))
- “*Missouri v. U.S. Dep't of Interior*, 297 F.3d 745, 750- 51 (8th Cir. 2002) (holding that records maintained in agency office by agency employee who was acting as full-time coordinator of nonprofit organization that had "cooperative" relationship with agency were not "agency records," because they were not integrated into agency files and were not used by agency in performance of its official functions)” (Footnote 64, pg 11, [DOJ 2013 Procedural Requirements](#))
- “*Wolfe v. HHS*, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) (holding that transition team records, although physically maintained within "four walls" of agency, were not agency records under FOIA)” (Footnote 64, pg 11, [DOJ 2013 Procedural Requirements](#))
- “*Henderson v. Sony Pictures Entm't, Inc.*, 135 F. App'x 934, 935 (9th Cir. 2005) (same); *Mitchell*, 2003 WL 22999456, at *1 (private attorney and law firms)” (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- “*In re Olsen*, No. UT-98-088, 1999 Bankr. LEXIS 791, at *11 (B.A.P. 10th Cir. June 24, 1999) (bankruptcy trustee)” (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- “*Buemi v. Lewis*, 51 F.3d 271 (6th Cir. 1995) (unpublished table decision) (concluding that FOIA applies to federal agencies and not to private individuals)” (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- “*Consumer Fed'n of Am. v. USDA*, 455 F.3d 283, 288 (D.C. Cir. 2006) (determining that agency employees' electronic calendars maintained on work computers were not agency records because they were not distributed to other employees so that they could perform their duties)” (Footnote 64, pg 11, [DOJ 2013 Procedural Requirements](#))
- “*Few v. Liberty Mut. Ins. Co.*, 498 F. Supp. 2d 441, 452 (D.N.H. 2007) (private corporations and individuals)” (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- “*Furlong v. Cochran*, No. 06-05443, 2006 WL 3254505, at *1 (W.D. Wash. Nov. 9, 2006) (lawyer and law firm)” (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- “*Torres v. Howell*, No. 03-2227, 2004 U.S. Dist. LEXIS, at *8 (D. Conn. Dec. 6, 2004) (private business and nonfederal attorney)” (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- “*Allnutt v. DOJ*, 99 F. Supp. 2d 673, 678 (D. Md. 2000) (private bankruptcy trustee), *aff'd per curiam sub nom. Allnut v. Handler*, 8 F. App'x 225 (4th Cir. 2001) appeal dismissed for lack of jurisdiction, No. 99-5410 (D.C. Cir. Feb. 2, 2000)” (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- “*Lazaridis v. DOJ*, 713 F. Supp. 2d 64, 67-69 (D.D.C. 2010) (holding that National Center for Missing and Exploited Children and the International Centre for Missing and

Exploited Children, both nonprofit organizations, were not subject to FOIA because their "seeming 'public authority' [are] 'entirely ancillary to its information and educational mission.'" (quoting *Dong v. Smithsonian Inst.*, 125 F.3d 877, 882 (D.C. Cir. 1997))." (Footnote 50, pg 9, [DOJ 2013 Procedural Requirements](#))

- "Simon v. Miami County Incarceration Facility, No. 05-191, 2006 WL 1663689, at *1 (S.D. Ohio May 5, 2006) (communications company)" (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- "Germosen v. Cox, No. 98 Civ. 1294, 1999 WL 1021559, at *20 (S.D.N.Y. Nov. 9, 1999) (private individuals)" (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- "Allnutt v. U.S. Trustee, Region Four, No. 97-02414, slip op. at 6 (D.D.C. July 31, 1999) (private bankruptcy trustee), appeal dismissed for lack of jurisdiction, No. 99-5410 (D.C. Cir. Feb. 2, 2000)" (Footnote 49, pg 8, [DOJ 2013 Procedural Requirements](#))
- "Judicial Watch, Inc. v. DOE, 412 F.3d 125, 127 (D.C. Cir. 2005) (holding that "records created or obtained by employees detailed from an agency to the NEPDG [an advisory group within Office of the Vice President] are not 'agency records' subject to disclosure under the FOIA")" (Footnote 64, pg 11, [DOJ 2013 Procedural Requirements](#))
- "Katz v. NARA, 68 F.3d 1438, 1442 (D.C. Cir. 1995) (holding that autopsy x-rays and photographs of President Kennedy, created and handled as personal property of Kennedy estate, are presidential papers, not records of any agency)" (Footnote 64, pg 11, [DOJ 2013 Procedural Requirements](#))
- "Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1400- 01 (7th Cir. 1984) (determining that agency "use" of internal report submitted in connection with licensing proceedings renders report an agency record)" (Footnote 64, pg 11, [DOJ 2013 Procedural Requirements](#))
- "Judicial Watch, Inc. v. U.S. Secret Service, 803 F. Supp. 2d 51, 56-60 (D.D.C. 2011) (analyzing four "control" factors to find that agency controls White House visitor access records despite agency's stated intent otherwise, as "intent" factor is "substantially outweighed" by other three factors)" (Footnote 64, pg 11, [DOJ 2013 Procedural Requirements](#))
- "Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (declaring that records created outside federal government which "agency in question obtained without legal authority" are not agency records), aff'd on other grounds, 825 F.2d 1148 (7th Cir. 1987)" (Footnote 64, pg 11, [DOJ 2013 Procedural Requirements](#))
- "In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 100-01 (D.D.C. 2008) (finding agency had control over chimpanzee clinical records located at contractor-operated facility where agency owned facility, chimpanzees, and chimpanzee clinical files, and contract provided for agency access to clinical records created and maintained on-site)" (Footnote 65, pg 12, [DOJ 2013 Procedural Requirements](#))
- "see also FOIA Post, "Treatment of Agency Records Maintained for an Agency by a Government Contractor for Purposes of Records Management" (posted 9/09/08) (advising that term "records" includes agency records maintained for agency by government contractor for purposes of records management, even if such records are not physically in possession of agency)" (Footnote 66, pg 13, [DOJ 2013 Procedural Requirements](#))

- “Conservation Law Found. v. Dep't of the Air Force, No. 85-4377, 1986 U.S. Dist. LEXIS 24515, at *10 (D. Mass. June 6, 1986) (computer program generated and held by federal contractor)” (Footnote 104, [DOJ 2004 Procedural Requirements](#))
- “cf. United States v. Napper, 887 F.2d 1528, 1530 (11th Cir. 1989) (concluding that FBI was entitled to return of documents loaned to city law enforcement officials, notwithstanding fact that copies of some documents had been disclosed) (non-FOIA case)” (Footnote 104, [DOJ 2004 Procedural Requirements](#))
- “Cal-Almond, Inc. v. USDA, No. 89-574, slip op. at 3-4 (E.D. Cal. Mar. 17, 1993) (ordering agency to reacquire records that mistakenly were returned to submitter upon closing of administrative appeal) ,appeal dismissed per stipulation, No. 93-16727 (9th Cir. Oct. 26, 1994)” (Footnote 104, [DOJ 2004 Procedural Requirements](#))
- “cf. Nw. Coalition for Alternatives to Pesticides v. EPA, 254 F. Supp. 2d 125, 131 (D.D.C. 2003) (noting that a private entity's "voluntary provision" of a requested record to plaintiff "does not relieve the [agency] of [its] obligation to respond to plaintiff's [FOIA] request" for an identical record maintained in the agency's files)” (Footnote 104, [DOJ 2004 Procedural Requirements](#))
- “Forman v. Chapotan, No. 88-1151, 1988 WL 524934, at *6 (W.D. Okla. Dec. 12, 1988) (rejecting contention that materials distributed to agency officials at privately sponsored seminar are agency records), aff'd, No. 89-6035 (10th Cir. Oct. 31, 1989)” (Footnote 77, pg 15, [DOJ 2013 Procedural Requirements](#))

The DOJ’s 2004 guide to procedural requirements, but removed from 2013’s guide, states:

“Agencies also cannot be required by FOIA requesters to seek the return of records over which they retain no "control"⁽¹⁰¹⁾ (even records that were wrongfully removed from their possession);⁽¹⁰²⁾ to recreate records properly disposed of;⁽¹⁰³⁾ or to seek the delivery of records held by private entities.⁽¹⁰⁴⁾” ([Department of Justice, 2004](#))

According to the non-profit research organization, In the Public Interest, states such as Connecticut and Minnesota require that contractors with large government contracts make their records accessible to the government agency overseeing the work and to the public through state freedom of information acts. This would only be applicable to state government contracts and not to federal government contracts taking place in the state.

“Connecticut has one of the few laws that require large government contracts (over \$2.5 million) to contain provisions that specify that the government agency has access to contractor records, and that these records must be disclosed to the public through the state freedom of information act. 30 This approach not only clarifies government and public access to contractor records, but also provides an extra layer of enforcement, by including open records requirements in the actual contract between the government and the contractor. Minnesota also requires contracts between the government and a private company to contain terms that makes public any government data that the

contractor “creates, collects, receives, stores, uses, maintains, or disseminates.” 31 Minnesota also requires provisions within the contract that require public access to privatized public records, protects the public’s right to this data, and ensures a complete government record. This approach makes expectations of transparency clear to the contractor before the contract even begins.” (pg. 16, “Floodlights Instead of Flashlights”)

According to FOIA.gov (<https://www.foia.gov/faq.html#exemptions>),

Not all records can be released under the FOIA. Congress established certain categories of information that are not required to be released in response to a FOIA request because release would be harmful to a government or private interest. These categories are called "exemptions" from disclosures. Still, even if an exemption applies, agencies may use their discretion to release information when there is no foreseeable harm in doing so and disclosure is not otherwise prohibited by law. There are nine categories of exempt information:

Exemption 1: Information that is classified to protect national security.

Exemption 2: Information related solely to the internal personnel rules and practices of an agency.

Exemption 3: Information that is prohibited from disclosure by another federal law.

Exemption 4: Trade secrets or commercial or financial information that is confidential or privileged.

Exemption 5: Privileged communications within or between agencies, including:

- 1) Deliberative Process Privilege
- 2) Attorney-Work Product Privilege
- 3) Attorney-Client Privilege

Exemption 6: Information that, if disclosed, would invade another individual's personal privacy.

Exemption 7: Information compiled for law enforcement purposes that:

- 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
- f) Could reasonably be expected to endanger the life or physical safety of any individual

Exemption 8: Information that concerns the supervision of financial institutions.

Exemption 9: Geological information on wells.

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