American Association of Port Authorities

Port Administration & Legal Issues Seminar

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Presented by Paul Marron, Esq., and Steven Rice, Esq.
Friday, April 15, 2011

Public Records Acts Makes Headlines

Texas Sees First Conviction For Violation Of Public Records Act

Sept. 8, 2003 -- A Texas superintendent was convicted Aug criminal violation of the state's Information Act after refusing to p school credit card records requested local newspaper. It was the first anyone convicted on a crim Texas' Public Rec rmally enforced thro ve processes.

School Distri Patton was convicte ry and sentenced b Murray Jordan to

Former foster children awarded record payout in public-records lawsuit

SEATTLE (Nov. 5, 2009) - Three girls abused for years by their foster father have just won a landmark payout from the state of Washington.

The Department of Social and Health Services (DSHS) has agreed to pay $525,000 to the girls for keeping public records from them.

This is the most money DSHS has ever paid in a public records lawsuit.

Vanette Webb Jailed For Violations Of Public Records Act

St. Petersburg Times, June 7, 1999

PENSACOLA -- Vanette Webb tried to put a positive spin on imprisonment. Closing her eyes, she could almo imagine the Escambia County Jail as noisy hotel with good locks and lou room service. She thought of the p where they strip-searched her, t her belongings, then rolled her fingers on a card as "checking When another woman arrived to her cell, Webb called the two of "roommates." Her "room snapped Webb back to reality. "

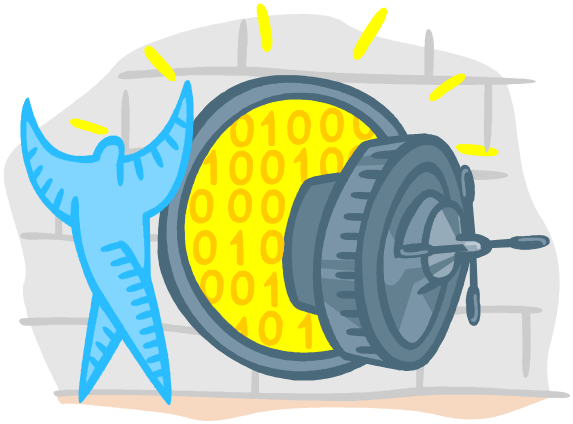
FEBRUARY 2008: The federal government will pay $105,000 in attorneys' fees to The Fort Myers News-Press following the newspaper's successful lawsuit against the Department of Homeland Security for the release of public records. The agency was sued after it refused to release information about the 1.1 million recipients of $1.2 billion in disaster aid after the 2004 Florida hurricane season.

Munroe Regional Health Systems Indicted For Records Act Violations

MARCH 2007 (Ocala): A hospital that was indicted on misdemeanor charges for violating Florida's open government laws during a CEO search has reached an agreement with the State Attorney's Office. The hospital, which leases publicly owned facilities, did not concede guilt but will pay $2,000 for investigative costs.

fellow Republican, suspended two weeks later and is searching for a successor

Topics



1. Electronically Stored Information

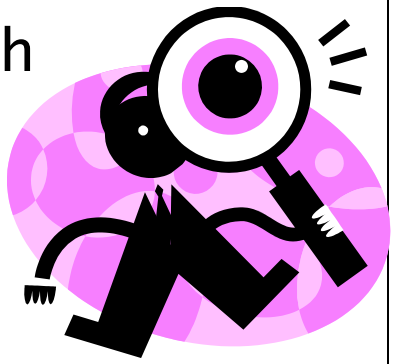
2. Public Records Act Requests

Electronically Stored Information & Electronic Discovery

What is Electronic Discovery?

Electronic Discovery ("e-discovery") is civil litigation discovery involving requests for information that is in electronic format, *i.e.,* Electronically Stored Information ("ESI"). This may involve *any* electronic data that might be relevant to a lawsuit, including emails, instant messaging chats, websites, documents accounting data bases, *etc.*

E-Discovery – The Problem With Metadata



E-discovery can also involve "metadata," which forensic investigators can review for *hidden evidence*.

A document might be produced in discovery in a printed form, in PDF format, or in its original format.

If a document is produced in its original format, other information about the document may be accessible. E.g., the date and time that it was drafted or revised, the *edits* made to the document, each person who worked on it, and other information *not shown on the face of the document*.

Discussion

I. The Duty to Preserve Data

II. Implementing a "Litigation Hold"

ESI – When To Preserve Data

- Generally, unless there is a *duty* to preserve evidence, "a court may not impose sanctions on a party for failing to provide electronically stored information **lost as a result of the routine, good-faith operation of an electronic system.**" Federal Rules of Civil Procedure, Rule 37 (f) (emphasis added).
- In other words, without a *duty* to preserve information, an organization can safely delete or recycle information – as long as this is done *pursuant to a document retention/destruction policy* that is *consistent*, and *implemented in good faith*.

ESI – The Key Questions

1. Has a DUTY arisen to preserve data?
2. If so, what is the scope of that duty?
3. What steps must be taken to fulfill that duty?
4. What are the consequences of failure to fulfill that duty?

PART I. THE DUTY TO PRESERVE DATA

ESI – The Duty To Preserve Data (continued)

The duty to preserve information includes an obligation to **identify, locate, and maintain information** that is **relevant** to **specific, predictable, and identifiable litigation**.

Litigation Hold: A "litigation hold" or "legal hold" program defines the process by which information is identified, preserved, and maintained. It is important that organizations have policies detailing the procedures for the implementation of a litigation hold.

The Duty To Preserve Data

The duty to preserve data or information is triggered when there is a reasonable anticipation of litigation. This occurs when the "organization is **on notice of a credible probability that it will become involved in litigation**, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." The Sedona Conference Journal, *The Sedona Conference Commentary on Legal Holds: The Trigger & the Process*, Vol. XI., 269 (2010).

ESI – The Duty To Preserve Data (continued)

Whether litigation can be reasonably anticipated is based on a **good faith and reasonable evaluation of the facts and circumstances** as they are known to the organization at the time. When an organization reasonably anticipates litigation, "it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC, et al.*, 685 F.Supp.2d 456, 466 (S.D.N.Y. 2010)

Having A Written Policy

It is important that your organization have a **written policy** covering *how* it will evaluate whether a duty to preserve information has arisen.

Such a policy will be an important factor in proving that your decisions were reached reasonably and in good faith, if the decision is later scrutinized by opposing counsel or a court.

It is also important for the person making these decisions to memorialize the steps taken to comply with the organization's policy, in case the organization needs to defend its determination in court.

Reporting Potential Litigation

Having established procedures for making reports regarding potential litigation to the decision maker(s) is another important factor in supporting your organization's determination of when/whether it has a duty to preserve ESI. These procedures will depend on the size and culture of your organization. These procedures may include:

1. Regular reporting via email,
2. Staff meetings, or
3. An internal website (for large organizations.)

Determining When A Duty Arises

Deciding whether litigation is "reasonably anticipated" based on a complaint or threat requires a case-by-case and fact intensive analysis by experienced counsel.

Some of the factors that must be considered include:

- The nature and specificity of the complaint or threat (direct, implied, or inferred);
- The party making the claim;
- The business relationship between the accused and accusing parties;
- (continued)

Determination *(continued …)*

- Whether the party making the claim is known to be aggressive or litigious;
- Whether a party who could assert a claim is aware of the claim;
- The strength, scope, or value of a known or reasonably anticipated claim;
- Whether the company has learned of similar claims;
- The experience of the industry; and
- Reputable press and/or industry coverage of the issue either directly pertaining to the client or of complaints brought against someone similarly situated in the industry.

The Sedona Conference Journal*, supra*, at 276.

PART II. IMPLEMENTING A LITIGATION HOLD

Once the duty to preserve information has arisen, the organization must decide what to preserve and how to accomplish that preservation.

Litigation Hold – Scope of Duty to Preserve

An organization that has reasonably anticipated litigation must retain *all relevant information* "in existence at the time the duty to preserve attaches, and any relevant documents created thereafter."

Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) ("*Zubulake IV*").

Litigation Hold – Scope of Duty to Preserve

Reasonable steps should be taken to *identify and preserve* relevant information as soon as is practicable.

An effective litigation hold can then be limited to:

- the *information* relevant to the anticipated litigation or investigation
- only those *individuals* who maintain the information subject to the hold.

Litigation Hold – Who's in charge?

The person implementing the litigation hold must be familiar with the organization's personnel structure and its document retention policies.

The process of identifying the sources of information and custodians of relevant information may consist of having a litigation hold "team" that includes legal counsel responsible for preservation efforts, working with key individuals within the organization: including the custodians of records, the record management and IT personnel.

Litigation Hold – Implementation

A litigation hold must be described **in writing** and distributed to **persons likely to have relevant information** (including records management and IT personnel), and be accompanied by an acknowledgment of receipt by the individuals subject to the hold notice.

An Effective Litigation Hold

A litigation hold is most effective when it:

1. Identifies the **persons** who are likely to have relevant information and communicates a preservation notice to those persons;
2. Communicates the preservation notice in a manner that ensures the recipients will receive actual, comprehensive and effective **notice of the requirement to preserve** information;
3. Is in **written** form;
4. Clearly identifies what **information** is to be preserved and how the preservation is to be undertaken;
5. Is periodically **reviewed** and, when necessary, reissued in either its original or an amended form.

Litigation Hold – Policy and Process

The litigation hold policy and the process of implementing the hold **should be documented** in each case. These facts should be included:

1. The date and by whom the hold was initiated, and why;
2. The initial scope of information, custodians, sources, and systems involved;
3. Subsequent changes of scope, as new custodians or data are identified or initial sources are eliminated;
4. Notices and reminders sent, confirmations of compliance received (if any) and the handling of exceptions.

Litigation Hold – Policy and Process continued …

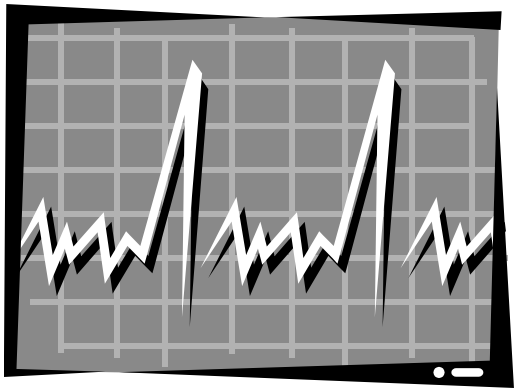
In some cases, it might also be appropriate to document:

- Description as to the collection protocol, persons contacted, and the date information was collected;
- Notes (at least as to procedural matters) from any interviews conducted with employees to determine additional sources of information; and
- Master list of custodians and systems involved in the preservation effort.

The Sedona Conference Journal, at 285.

Litigation Hold – Monitoring

The litigation hold should be **regularly monitored** to ensure that the organization is retaining, and if already in discovery, producing the information or documents.



Litigation Hold – Release of Information

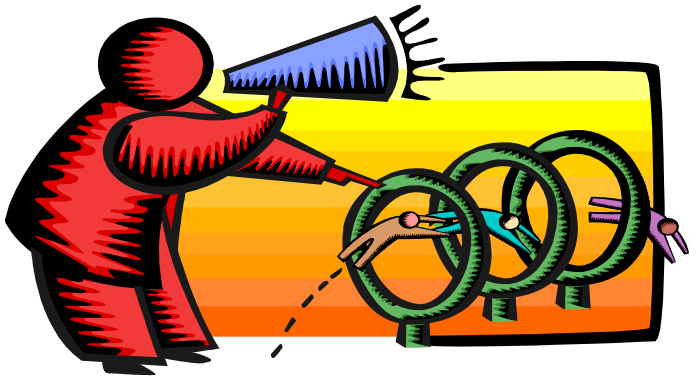
Every litigation hold policy should include procedures for releasing information from the hold, once the duty to preserve information is terminated. This usually involves sending notice of termination of the hold to the individuals who received the hold notice.

Release ≠ Destruction

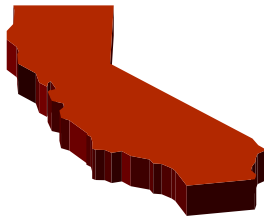
An organization's procedures for release of data must include a process by which the **data is reviewed before release** to ensure that it is not subject to other ongoing preservation obligations.

Public Records Act Requests:

Handling Requests For Access To Records Made Under "Public Records Acts"



California Public Records Act



What Is Covered?

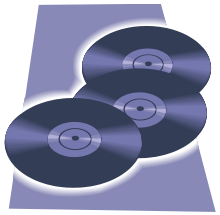
The Act begins with a declaration that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." The law requires that public records be available for "inspection at all times during the office hours of the ... agency." Further, any member of the public has a right to a copy of the record, unless it is "impracticable" to provide one. Gov. Code §6253.

The Act applies broadly to all agencies, state and local, as well as officers, bureaus, departments, any other group that is involved in legislating or regulating local agencies, and advisory boards. Gov. Code §6252.

California Public Records Act – "Public Record"

What is a "public record"?

According to the Act, a record is a "writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency." Gov. Code §6252(e).



The term "writing" is broadly defined to include "handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, **and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.**"

California Public Records Act continued …

What Is Not Covered?

1. Records protected from disclosure by other laws. *See* Gov. Code §§6253.9(g), 6254(k).
2. Preliminary drafts, notes, memos that are not normally retained in the ordinary course of business. Gov. Code §6254(a).
3. Most documents relating to ongoing or threatened litigation. Gov. Code § § 6254(b), 6254.25.
4. "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Gov. Code §6254(c).
5. Financial information that is submitted by others. Gov. Code §6254(h).

California Public Records Act continued …

6. Real estate appraisals and engineering or feasibility studies made for or by the agency regarding acquisition of property, or relating to public supply and construction contracts need not be produced, "until all of the property has been acquired or all of the contract agreement obtained." Gov. Code §6254(h).
7. Documents reviewed in closed session which relate to the assessment of terrorist threats or criminal acts. Gov. Code §6254(aa).
8. Information relating to the investigation of criminal acts, as well as other law enforcement activities. Gov. Code §6254(f).

California Public Records Act – Immediate Access

What Access Must Be Provided?

For standard requests, the public's access to the records must be immediate and available at all times during business hours. Gov. Code §6253(a).

If a copy is requested, it should be provided "promptly." Gov. Code §6253(b).

Where the request seeks records not normally made available on a routine basis, however, the agency has **10 days from the receipt of the request** to consider whether production should be made.

California Public Records Act – Duty to Assist

- The agency also has an obligation to assist the requesting party to:

  - identify the documents containing the information being sought,
  - describe the location and technology issues pertaining to the records, and
  - "provide suggestions for overcoming any practical basis for denying access to the records or information sought."

Gov. Code §6253.1(a).

California Public Records Act – Duty to Respond

- The agency must then "**promptly notify** the person making the request of the determination and the reasons therefor."
- If additional time needed:
  - The 10 day response period can be extended by an additional 14 days in "unusual circumstances," if the agency provides **written notice** to the requesting party setting forth the **reasons** why the extension is needed. Gov. Code §6253(c).
  - Reasons include: voluminous, in remote location, multiple divisions involved, need to create software to extract data. See Gov. Code §6253(c)(1)-(4).

California Public Records Act – ESI Production

- Electronic records must be produced in their usual format *or in any other format requested, as long as the requested format is one used by the agency for such records.* Gov. Code §6253.9(b). If the requestor does not request an electronic copy, then the agency MAY notify the requestor that the information is available in electronic format.
- However, this does not permit the agency to produce the information *only* in an electronic format. The requesting party can elect to obtain paper copies instead. Gov. Code §6253.9(d), (e).

California Public Records Act – Expense of Compliance

- ***What About The Expense?***

- No charges permitted for *access* to public records.
- However, charges can be imposed for *copies.* Copies are to be provided upon payment of fees covering "direct costs" of duplication, or a statutory fee if applicable. Gov. Code §6253(b). Charges must be reasonable.

  The direct cost of duplication is the cost of running the copy machine, and conceivably also the expense of the person operating it. "Direct cost" does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted.

  North County Parents v. Dept. of Educ. (1994) 23 Cal.App.4th 144, 146–8.

California Public Records Act – Expense of Compliance

- Extraordinary costs associated with unusual record requests can usually be shifted to the requesting party, but only as to the **actual costs** associated with providing the requested information. See, Gov. Code §6253.9(a), (b); *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301.

California Public Records Act – Penalties and Enforcement

- California provides for judicial review of an agency's refusal to provide access to a record. Gov. Code §6259(a).
- If the Superior Court orders disclosure of records an agency has withheld, it must award the plaintiff attorneys' fees and costs. Gov. Code §6259(d).

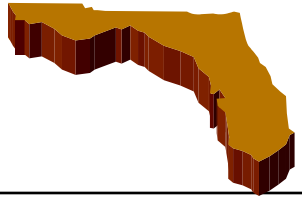
- Note: An *agency* can be awarded its fees and costs only if it shows that "the plaintiff's case is clearly frivolous." *Id*.

California Public Records Act – Penalties and Enforcement

- Agency has no right to appeal adverse finding in Superior Court. May only petition Appellate Court for writ of mandamus – Appellate Court can reject summarily.
- If agency prevails in court, requestor *does* have the right to appeal.

  Filarsky v. Superior Court (2002) 28 Cal.4th 419 [Supreme Court upholds this procedure as an appropriate expression of the State's preference for public access].

Florida Public Records Act



The Florida Public Records Act is found at Chapter 119 of the Florida Statutes.

Florida's stated policy is that "all state, county, and municipal records are open for personal **inspection and copying** by any person," and that "[p]roviding access to public records is a duty of each agency." Fla. Stats. §119.01(1).

Also, the trend toward electronic records should not adversely affect the public's right to access.

Florida Public Records Act – Defining "Public Record"

What is a "public record"? Any record:

- "... *made* or *received* pursuant to law or ordinance or in connection with the transaction of official business...." Fla. Stats. §119.011(12).
- "prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."
- "memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of the agency's later, formal public product." *Shevin v. Byron, Harless, et al.*, 379 So.2d 633 (Fla.1980); *Johnson v. Butterworth*, 713 So.2d 985 (Fla.1998).

Florida Public Records Act – "Personal" Communications

The definition of public record does not include records maintained by a public agency which consist of *personal* communications.

- Messages can be deemed "personal" if they are not made pursuant to a statute or to further government business. *Times Publishing Co. v. City of Clearwater*, 830 So.2d 844 (Fla.App. 2 Dist., 2002).
- "public records" does *not* include "drafts and notes, which constitute mere precursors of governmental 'records' … [not] intended as final evidence of the knowledge to be recorded." *Shevin*, *supra*, 379 So.2d at 640-641.

Florida Public Records Act – No "general" definition

- "It is impossible to lay down a definition of general application that identifies all items subject to disclosure under the act. Consequently, the classification of items which fall midway on the spectrum of clearly public records on the one end and clearly not public records on the other will have to be determined on a case-by-case basis."

  Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d at 640 (Fla.1980).

Florida Public Records Act – Exemptions

- Florida Statutes spell out lists of very specific exemptions. The lists which should be consulted if a request relates to the following:
- *Agency Administration Materials*
- *Agency Personnel Information*
- *Investigational Materials*
- *Security Information*

Fla. Stats. § 119.071

Florida Public Records Act – Exemptions

Agency Administration Materials

- E.g., pending sealed bids, financial statements of bidders, work product of agency attorneys as to ongoing litigation or administrative proceedings, video and audio relating to radio or television broadcasts, software licensed from a vendor

Agency Personnel Information

- E.g., Social Security Numbers of employees (or the public), medical information of employees, unless directly related to job performance, information regarding the children of employees, addresses, telephone numbers, photographs of agency managers, H/R personnel (but protection does NOT apply to personnel records in general).

Florida Public Records Act – Exemptions

Investigational Materials

- E.g., records of active investigations, investigation materials older than 1/25/1979, information from an outside agency (per confidentiality agreement), law enforcement requests for records, descriptions of surveillance techniques or personnel, information re confidential informants or sources, records revealing the substance of any confession, discrimination reports and complaints (until findings made), records relating to victims of child abuse and sex crimes.

Security Information

- E.g., records revealing security systems or "relating directly to the physical security of the facility," security or emergency response plans, evacuation plans, threat assessments, records discussing security training or security equipment.

Florida Public Records Act – Exemptions

Other Exemptions

- Bank account numbers and debit, charge, and credit card numbers obtained by the agency
- Information regarding individuals participating in a government sponsored recreation program
- Information regarding individuals participating, or seeking to participate, in a ride-sharing program, or paratransit
- Biometric information (fingerprints, palm prints, footprints, etc.)

Florida Public Records Act – Access

Access must be immediate to easily obtained records that are clearly "public records."

All other requests for access must be "promptly" acknowledged by the custodian, and must receive a "good faith" response. This includes making reasonable efforts to find out whether the records exist and determining where the records may be accessed.

Fla. Stats. §119.017(1)(c).

Florida Public Records Act – Response and Delay

- Delay in release of records must be limited to the "reasonable time" needed to retrieve records and delete portions which are exempt from disclosure. *Tribune Co. v. Cannella*, 458 So.2d 1075 (1984).
- Custodian must provide a clear, detailed statement of why any records are exempt, and the specific statutory exemption. *Weeks v. Golden*, 764 So.2d 633 (Fla.App. 1 Dist., 2000); Fla. Stats. §119.07(1)(e), (f).

Florida Public Records Act – Expense of Compliance

The requestor must be provided with ***access*** **to the records free of charge.** See, Fla. Op. Att'y Gen. 84-03

- Fees may be charged for remote access, including direct and indirect costs of providing such access. Fla. Stats. § 119.07(1)(i).

Copies:

- Copies of normal paper records must generally be provided, and the requestor will be charged 15¢ per page (20¢ if two-sided). Some agencies have special provisions allowing them to charge up to $1 per page. $1 per page is standard for all "certified" copies.

Florida Public Records Act – Expense of Compliance

Copying (other than normal paper copies)

- Agency may charge "actual cost of duplication." This includes only "the cost of the material and supplies used to duplicate the public record, but does *not* include labor cost or overhead cost associated with such duplication." Fla. Stats. §119.001(1).
- Where request requires "extensive use of information technology resources or extensive clerical or supervisory assistance" by agency, then a "special service charge" including labor costs, is allowed. Fla. Stats. § 119.07 (4)(a)(3)(d).

Florida Public Records Act – Criminal Penalties

Agency Personnel Face Criminal Penalties

- Pursuant to Fla. Stats. §119.10(1)(a), any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed **$500**.
- Under §119.10(1)(b), a public officer who *knowingly* violates the Public Records Act, commits a first-degree misdemeanor, and is subject to suspension and removal from office or impeachment.
- Any person who *willfully* and *knowingly* violates any provision of the chapter is guilty of a first-degree misdemeanor, punishable by potential **imprisonment** not exceeding one year and a fine not exceeding **$1,000**.

The Freedom of Information Act

How?

- **Any person** may require an agency to disclose **any reasonably described agency records.**
- A requestor's need for the records and his purpose in making the request normally do not affect the right to obtain disclosure.
- The agency **must** release the records unless they fall within one of the nine exemptions specified in the Act.

Freedom of Information Act continued …

NOTE: FOIA permits access not only to documents and information *generated by* the government, but also to **information *provided to* the government by others** including the ports. This includes information provided to:

- Federal Maritime Commission
- Department of Transportation
  - Division on Maritime Commerce
  - Maritime Administration (MARAD)
- United State Coast Guard
- Dept. of Homeland Security

Freedom of Information Act continued …

Timing

Federal agencies are required to respond to a FOIA request within **twenty (20) working days** (excluding weekends and legal holidays), which generally begins when the request is actually received by the agency. In "unusual circumstances," the response time can be extended for an additional ten (10) working days.

5 U.S.C. §§ 552(a)(6)(A)(i) & (ii).

Freedom of Information Act continued …

What Is Not Covered?

1. Records that are classified national defense or foreign policy materials;
2. Related solely to the internal personnel rules and practices of an agency;
3. Information specifically exempted from disclosure by another statute;
4. Trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(continued) 5 U.S.C. § 552(b)(1)–(4)

Freedom of Information Act continued …

5. Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
6. Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
7. Records compiled for law enforcement purposes;
8. Records relating to the examination, operations, or condition of financial institutions;
9. Oil well data.

5 U.S.C. § 552(b)(5)-(9)

Final Thoughts

The general principles of the law favor *disclosure*, rather than secrecy. Therefore, whenever an agency takes a final position that records will not be produced, the agency must be prepared to bear the burden of justifying that decision in court.

If faced with a burdensome request:

- Try to work out a solution with the requestor;
- Keep the requestor promptly informed of the status, in writing, explaining any delays;
- Suggest an alternative to provide the requestor with the information he needs in an easier to access format.
- Be sure to advise of the additional costs – requestor may reconsider.