Referrals, Consultations, and Exemption (b)(5) Deliberative Process

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Outline

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Regulatory Structure

MISDIRECTED WITHIN THE DEPARTMENT:

Where a component's FOIA office determines that a request was misdirected within the Department:

- The receiving component's FOIA office needs to route the request to the correct bureau(s).
- The search starts the time cutoff for records

Regulatory Structure (Cont'd)

OTHER BUREAUS MAY HAVE RECORDS:

How the proper Department component to respond to a FOIA Request is determined:

- The component that first receives the request and has responsive records.
  - When no records exist, the component that first receives the request and is likely to have responsive records should process the FOIA request.
- Or, the component to which the Departmental FOIA Officer or component FOIA Officer assigns lead responsibility for responding to the request.

Regulatory Structure (Cont'd)

CONSULTATIONS:

When a record is requested that originated with NOAA and another Federal agency has a *significant interest* in the record, NOAA must allow the other Federal agency to review the record before responding to a requester.

Consultations Continued...

Consultations can be done within FOIAonline by uploading the record requiring consultation and then selecting the **"Create Consultation"** button found in the left hand column in FO (if the agency also uses FO)

- If attempts to consult with outside agencies cause a delay in responding to the request, notify the requester that the request will be processed or completed after the consultation has been completed.
- Consultation with another agency constitutes ***unusual circumstances*** and allows you to invoke a 10 day extension.

Regulatory Structure (Cont'd)

REFERRALS:

When NOAA possesses requested records that originated with another Federal agency.

NOAA routes these records to that agency for direct response to the requester.

OIP Referral Guidance

OIP's Summary:

"The agency that is best able to determine a record's sensitivity, and in turn its exemption status, is the agency that should process that record under the Act.

While this may vary in particular cases, as a general rule the agency that originated a record is usually the most appropriate agency to make a FOIA-disclosure determination regarding it."

The Risks of Other Agency Docs

There are at least **7** different types of referrals and consultations:

1. External Referrals for direct response to the requester including Exemptions asserted by the referring agency to include their appeal language.

Example: ACOE referrals where we respond to requester with their appeal contact.

The Risks of Other Agency Docs

2. External Referrals of the request in its entirety with no asserted Exemptions or responsive records being located by the referring agency.

Example: Recent DOI Refers us records that fall entirely under our purview.

The Risks of Other Agency Docs (Cont'd)

3. Records in which all or part of the record requires a declassification review by the original classifying authority.

Example: Navy necropsy records OCA is the Director of the office that generated those docs.

The Risks of Other Agency Docs (Cont'd)

4. External Consultations for providing withholding recommendations to another agency

Example: Fisheries Management Council Records found within our Control

The Risks of Other Agency Docs (Cont'd)

5. Intra-Departmental taskings requiring a tasking Memorandum

Example: DOC sends us a tasking to conduct a search in Presidential Transition cases through FOIAOnline, and we, in turn, issue taskings within Bureau.

The Risks of Other Agency Docs (Cont'd)

6. External Litigation consultations seeking NOAA's asserted exemptions

Example: FBI recently asked NOAA in the DB Cooper case to provide withholding recommendations on the weather docs from the plane flight.

The Risks of Other Agency Docs (Cont'd)

7. Referrals asking for non-attribution

Example: If we ever have intelligence agency records, they frequently don't want to be identified as the originator of the records.

NAO 205-14: NOAA FOIA Taskings

There are at least 6 types of taskings—it must be clear which type you are being asked to review:

1. Conduct a search for responsive records (fees waived or non-billable)
2. Prepare a fee estimate in a non-referral
3. Prepare a fee estimate for a case being coordinated by DOC, and the aggregate threshold is not determined by NOAA
4. Review referred records and provide release recommendations to the referring entity
5. Review referred records, and respond directly to the requester, incorporating the referring entities exemptions and appeal language.
6. Respond to an adjudication on appeal

OIP GUIDANCE

If they are Agency Records:

When an agency receives a FOIA request for agency records in its possession it must take responsibility for searching for the records and processing the request. It cannot simply refuse to act on the ground that the documents originated elsewhere.

OIP Guidance (Cont'd)

"When litigation (results), the government generally has not raised any issue over which agency is the "proper party defendant," but instead has provided affidavits from the originating agencies to justify any contested nondisclosure."

Plain English: DOJ won't challenge who the Plaintiff names in Court. If you worked on the request, you can be the one sued, and other agencies will just provide affidavits for the records they created.

(b)(5) Two Prong Test

When (b)(5) Deliberative Process Applies:

- (b)(5) Statute generally protects: "Inter and intra-agency" (internal and external) communications that would not be available by law to a party other than an agency in litigation with the agency".
- Courts define this as only documents that are typically privileged in civil discovery

(b)(5) Two Prong Test (cont'd)

- As to one of those privileges, Deliberative Process Privilege includes:
  - The Inter-agency (internal) and Intra-agency (external) communication requirement which encompasses the "consultant corollary".
  - If the consultants, contractors, external advisors provided advice similar to what might have been received from an employee. Must ask—
    - Are they an interested party?
    - Seeking benefit at the expense of other applicants?
    - If yes, no (b)(5) protection.

(b)(5) Two Prong Test (cont'd)

Two Part Test:

1) Is the material pre-decisional?
   a) i.e., antecedent to the adoption of the agency policy? (the making of the "policy sausage")
2) Is it deliberative (not factual)—making recommendations, expressing opinions on legal or policy matters?

The Extent of the Privilege

- **Policy behind DPP**:
  - Encourage open and frank discussions among employees and protect the decision making processes of the government
  - Protect against premature disclosure of proposed policies before adopted
  - Protect against public confusion

The Extent of the Privilege

- Since the 2016 FOIA Improvement Act, a **Risk of Harm** must exist for the Privilege to apply.
- Previously, this was only advisory, although in practice, this should not change NOAA's approach, as NOAA routinely required a Risk of Harm Analysis for (b)(5) Deliberative Process.

Risk of Harm

Foreseeable Harm is now a requirement under the 2016 FOIA Improvement Act:

To Reach Foreseeable Harm, OIP summarizes the considerations:

- How sensitive is the decision?
- How sensitive is the decision-making process? (consider peer review)
- Is the decision final yet?
- Would disclosure affect the employees that contributed to the records?
- Would future decisions be jeopardized if the records were released?
- How significant would the "chilling" effect be?
- How old is the record?
- How sensitive are portions of the record?

The Extent of the Privilege

- There is also now a 25 year limit on the use of Deliberative Process.
- After that time—the privilege no longer applies.

Questions

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