



How broken is FOIA? One carveout gives us a picture.

PATRICK EDDINGTON

MAR 17, 2021

This article was prepared by Patrick G. Eddington for Americans for Prosperity Foundation's Restoring Accountability essay series on government transparency to commemorate Sunshine Week. The views expressed in this article are the author's own and do not necessarily reflect the views or opinions of Americans for Prosperity Foundation, which encourages the expression of diverse viewpoints within a culture of civil discourse and mutual respect.

As we mark Sunshine Week 2021, it's a fair question to ask: how broken is the nearly 60 year-old Freedom of Information Act?

Very, in many ways. But for my purposes here, I'm going to focus on just one, recently highlighted in a January 2021 Government Accountability Office report titled Update on Federal Agencies' Use of Exemption Statutes. I'll let the GAO reports' executive summary paragraph tell the tale:

In fiscal years 2010 through 2019, federal agencies claimed a total of 256 statutes as the basis for withholding requested information using Freedom of Information Act (FOIA) exemptions known as (b)(3) exemptions. During this time, 91 agencies reported withholding information using at least one of the 256 statutes a total of more than 525,000 times.

What is a “(b)(3)” exemption? GAO explains:

Of the nine exemptions authorized by FOIA, only one—exemption 3, also referred to as the (b)(3) exemption—specifically authorizes withholding information under FOIA on the basis of another federal statute that prohibits disclosure of that information.

Let me give you a real world example of how one agency, the National Security Agency, has used its (b)(3) exemption statute, the NSA Act of 1959 (Public Law 86-36 or 50 U.S. C. § 3605) to conceal waste, fraud, abuse, mismanagement and even criminal conduct from you, the American taxpayer. Section 6 of P.L. 86-36 states,

Nothing in this Act or any other law...shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

So whether you want to know how big the cafeteria at NSA is or whether they defied a congressional directive to more widely deploy a revolutionary (and by government standards very inexpensive) digital network exploitation (DNE) tool, P.L. 86-36—NSA’s very own (b)(3) statute under FOIA—gives NSA the ability to tell you to take your FOIA and...well, you get the idea.

As you’ve probably guessed by now, I’ve had a more than three-year, very bitter personal experience with this phenomenon as lived out through a FOIA lawsuit, *Eddington v DoD IG et al* (17-cv-00128, D.C.C.).

At issue in the case was whether NSA could censor, using P.L. 86-36, Section 6, DOD Inspector General reports that were harshly critical of a failed NSA DNE program codenamed TRAILBLAZER.

During my time as senior policy advisor to then-Rep. Rush Holt (D-NJ), I’d seen all of the DOD IG reports on TRAILBLAZER and knew what a disaster it had been, so unlike most FOIA requesters, in this particular case I had insider knowledge of the truth.

But even that was not enough to fully overcome NSA’s assertion of its (b)(3) “criminality shield,” as I termed it. Among a number of other things, we did manage to get one key budget-related figure released, as the screenshots below demonstrate. Here’s the before:

And here’s the after:

The Cato Institute, with the terrific help of the FOIA litigation team at Loevy & Loevy (Josh Burday, Esq., specifically), was forced to litigate to get this released, even though NSA’s actions clearly violated EO 13526’s prohibition on concealing “violations of law, inefficiency, or administrative error” or to “prevent embarrassment to a person, organization, or agency.”

The same litigation revealed that NSA had defied Congress and failed to more fully deploy a TRAILBLAZER alternative, codenamed THINTHREAD, that might well have prevented the 9/11 attacks. NSA is continuing to withhold information on that topic despite having another FOIA from me seeking that information.

If FOIA is going to ever be truly effective at helping civil society groups uncover waste, fraud, abuse or even criminal conduct among national security-related agencies, the (b)(3) FOIA carve out needs to go the way of the dinosaurs.

Former House senior policy advisor and ex-CIA analyst Patrick G. Eddington is a research fellow at the Cato Institute. Read other essays in the Restoring Accountability series [here](#).