



# Ethics and Open Government in a Virtual World

Ethics Week 2020  
Board of Ethics and  
Government  
Accountability





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ONE OF THE TOP CONCERNS WE HEAR  
FROM THE PUBLIC IS . . . .







# COMMUNICATION





# COOPERATION



## COOPERATION

- IN 2016 DECISION THE COURT STATED: "FOIA REQUESTER AND THE DISTRICT ENTITY RECEIVING A REQUEST ARE NOT—OR SHOULD NOT BE—IN AN INHERENTLY ADVERSARIAL RELATIONSHIP. LITIGATION IS AUTHORIZED AS AN ENFORCEMENT MECHANISM, BUT IT IS NOT MEANT TO BE THE INEVITABLE PATH."



## COOPERATION

- “EACH CASE HAS PRESENTED ITS OWN DISCRETE ISSUES, BUT THE CONSTANT IS AN APPARENT INABILITY OR UNWILLINGNESS BY BOTH PARTIES TO COMMUNICATE EFFECTIVELY TO ACHIEVE THE OBJECTIVES ANIMATING FOIA. BOTH PARTIES SEEM TO HAVE FORGOTTEN WHAT FOIA IS ALL ABOUT.” *FOP V. DISTRICT OF COLUMBIA*, 139 A.3D 853 (2016).



# AVAILABLE WITHOUT A FOIA REQUEST

RECORDS THAT MUST BE AVAILABLE TO THE PUBLIC WITHOUT THE NEED OF A FOIA REQUEST INCLUDE:

- EMPLOYEE'S SALARY, TITLE AND EMPLOYMENT DATES;
- CONTRACTS EXPENDITURES;
- BUDGETS;
- MANUALS;
- POLICIES;
- RULES;
- OPINIONS;
- ORDERS; AND
- MEETING MINUTES OF OPEN PROCEEDINGS OF PUBLIC BODIES.

SEE (D.C. OFFICIAL CODE § 2-536)



# WHAT ARE FINAL OPINIONS AND ORDERS IN THE ADJUDICATION OF MATTERS (D.C. OFFICIAL CODE § 2-536(a)(3))?

WHEN THE ACTION TAKEN BY A RESPONSIBLE ENTITY IN AN AGENCY'S DECISION-MAKING PROCESS EFFECTIVELY DISPOSES OF A MATTER BEFORE THE AGENCY; (2) WHEN SUCH ACTION IS ACCOMPANIED BY A WRITTEN EXPLANATION OF THE DECISION MAKER'S REASONING; AND (3) WHEN THE DECISION IS MORE THAN ADVISORY (POST- DECISIONAL).

THE U.S. SUPREME COURT IN *NLRB v. SEARS, ROEBUCK & Co.*, 421 U.S. 132, 158, 159 (1965), DECIDED THAT THE ADJUDICATION OF A MATTER DOES NOT REQUIRE LITIGATION FOR AN AGENCY TO ISSUE A FINAL OPINION SUBJECT TO PROACTIVE DISCLOSURE OF FEDERAL FOIA. COURTS HAVE FOUND AN ADJUDICATION BY AN AGENCY TO HAVE ALSO OCCURRED: (1) WHERE THERE WAS A WRITTEN DECISION DENYING INMATES APPLICATIONS FOR PAROLE THAT CONTAIN CONCISE, GENERAL REASONS FOR THE DENIAL (*NATIONAL PRISON PROJECT OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION INC. v. SIGLER*, 390 F. SUPP. (1975)); AND WHEN AN AGENCY ISSUES AN ENGINEER'S REPORT ON THE VALUATION OF TIMBER (*WILLAMETTE INDUSTRIES, INC. v. UNITED STATES*, 530 F. SUPP. 904(1981)).



# ARE ALL PRIVATE CONTRACTORS SUBJECT TO D.C. OFFICIAL CODE § 2-532 (a)(3)?

- APPLIES ONLY TO CONTRACTORS THAT PROVIDE GOODS OR SERVICES THAT WERE PREVIOUSLY PROVIDED BY THE GOVERNMENT BUT HAVE BEEN CONTRACTED OUT TO PRIVATE ENTITIES. THE COMMUNITY PARTNERSHIP FOR THE PREVENTION OF HOMELESSNESS IS THE TYPE OF CONTRACTOR THAT D.C. OFFICIAL CODE § 2-532 (a)(3) IS INTENDED TO COVER.



# 1<sup>ST</sup> PARTY FOIA REQUESTS AND REQUESTER IDENTIFICATION

ABSENT STATUTORY OR REGULATORY AUTHORITY AN AGENCY'S FOIA IDENTITY-VERIFICATION REQUIREMENT DOES NOT HAVE THE FORCE OF LAW. D.C. FOIA DOES NOT SUPPORT A REQUIREMENT: (1) THAT THE REQUESTER PRESENT VALID IDENTIFICATION TO SUBMIT A FIRST-PARTY REQUEST; AND (2) TO OBTAIN THE RECORD.

GENERALLY, THE IDENTITY OF A FOIA REQUESTER IS IRRELEVANT, AND D.C. FOIA LAW DOES NOT REQUIRE A REQUESTER TO PROVIDE IDENTIFICATION OR TO PROVE HIS OR HER IDENTITY. "EXCEPT FOR CASES IN WHICH THE OBJECTION TO DISCLOSURE IS BASED ON A CLAIM OF PRIVILEGE AND THE PERSON REQUESTING DISCLOSURE IS THE PARTY PROTECTED BY THE PRIVILEGE, THE IDENTITY OF THE REQUESTING PARTY HAS NO BEARING ON THE MERITS OF HIS OR HER FOIA REQUEST." UNITED STATES DEP'T OF JUSTICE V. REPORTERS COMM. FOR FREEDOM OF THE PRESS, 489 U.S. 749, 771, 103 L. ED. 2D 774, 109 S. CT. 1468 (1989).



# 1ST PARTY FOIA REQUESTS AND REQUESTER IDENTIFICATION

- ADDITIONAL LEGAL AUTHORITY TO SUPPORT THIS POSITION IS FOUND IN THE D.C. FOIA STATUTE, D.C. FOIA REGULATIONS AND A MAYOR'S FOIA APPEAL DECISION. D.C. OFFICIAL CODE § 2-532(A) STATES, "[A]NY PERSON HAS A RIGHT TO INSPECT, AND AT HIS OR HER DISCRETION, TO COPY ANY PUBLIC RECORD OF A PUBLIC BODY, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED BY § 2-534." THE REGULATIONS IMPLEMENTING D.C. FOIA, AT 1 DCMR § 402.3, DO NOT REQUIRE THAT THE REQUESTER IDENTIFY HIM OR HERSELF. IN RELEVANT PART THIS PROVISION STATES, "[A] REQUEST SHALL INCLUDE A DAYTIME TELEPHONE NUMBER, E-MAIL ADDRESS OR MAILING ADDRESS FOR THE REQUESTER." FURTHER, THE MAYOR'S OFFICE OF LEGAL COUNSEL'S FOUND IN FOIA APPEAL 2017-90R 8 THAT AN ANONYMOUS PERSON IS ENTITLED TO SUBMIT A FOIA REQUEST UNDER D.C. LAW AND THEIR IDENTITY IS GENERALLY IMMATERIAL.



# REASONABLE DESCRIPTION TO CONDUCT EMAIL SEARCH

- THE D.C. COURT OF APPEALS IN *FOP v. DISTRICT OF COLUMBIA*, 139 A.3d 85, HELD THAT A REQUEST FOR EMAILS FROM A DISCRETE TIME PERIOD THAT ARE SENT TO OR BY PARTICULAR INDIVIDUALS, OR THAT ARE ABOUT A PARTICULAR ENTITY CONSTITUTES A REASONABLE DESCRIPTION OF THE PUBLIC RECORDS IN COMPLIANCE WITH FOIA. THE COURT ALSO HELD THAT A REQUEST WHICH MEETS THESE CRITERIA DOES NOT REQUIRE FURTHER CLARIFICATION BY THE REQUESTOR TO THE AGENCY.



# FOIA RESPONSE SENT IN ENCRYPTED EMAIL

- AN AGENCY MAY NOT RESTRICT THE METHOD A REQUESTER USES TO SUBMIT A FOIA REQUEST TO THE FOIA PORTAL;
- FOIA DOES NOT REQUIRE THE DELIVERY OF RESPONSIVE RECORDS TO THE REQUESTER IN AN ENCRYPTED EMAIL, WHICH THE
- STATUTE AND COURTS HOLD IS A VIOLATION OF FOIA. FIRST, THERE IS NO STATUTORY AUTHORITY UNDER DISTRICT FOIA OR THE FOIA REGULATIONS FOR AN AGENCY TO USE AN ENCRYPTED EMAIL TO PROVIDE RECORDS TO A REQUESTER. WHEN THIS IS DONE THE AGENCY ACTION IS ULTRA VIRES. SECONDLY, SINCE THE RECORD IS NO LONGER AVAILABLE TO BE ACCESSED BY THE REQUESTER AFTER A STATED PERIOD, THE AGENCY IS “LIMITING THE AVAILABILITY OF RECORDS TO THE PUBLIC” IN VIOLATION OF D.C. OFFICIAL CODE § 2-534(c).



# FOIA RESPONSE SE SENT IN ENCRYPTED EMAIL

- AN AGENCY DOES NOT COMPLY WITH THE FOIA WHEN IT PRODUCES RECORDS SUBJECT TO RESTRICTIONS ON HOW THOSE RECORDS MAY BE USED (YONEMOTO V. VA., 686 F.3D 681, 690).
- ONCE RECORDS ARE RELEASED TO THE PUBLIC IN RESPONSE TO A FOIA REQUEST, “[T]HE INFORMATION BELONGS TO CITIZENS TO DO WITH AS THEY CHOOSE.” NAT’L ARCHIVES & RECORDS ADMINISTRATION V. FAVISH, 541 U.S. 157, 172 (2003). WHERE THE RECORD EXPIRES OR VANISHES WITHIN A TIME-FRAME THE RESULTING RESTRICTION PREVENTS THE REQUESTER FROM ACCESSING OR DISSEMINATING IN THE FUTURE.

# PUBLIC DOMAIN DOCTRINE

COURTS ORDER THE RELEASE OF THE RECORD  
BECAUSE:

- (1) A PERMANENT AND COMPLETE COPY OF THE RECORD HAS BEEN RELEASED IN THE PUBLIC DOMAIN;
- (2) THE PARTY ASSERTING A CLAIM OF PRIOR IDENTIFIES THE SPECIFIC INFORMATION IN THE PUBLIC DOMAIN THAT APPEARS TO DUPLICATE THAT BEING WITHHELD; AND
- (3) THE GOVERNMENT'S FAILURE TO DEMONSTRATE THAT THE SPECIFIC RECORDS IDENTIFIED HAVE SINCE BEEN REMOVED FROM THE PUBLIC DOMAIN.



# PUBLIC DOMAIN DOCTRINE

- *NIAGARA MOHAWK POWER CORP. V. UNITED STATES DOE*, 169 F.3d 16, 19; 335 U.S. App D.C. 100, EXPLAINS THE LOGIC AND NECESSITY OF REQUIRING THE GOVERNMENT TO RELEASE A RECORD PURSUANT TO A FOIA REQUEST THAT IS IN THE PUBLIC DOMAIN.



# PUBLIC DOMAIN DOCTRINE

- “NIAGARA’S POSITION IS HERE IS A LITTLE ODD: IF THE INFORMATION IS PUBLICLY AVAILABLE, ONE WONDERS WHY IS IT BURNING UP COUNSEL FEES TO OBTAIN IT UNDER FOIA?”



# PUBLIC DOMAIN DOCTRINE

- “BUT THE LOGIC OF FOIA COMPELS THE RESULT: IF IDENTICAL INFORMATION IS TRULY PUBLIC, THEN ENFORCEMENT OF AN EXEMPTION CANNOT FULFILL ITS PURPOSES.”



# EXEMPTION 1

- TRADE SECRETS AND COMMERCIAL OR FINANCIAL INFORMATION OBTAINED FROM OUTSIDE THE GOVERNMENT, TO THE EXTENT THAT DISCLOSURE WOULD RESULT IN SUBSTANTIAL HARM TO THE COMPETITIVE POSITION OF THE PERSON FROM WHOM THE INFORMATION WAS OBTAINED.



# FOOD MKTG. INST. V. ARGUS LEADER MEDIA, 139 S. CT. 2356 (2019).

- WHERE COMMERCIAL OR FINANCIAL INFORMATION IS BOTH CUSTOMARILY AND ACTUALLY TREATED AS PRIVATE BY ITS OWNER AND PROVIDED TO THE GOVERNMENT UNDER AN ASSURANCE OF PRIVACY, THE INFORMATION IS “CONFIDENTIAL” WITHIN THE MEANING OF FOIA'S EXEMPTION 4. THE SUBSTANTIAL COMPETITIVE HARM TEST IS NO LONGER THE STANDARD TO BE APPLIED.
- BESSON V. UNITED STATES DOC, 2020 U.S. Dist. LEXIS 139568.



# PERSONAL PRIVACY EXEMPTION 2

EX PARTE IN RE M.M.B., 2019 D.C. SUPER. LEXIS 16

- UNDER FOIA, THE PRIVACY INTEREST IN NONDISCLOSURE OF IDENTIFYING INFORMATION MAY BE DIMINISHED WHERE THE INDIVIDUAL IS DECEASED. BUT IT DOES NOT DISAPPEAR; INSTEAD, COURTS UNDERTAKING A BALANCING TEST MUST CONSIDER THE EFFECT OF THE DEATH OF THE PERSON IN QUESTION ALONG WITH ALL THE OTHER CIRCUMSTANCES SURROUNDING THE DISCLOSURE REQUEST. IN PARTICULAR, INDIVIDUALS WHO ARE DECEASED BY DEFINITION CANNOT SUFFER THE PERSONAL INJURIES, SUCH AS EMBARRASSMENT, THAT MAY COME WITH DISCLOSURE. BUT CERTAIN REPUTATIONAL INTERESTS AND FAMILY-RELATED PRIVACY EXPECTATIONS SURVIVE DEATH. FOR EXAMPLE, AN INDIVIDUAL MAY BE CONCERNED ABOUT DISCLOSURE FOLLOWING DEATH FOR REASONS OF REPUTATION, CIVIL LIABILITY, OR POSSIBLE HARM TO FRIENDS AND FAMILY.



# DELIBERATIVE PROCESS PRIVILEGE

- A DOCUMENT IS PREDECISIONAL IF IT WAS PREPARED IN ORDER TO ASSIST AN AGENCY DECISION MAKER IN ARRIVING AT HIS DECISION RATHER THAN TO SUPPORT A DECISION ALREADY MADE, AND MATERIAL IS DELIBERATIVE IF IT REFLECTS THE GIVE-AND-TAKE OF THE CONSULTATIVE PROCESS. THE GOVERNMENT BEARS THE BURDEN OF DEMONSTRATING THAT DOCUMENTS QUALIFY FOR AN EXEMPTION FROM DISCLOSURE.
- KANE V. DC, 180 A.3D 1073 ; 2018 D.C. APP



# ADEQUACY OF SEARCH

- AN AGENCY FULFILLS ITS OBLIGATIONS UNDER FOIA IF IT CAN DEMONSTRATE BEYOND MATERIAL DOUBT THAT ITS SEARCH WAS REASONABLY CALCULATED TO UNCOVER ALL RELEVANT DOCUMENTS. THE ISSUE TO BE RESOLVED IS NOT WHETHER THERE MIGHT EXIST ANY OTHER DOCUMENTS POSSIBLY RESPONSIVE TO THE REQUEST, BUT RATHER WHETHER THE SEARCH FOR THOSE DOCUMENTS WAS ADEQUATE. THE ADEQUACY OF AN AGENCY'S SEARCH FOR DOCUMENTS REQUESTED UNDER FOIA IS JUDGED BY A STANDARD OF REASONABLENESS AND DEPENDS, NOT SURPRISINGLY, UPON THE FACTS OF EACH CASE. TO MEET ITS BURDEN, THE AGENCY MAY SUBMIT AFFIDAVITS OR DECLARATIONS THAT EXPLAIN THE SCOPE AND METHOD OF ITS SEARCH IN REASONABLE DETAIL. THE AFFIDAVITS OR DECLARATIONS SHOULD SET FORTH THE SEARCH TERMS AND THE TYPE OF SEARCH PERFORMED, AND AVER THAT ALL FILES LIKELY TO CONTAIN RESPONSIVE MATERIALS (IF SUCH RECORDS EXIST) WERE SEARCHED. ABSENT CONTRARY EVIDENCE, SUCH AFFIDAVITS OR DECLARATIONS ARE SUFFICIENT TO SHOW THAT AN AGENCY COMPLIED WITH FOIA. IF, HOWEVER, THE RECORD LEAVES SUBSTANTIAL DOUBT AS TO THE SUFFICIENCY OF THE SEARCH, SUMMARY JUDGMENT FOR THE AGENCY IS NOT PROPER.
- BLIXSETH V. US IMMIGRATION & CUSTOMS ENFORCEMENT, 2020 U.S. DIST. LEXIS 5906 (CITING VARIOUS AUTHORITIES).



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**THANK YOU!**