

## FREEDOM OF INFORMATION ACT

### Reasonable Foreseeable Harm

You have asked for guidance in applying the new “reasonable foreseeable harm” analysis that must be conducted as a result of the passage of the Freedom of Information Act (FOIA) Improvement Act of 2016, before records can be withheld pursuant to a FOIA request. This amendment to the FOIA requires Federal Agencies to conduct such an analysis before it can withhold part or all of a record under certain FOIA exemptions. The additional analysis will primarily impact the use of FOIA exemption (b)(5). Other FOIA exemptions that the Air Force rarely uses are also impacted, such as exemption (b)(2) and (b)(9). Our analysis here will discuss the use of the pre-decisional, deliberative process privilege under FOIA exemption (b)(5).

The FOIA Improvement Act of 2016 notes that its requirements apply to all FOIA requests received from the date of its implementation—in this case the act was signed by the President on 30 June 2016. One of the act’s changes to the FOIA requires Federal Agencies to specifically determine that a harm a FOIA exemption was designed to protect against occurring as a result of the release of the agency record would “reasonably, foreseeably” occur if the record was released.

Most of the FOIA exemptions already have built in to their required analysis a “reasonable foreseeable harm” component. Accordingly, the Department of Defense FOIA office has determined the additional reasonable foreseeable harm analysis now required under the FOIA Improvement Act applies only when an agency wishes to withhold records under FOIA exemptions (b)(2), (b)(5), or (b)(9).

This change impacts the use of the pre-decisional, deliberative process privilege under FOIA exemption (b)(5). This privilege applies to inter- and intra-agency records that contain pre-decisional, deliberative (i.e., recommendations, opinions, analysis) information. Prior to the FOIA Improvement Act of 2016, once it was determined the record was an inter- or intra-agency record that contained such information, that type of information in the record could discretionarily be withheld under FOIA exemption (b)(5) as pre-decisional, deliberative process privileged information. Now, however, after it is determined a document, or information in a document, is inter- or intra-agency information, and also meets (for purposes of our example) the definition of the pre-decisional, deliberative process privilege, the agency must further determine that it would be “reasonably foreseeable” that the document/information, if released, would cause a harm to the agency that the pre-decisional, deliberative privilege was designed to protect against occurring. If the agency cannot do so, the information must be released.

The act does not specifically define what is meant by “reasonably foreseeable.” In our view, a standard dictionary definition applies, such as: “A consequence is ‘reasonably foreseeable’ if it could have been anticipated by an ordinary person of average intelligence as naturally flowing from his actions.” See <https://www.quimbee.com/keyterms/reasonably-foreseeable>.

The ‘harm’ to be analyzed under the ‘reasonable foreseeable harm’ test is the particular type of harm the FOIA exemption was designed to protect against occurring by the release of the document

to the public. For example, such types of harms under the pre-decisional, deliberative process privilege (not an all-inclusive list) could include concerns that release of recommendations and opinions will cause public confusion, where the public might think a recommendation or opinion was actually the agency's final decision, or was a basis for an agency's final decision when, in fact, it was not; adversely impact the decision making process itself by bringing inappropriate pressure upon the decision maker to make a decision contrary to what is in the agency's best interest applying established agency processes; or 'chilling' the willingness of employee subordinates to in the future provide candid/controversial recommendations and opinions.

In summary, then, using our example, in order to withhold pre-decisional, deliberative process privileged information under FOIA exemption (b)(5) for any request received on or after 30 June 2016, the information must: (1) be an inter- or intra-agency document; (2) the responsive record must contain pre-decisional, deliberative process information; and (3), the Air Force must have affirmatively determined, under the particular facts and circumstances of the request and the record requested, that it would be reasonably foreseeable that release of the information will cause a harm that the exemption/privilege was designed to protect against occurring from release of the information. Even if the first two criteria are met, the record can no longer be discretionarily withheld under the privilege of FOIA exemption (b)(5) if this last step cannot be met. Note: Because FOIA exemption (b)(5) applies governmental civil discovery privileges to the FOIA process, if all three steps are met in our example, the government could still discretionarily release the record.