FOIA Court Case Update – January 29, 2026

Presented by Michael Heise and Richard Huff

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FOIA Court Case Update Presentation Materials

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2. Case Listing – Presented by Richard Huff

3. Case Listing – Presented by Michael Heise

4. Power Point Presentation Slides (PDF) – Created by Richard Huff *(Permission to use for educational purposes)*

5. Presenter Bios

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PROCEDURAL ISSUES

Agency Status

CREW v. U.S. DOGE SERV., **No. 25-0511, 2025 WL 752367 (D.D.C. Mar. 10, 2025)** – ruling in the context of a preliminary injunction that DOGE is likely a federal agency even though it was established within the Executive Office of the President, finding that its sole function is not exclusively "to advise and assist the President," but "the relevant executive orders appear to endow USDS with substantial authority independent of the President," "Musk and the President's public statements indicate that USDS is in fact exercising substantial independent authority," and "USDS's actions to date demonstrate its substantial authority over vast swathes of the federal government"; ordering DOGE to process CRES's requests on an expedited basis; *motion for reconsideration denied,* **No. 25-0511, 2025 WL 863947 (D.D.C. Mar. 19, 2025)**; *granting expedited limited discovery,* **No. 25-05111, 2025 WL 1392836 (D.D.C. April 15, 2025)** (to discover DODG's "influence and operations for purposes of determining whether it is exercising the requisite authority" to qualify as a "agency") ***stay granted*, No. 24-1244, 2025 WL 1602338 (S. Ct. June 6, 2025)** ("The portions of the District Court's April 15 discovery order that require the Government to disclose the content of intra–Executive Branch USDS recommendations and whether those recommendations were followed are not appropriately tailored. Any inquiry into whether an entity is an agency for the purposes of the Freedom of Information Act cannot turn on the entity's ability to persuade. Furthermore, separation of powers concerns counsel judicial deference and restraint in the context of discovery regarding internal Executive Branch communications.")

Agency Records

Am. Oversight v. HHS, **No. 17-827, 2025 WL 271897 (D.D.C. Sep. 24, 2025), on remand from 101 F.4th 909 (D.C. Cir. 2024) –** ruling records exchanged between intervenor House Ways & Means Committee and agencies related to healthcare reform legislation held to be agency records despite a legend on committee email providing in part

> records of the Committee, remain subject to the Committee's control, and are entrusted to your agency only for use in handling this matter. Any such documents created or compiled by an agency in connection with any response to this Committee including but not limited to any replies to the Committee, are also records of the Committee and remain subject to the Committee's control. Accordingly, the aforementioned documents are not "agency records" for purposes of the Freedom of Information Act or other law.

Finding that the legend does "not show that Congress manifested its intent to control the records, but instead that Committee staffers affixed a generally applicable disclaimer to email communications with the Agencies in the course of discussing proposed legislation about health care reform [because t]his non-specific assertion does not reflect the considered judgment that has previously been held to

manifest Congress's clear intent." Noting that "By affixing the same boilerplate Legend to each message, there is nothing to suggest that Congress applied any criteria for reserving control that is particularized to the content of the document." Although the Court presumes that Congress's oversight function, or lack thereof, does not determine which test applies, it finds that the records were not exchanged in the course of oversight.

Expedited Processing

***Democracy Forward Found. v. Dep't. of Justice*, No. 25-2597 (D.D.C. Nov. 24, 2025)** – ordering expedited processing of a request seeking records concerning DOJ officials' discussions about the handling of the Epstein records and communications between Trump and Epstein; finding "widespread and exceptional media interest" and "possible questions about the government's integrity that affect public confidence," the later based on conflicting statements made by agency officials.

Record Creation

***Gelb v. Dep't of Def.*, No. 23-0995, 2025 WL 49882 (D.D.C. Jan. 8, 2025), *appeal pending*, No. 25-5055 (D.C. Cir.) --** holding, in relevant part, that the Defense Finance and Accounting Service was not required to "create a computer program that obtains and synthesizes information from multiple databases to create a record that does not otherwise exist," i.e., a report of "stale-dated checks and EFT payments worth $100,000 or more, issued between 2017 and 2020, that remain uncashed[.]"

Public Domain Doctrine/Official Acknowledgment Doctrine

***Pearce v. Dep't of Army*, No. 24-0520, 2025 WL 1905552 (D.D.C. July 10, 2025)** – ruling that agency had not waived its attorney client privilege in "EEOC summary judgment briefing, deposition transcripts, and exhibits" provided to requester in her administrative EEOC action against the agency because those documents because "[t]he fact that Ms. Pearce already has access to the relevant material in her ongoing EEOC litigation does not mean that the agency is required to disclose it publicly under FOIA"; oddly citing cases dealing only with records provided in discovery.

Clawing Back

***Gun Owners of Am., Inc. v. ATF*, No. 21-2919, 2025 WL 2061705 (D.D.C. Jul 23, 2025), *appeal pending*, No. 25-5309 (D.C. Cir.)** – ruling agency could clawback erroneously disclosed information and distinguishing, with some difficulty, *Human Rights Def. Ctr.*, 126 F.4th 708 (D.C. Cir. 2025), stating that because here "everything marked for redaction [but erroneously disclosed] by the ATF was properly exempt," and further since the majority of the information disclosed was protected by Exemption 3, it was "subject to [an] independent legal prohibition on disclosure."

EXEMPTION 1

***Brennan Ctr. for Justice v. Dep't of State*, No. 17-7520, 2025 WL 753870 (S.D.N.Y. Mar. 10, 2025) –** ruling records that contain "the names of countries that performed poorly in the information sharing categories. . . , which was based on confidential exchanges with the host governments, as well as critical evaluations of host country capabilities by U.S. Government officials" would, "if revealed, could cause serious damage to national security[,] and inject friction into, or cause damage

to, a number of our bilateral relationships with countries whose cooperation is important to U.S. National Security."

EXEMPTION 4

Ctr. for Invest. Reporting v. DOL, **No. 24-990, 2025 WL 2155687 (9th Cir. July 30, 2025**) – ruling that EEO "reports filed by federal contractors" (used by DOL to "monitor compliance with federal antidiscrimination and equal employment opportunity requirements) that "describe the composition of the contractors' Workforces," including "contractors' racial, sexual, and ethnic diversity (or lack thereof)," are not commercial; explaining that "information is the object of commerce—serves a commercial function—and is therefore "commercial" if it is designed to be profitable. [ ] That is, if it was made to be bought and sold." Additionally, it "has the subject of commerce—is of a commercial nature—and is therefore "commercial" if it pertains to business or trade" such as "sales statistics, profits and losses, and inventories." **Note**: Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025), rescinded the obligation to submit these reports.

EXEMPTION 5

Georgia v. DOJ, **No. 23-5083, 2025 WL 2314892 (D.C. Cir. Aug. 12, 2025)** — reversing district court and holding attorney work product communications exchanged with private parties concerning related joint election-related lawsuits against plaintiff qualified as "intra-agency" under a "common-interest" agreement; purporting to follow "the only other court of appeals' decision to consider the issue. *See Hunton & Williams v. U.S. Dep't of Just.,* 590 F.3d 272 (4th Cir. 2010)," while ignoring *Lucaj v. FBI*, 852 F.3d 541 (6th Cir. 2017) (denying common interest application containing legal analysis from Criminal Division to a foreign government pursuant to a Mutual Leal Assistance Treaty).

EXEMPTION 6

Tx. Pub. Policy Found. v. U.S. Dep't of State, **No. 24-50189, 2025 WL 1287890 (5th Cir. May 5, 2025**) – 2-1 decision purporting to distinguish 3 decisions from other circuits by ordering disclosure of names and email addresses of State Department mid-level employees without policy-making authority who worked on the Biden administration's now-rescinded greenhouse-gas-reduction target had no privacy interest; distinguishing the "only 'harassment' incident that the Department describes involved a handful of unpleasant replies (e.g., 'criminals,' 'Climate Cult,' and 'nazi secret group') to a 2023 Republican Party tweet about John Kerry's declining to 'identify the senior staff working in his office'"; ruling there is a public interest in helping the "public learn—through open-source research, for example—the seniority, backgrounds, and areas of expertise of those Department employees who worked to commit the United States to the goal of achieving a substantial reduction in emissions by 2030"; strangely, also finding a public interest the requester's "contention that having the information it seeks would help [it] and others craft more precise follow-up FOIA requests."

New York Times Co. v. Defense Counterintelligence and Security Agency, **No. 25-2333 (S.D.N.Y. Oct. 8, 2025)** – in an unusual case ruling agency must disclose Elon Musk's security clearance and whether there are any waivers; finding Musk "has discussed publicly that he holds a "top secret clearance" and, in doing so, has "diminished" any privacy interest he held in that fact"; noting that Musk "Musk has not publicly discussed whether his security clearance is subject to any conditions or waivers if so, what those conditions or waivers entail," but he "publicly discussed his drug use, NASA's requirement that he submit to random drug testing due to his drug use, and his contacts with foreign

leaders"; with regard to public interest finding "the public has an interest in knowing whether the leader of SpaceX and Starlink holds the appropriate security clearances" and "Musk's numerous public statements regarding his own drug use and contacts with foreign leaders only enhance the public interest in disclosure"; finally, finding same concerning Exemption 7(C).

EXEMPTION 7(A)

***Alper v. Dep't of Justice*, No. 24-1837, 2025 WL 1503795 (D.D.C. May 27, 2025)** – in an unusual case brought by an attorney representing a death-row client involving a conviction based on an a single "earwitness," ruling that fact that the fact that the only "enforcement proceedings pending are a "postconviction petition in state court as well as a federal habeas corpus petition in the U.S. District Court" "and the reasonably anticipated possibility of a new criminal trial in Alabama, should either pending petition be granted" does not persuade the Court "that disclosure would genuinely interfere with future proceedings [because] this case is 30 years old, and the State has already had the opportunity to present its case [twice, including a retrial] without interference. Generalized concerns about the potential for witness tampering, evidence destruction, and the thwarting of the government's trial strategy. . .are not as compelling when the witnesses have already been disclosed, the evidence is decades old, and the government has revealed its evidence and strategy in an earlier trial."

EXEMPTION 7(C)

***Brown v. FBI*, No. 23-5244, 2025 WL 1933347 (D.C. Cir. July 15, 2025)** – concerning records of the 2015 ISIS-inspired terrorist attack at the Inland Regional Center in San Bernardino, CA., easily ruling FBI had shown reasonably foreseeable harm for disclosure of the identities of third-party sources, mere mentions, and victims; sources could "be targeted for retaliation by investigative subjects, those sympathetic to investigative subjects, or by those who simply disparage cooperation with law enforcement"; mere mentions could be subjected "to possible harassment or criticism and focus derogatory inferences and suspicion"; and for victims "to protect their 'dignity and privacy,' and to avoid 'forc[ing] them to relive traumatic events.'"

EXEMPTION 7(D)

***Brown v. FBI*, No. 23-5244, 2025 WL 1933347 (D.C. Cir. July 15, 2025)** – concerning records of the 2015 ISIS-inspired terrorist attack at the Inland Regional Center in San Bernardino, CA., ruling FBI had shown reasonably foreseeable harm for confidential sources because disclosure "would create a risk of harm for witnesses," and "would undermine the efficacy of future witness interviews."

EXEMPTION 7(E)

***Off. of Fed. Pub. Def. v. DOJ*, No. 23-02476, 2025 WL 1734803 (D.D.C. June 23, 2025)** – strangely ruling that "it is not clear that security measures at trial or in transportation to the courthouse [of requester who is a white supremist convicted of murdering a fellow prison inmate] are techniques, procedures, or guidelines for a law enforcement investigation or prosecution."

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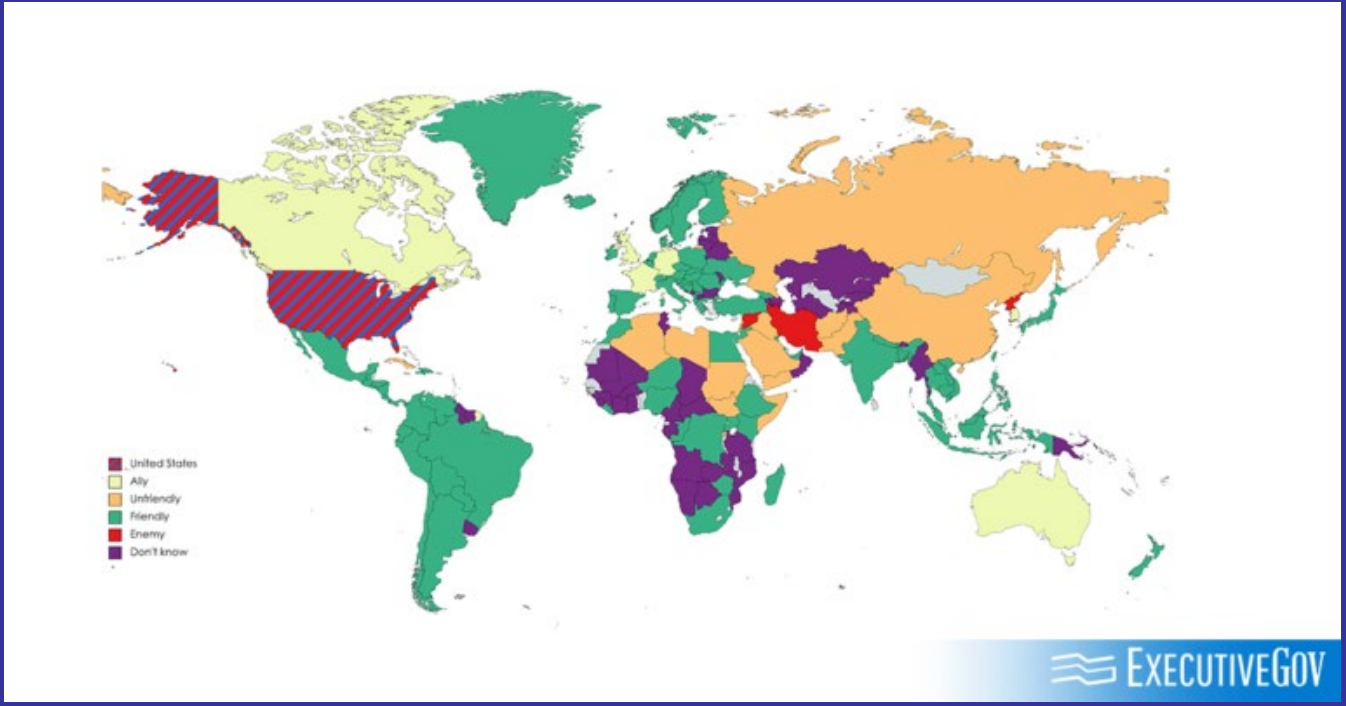

Exemption 4

Commercial

Ctr. for Invest. Reporting v. DOL, No. 24-990, 2025 WL 2155687 (9th Cir. July 30, 2025)

Exemption 5

Consultant Corollary / Threshold

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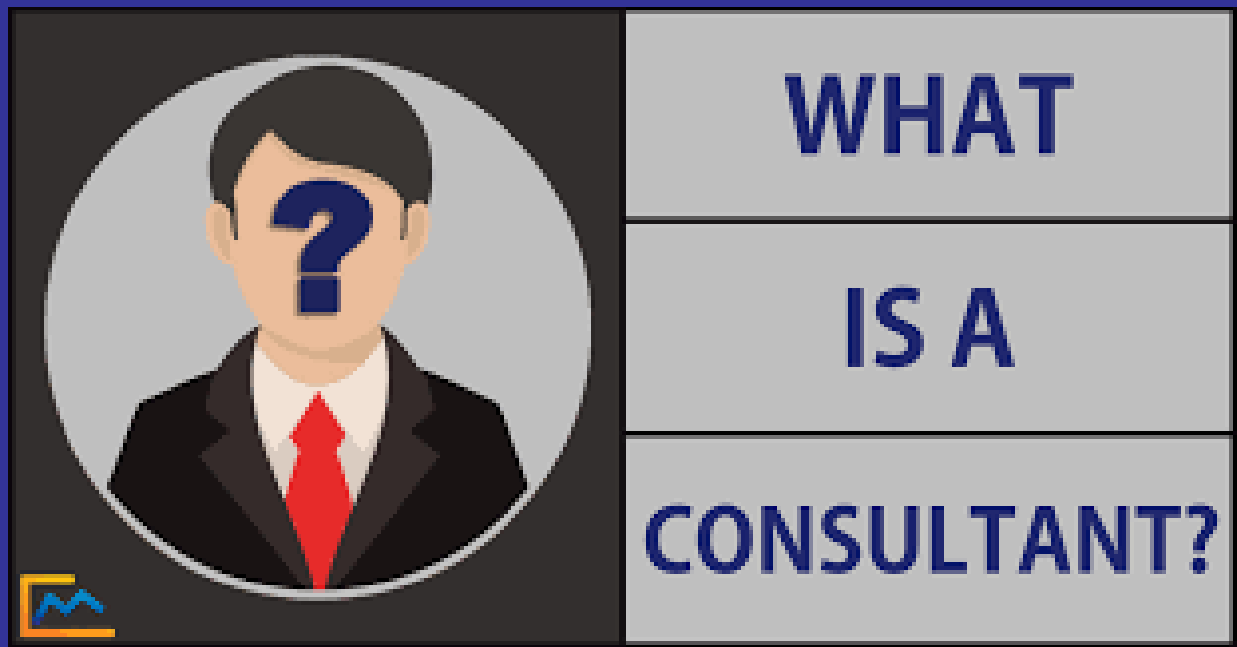

Exemption 6

Privacy Interest

Tx. Pub. Policy Found. v. U.S. Dep't of State, No. 24-50189, 2025 WL 1287890 (5th Cir. May 5, 2025)

New York Times Co. v. Defense Counterintelligence and Security Agency, No. 25-2333 (S.D.N.Y. Oct. 8, 2025)

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Out-of-date/Public Information

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Presenter Bios

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Michael Heise is the Associate Legal Counsel for the FOIA Division at the EEOC. He is also the Commission's FOIA Public Liaison. He began his career in FOIA as a federal contractor with the Department of Energy in Washington, DC. Michael serves as a director at large on the ASAP board since 2021 and has also served on the FOIA Advisory Committee."

Richard L. Huff, as a member of the Senior Executive Service, served as one of two co-directors of the Office of Information and Privacy since the Office's creation in 1982 until his retirement in 2005. He was the official designated by the Attorney General to act on all administrative appeals from denials under the Freedom of Information Act and Privacy Act of 1974 by Department of Justice components. He litigated and supervised FOIA cases at the district and appellate level and has testified before Congress on the implementation of the 1996 Electronic FOIA Amendments and on the interface between the FOIA and the Privacy Act. For twenty-three years he oversaw the development of the "Freedom of Information Act Guide & Privacy Act Overview," the Department of Justice's 1100-page treatise that was updated and distributed every other year to more than 22,000 recipients. He has also published several legal articles, most recently co-authoring, "Freedom of Information Act Access to Personal Information Contained in Government Records: Public Property or Protected Information?" Mr. Huff came to the Department of Justice in 1976 after serving seven years on active duty in the Army; his last reserve assignment was with the Army Judge Advocate General's Legal Center and School where he taught FOIA and Privacy Act subjects to military graduate students. He is now a retired colonel in the Army Reserve. Since retiring Mr. Huff has made one-, two-, and three-day training presentations for the Departments of Justice, Army, Navy, Commerce, Health and Human Services, and Homeland Security, as well as for the American Society of Access Professionals and the Graduate School USA. Mr. Huff received a B.A. from Stanford, an M.A. from St. Mary's University, a Juris Doctor from UC Law San Franciso, and a Master of Laws from Georgetown University. Mr. Huff will be inducted into the prestigious 2026 National FOIA Hall of Fame on March 16. The Hall of Fame recognizes key individuals who have demonstrated strong leadership in improving FOIA. https://brechner.org/2026/01/13/sixteen-inducted-into-2026-national-foia-hall-of-fame/