

Acquiring Records: Learn the Law

Society of Professional Journalists
and the Sigma Delta Chi Foundation
David Cuillier, Freedom of Information Committee
May 2011

Contents

Legal Lingo_____	2
How to Learn the Law_____	3
Access Law Resources_____	5

About the Trainer: David Cuillier, Ph.D., is a member of the SPJ Freedom of Information Committee and has been an SPJ newsroom trainer since 2005. He is an associate professor of journalism at the University of Arizona in Tucson, where he teaches public affairs reporting, computer-assisted reporting and access to public records. Before entering academia he was a public affairs reporter and city editor for a dozen years at daily newspapers in the Pacific Northwest. He is co-author with Charles Davis of *The Art of Access: Strategies for Acquiring Public Records* and researches the psychology of access. He provides news and tips about FOI at www.theartofaccess.com and <http://blogs.spjnetwork.org/foi/>, and he can be reached at cuillier@email.arizona.edu.

Legal Lingo

Useful terms to know when dealing with public records law

- **FOIA:** Pronounced “FOY-uh,” or sometimes by saying each letter, this represents the U.S. Freedom of Information Act. A few states also call their public record laws FOIA.
- **FOI:** This stands for “freedom of information,” which is a term for access issues in general. People usually pronounce it by its letters “F-O-I.”
- **Exemption:** This is a law in state or federal statutes that allows an agency to keep something secret. For example, Exemption 4 of U.S. FOIA allows agencies to black out, or redact, trade secrets from documents.
- **Redaction:** The process of blotting out some exempt materials from documents. In general, if a record contains exempt information, such as a social security number, the agency must redact that material and provide you the rest.
- **State law names:** The names of state public record laws vary widely. It’s important to know the name of your state law and not just call it FOIA (unless it is FOIA). For example, in Minnesota it’s called the Data Practices Act. In New Jersey they call it the Open Public Records Act.
- **Sunshine:** A lot of people call public record and open meeting laws “sunshine laws,” with the idea that they shed light into the darkness of secrecy. That’s why you see a lot of public record stories, advocacy groups and websites use sun icons.
- **FERPA:** Pronounced “FUR-puh,” this stands for the Federal Educational Rights and Privacy Act, which makes identifiable educational records secret in schools and public universities. See the SPJ Reporter’s Guide to FERPA at <http://www.spj.org/ferpa.asp>
- **HIPAA:** Pronounced “HIPP-uh,” this stands for the Health Insurance Portability and Accountability Act, which keeps medical records secret.
- **Meta-data:** Some states specifically state, by statute or case law (e.g., Arizona, Washington state), that the information embedded in an electronic file is part of the file and shall be released if requested. That can include the properties of Word files (who created it, when it was updated, etc.).
- **Native format:** Some states allow requesters to ask for, and receive, records in their native format – the medium the record is kept in, such as paper or as an electronic database. So if the agency has the file in Excel, it must provide it in Excel if requested, and can’t print out the document and charge copy fees.

How to Learn the Law

Basic Elements of Public Record Laws

- **Records covered:** Most public record laws require public agencies to provide records if requested in any format – paper, e-mail, audio, video, data, etc. Agencies aren't required to *tell* you anything – just let you see recorded material.
- **Agencies covered:** Most public record laws require public agencies in the executive branch to provide records (legislatures usually exempt themselves and the courts usually make up their own rules, depending on the state). That includes federal and state executive departments (e.g., Department of Education) and local agencies, such as cities, counties and school districts. These laws do not apply, usually, to private entities, such as individuals, commercial companies, churches or non-profits. However, if a company contracts with a public agency those records often would be public.
- **Exemptions:** The presumption is everything in a public agency is open to look at unless there is a law (exemption) that allows it to be closed. The agency must show you the law that says it is closed. In most cases, exemptions are discretionary, which means the agency can often provide the records to you if they want, even if there is an exemption that allows it to keep it secret.
- **Response time:** Most public record laws require the government to respond to a request within a certain amount of time, often 3-10 days, depending on the state, or within a reasonably prompt amount of time.
- **Copy fees:** Most public record laws outline how much an agency can charge for search time or copy fees. Sometimes it is left vague and some agencies charge more than they should (see training session on overcoming denials for how to reduce copy fees).
- **Penalties for non-compliance:** If an agency violates the public records law the usual recourse is that you must sue in court. Usually if you prevail you can get attorney fees paid for. Some states have stronger enforcement provisions, such as fines.

Learning About the U.S. Freedom of Information Act

- **Federal Open Government Guide:** You can learn about FOIA from the best guide online, provided by the Reporters Committee for Freedom of the Press, at <http://www.rcfp.org/fogg/index.php> . It even includes sample appeal letters. Read through to get a feel for how it works.

Learning About Your State Public Records Law

- **Open Government Guide:** The Reporters Committee for Freedom of the Press also provides a great online guide to each state public records law, at <http://www.rcfp.org/ogg/index.php>. Each description is written by a legal expert in each state and it's an easy way to get an understanding of the statutes and case law (good for tossing in request letters to provide added weight).
- **State public record guides:** Get a copy of a guide to your state public record laws, often provided by journalism organizations or your state coalition for open government.
- **Government guide:** Often state attorneys general or other officials provide guides to public records. This is useful to have in hand to show public agencies because they might not believe you but they'll believe government attorneys.

Learning About Other Public Record Laws

- **FERPA:** SPJ provides a good guide to educational records at <http://www.spj.org/ferpa.asp>. Also, see the Student Press Law Center website at <http://www.splc.org/>
- **HIPAA:** A good guide to accessing medical records is provided by the Reporters Committee at <http://www.rcfp.org/hipaa/index.html>
- **Law enforcement:** A state-by-state explanation of access to law enforcement records can be found at <http://www.rcfp.org/policerecords/index.html>
- **Electronic records:** An overview of issues regarding electronic records is at <http://www.rcfp.org/elecaccess/>. Also, see the SPJ online FOI module about "Dealing with Data."

Tip for Becoming an Expert

- **Read the actual statutes:** After getting an overview of your state public records law from the Reporters Committee website (www.rcfp.org/ogg) then read the actual statute. Read through it twice to absorb it.
- **Note the little words:** In the law, the little words, such as "and," "or," "may," and "shall" make a big difference on whether you might or might not get a record. Look at them carefully.
- **Definitions:** If you find a word that is unfamiliar, look it up at www.dictionary.law.com.
- **Case law:** Court cases clarify vague statutes. Make sure to get to know the major cases in your state and be able to cite them in your request letters.
- **Find experts:** Develop relationships with people in your state who are experts in the nuances of the law. Look for media law attorneys, college professors, government attorneys, press associations or open-government coalitions.

Access Law Resources

Society of Professional Journalists

<http://www.spj.org/foi.asp?> and <http://blogs.spjnetwork.org/foi/>

Provides information about freedom of information. The “Open Doors” publication has document-based story ideas, check the guide to FERPA, and see the Sunshine Network with experts for each state. See the FOI FYI blog at <http://blogs.spjnetwork.org/foi/>

State coalitions for open government

<http://www.nfoic.org/nfoicmembers>

Nearly every state has a coalition for open government, which provides assistance in accessing records. Check the National Freedom of Information Coalition Web site for a coalition in your area. Also, NFOIC has a litigation fund for suing agencies over records.

Reporters Committee for Freedom of the Press

<http://www.rcfp.org>

This group explains how to use FOIA, provides an online request letter generator (for FOIA and state laws), and provides easy-to-understand explanation of state public records laws (<http://www.rcfp.org/ogg/>). Find guides to accessing health records and other information.

Student Press Law Center

<http://www.splc.org/>

This nonprofit center provides free legal assistance to student journalists. Check out the Web site for the publications and searchable database on a variety of student media law issues. It also includes a super FOIA letter generator that caters to each state.

Office of Government Information Services

<http://www.archives.gov/ogis/>

The federal agency, started in fall 2009, is the federal ombudsman for FOIA. Have a problem with an agency? Contact them and see if they can help.

FindLaw

<http://www.findlaw.com>

Free online site that provides legal resources, law journals, mailing lists and bulletin boards. Check out the legal dictionary as well (<http://dictionary.lp.findlaw.com>).

Reporter’s Guide to FERPA

<http://www.spj.org/ferpa.asp>

This guide, put together by SPJ, provides some tips on dealing with this law that school and university officials often over-use to hide information that should be public.

The Art of Access blog

<http://www.theartofaccess.com>

The blog, by David Cuillier and Charles Davis, provides more tips and story ideas on accessing public records, as well as resources for requesters and teaching FOI.

State record ombudsman

About half the states have some sort of mediator or ombudsman to help requesters and agencies settle disputes over records. Check with your state attorney general’s office.

The National Security Archives

<http://www.gwu.edu/~nsarchiv/>

Tips for accessing public records through FOIA, as well as tons of federal records.

Citizen Access Project

www.citizenaccess.org

This Web site out of the University of Florida provides information about access laws in each state, including a rating for whether different aspects are good or bad.

Freedom of Information Center

<http://www.nfoic.org/foi-center>

Information about access in all the states, including a listing of public records audits and studies. Out of the University of Missouri – Columbia.

WikiFOIA

<http://sunshinereview.org/index.php/Portal:WikiFOIA>

Provides information and news about access issues nationally.

Alltop Freedom of Information

<http://freedom-of-information.alltop.com/>

A compilation of FOIA blogs with top stories and postings.

State Sunshine blog

<http://openrecords.wordpress.com/>

State Sunshine blog with news about FOIA issues nationally. A good list of links.

OpenTheGovernment.org

<http://www.openthegovernment.org/>

An advocacy group with news and reports about access to federal records.

Sunshine in Government Initiative

<http://www.sunshineingovernment.org/>

Check the FOIA files for hundreds of stories produced with public records.

Google News Alerts

<http://news.google.com>

Go to Google News, click on “News Alerts” then set up alerts with keywords such as “public records request” and “freedom of information” and Google will send you links to stories that contain those keywords.