

[FOIA-CUI FAQs]

Devin:

Hello, my name's Devin Casey, and I work for the Information Security Oversight Office as a program analyst overseeing and implementing the CUI Program. This is my colleague and attorney Bryan Oklin, working with the CUI Program office as well, overseeing information security policy for just about everyone in the government. And we're here to discuss a memorandum that's on our website entitled the "Revised Guidance Regarding the CUI or Controlled Unclassified Information and the Freedom of Information Act." That's a bit of a mouthful. In that document, it discusses the relationship between the CUI Program and FOIA, the Freedom of Information Act program, and it says: "FOIA should not be cited as a safeguarding or dissemination control authority for CUI." What does that mean?

Bryan:

Sure, it's a question that we've gotten from agencies, from the beginning of the CUI Program. And essentially, fundamentally at its core, the Freedom of Information Act is a statute that authorizes and permits the public to access the records and information from its government. It is fundamentally not an information protection statute. So, even though there are exemptions that agencies can apply to not disclose information in response to a FOIA request, when a member of the public requests a certain type of information, it is not appropriate to treat the Freedom of Information Act as a CUI control authority. So, essentially, the FOIA exemptions are generally discretionary. Exemption 1 for classified National Security Information is not discretionary. If you get a FOIA request in for classified information, that information, unless it's declassified, will not get disclosed. Exemption 3 is a sometimes mandatory exemption, where if a federal statute authorizes or prohibits information from being disclosed in response to a FOIA request, there are statutes where that is mandatory, and that information would not be able to be disclosed pursuant to that Exemption 3 FOIA statute. But for the rest of the exemptions generally it's on a case-by-case, request-by-request basis. And it's not appropriate at the creation of a document that's CUI to assert that the Freedom of Information Act is the reason behind its control.

Devin:

So, for all of the other categories of CUI, there's a law, regulation, or Government-wide policy that either requires or permits the protection of information in that category, and you're saying that the FOIA doesn't do that?

Bryan:

Right, the FOIA does have categories of information within its exemptions, certain types of information that might be exempt from disclosure in response to a specific FOIA request. But it is fundamentally to apply an exemption in response to a specific request versus controlling the information at the outset, at the creation of a document, and having that decision be determinative in any specific way.

Devin:

Actually, I think that really helps with that part. And, we get a lot of questions kind of on the flip side about that as well – which is what to do if you're a FOIA reviewer, a FOIA officer, and the information that has been requested, the records that you discovered or found as part of that request in response are marked as CUI – are all of the categories of CUI, do they have a Statute 3 exemption?

Bryan:

No – it's a great question. One of the fundamental issues with CUI and the Freedom of Information Act is the definition of what information qualifies to be CUI does not directly align with the Freedom of Information Act exemptions. Information might be CUI either because federal law, federal regulation, or Government-wide policy authorizes – either requires or permits – that information to be protected. But that's a very different standard from the exemptions under the Freedom of Information Act. And the Exemption 3 under the Freedom of Information Act is for certain federal laws that authorize a FOIA reviewer to not disclose that information – for an agency not to disclose that information that falls under that B3 – they're called B3 Statutes – in response to a FOIA request. But for federal regulations and Government-wide policies, there is no specific exemption that applies for information that might qualify as CUI, but nonetheless would have to be disclosed in response to a FOIA request. So, it's a common request that we get from agencies, by virtue of a CUI marking, or by virtue of a CUI designation, what does that mean specifically in the FOIA context? And the answer really is: it depends, if it's based on a B3 Statute that exempts that information from disclosure in response to a FOIA request, then it would be marked as CUI, and ultimately that marking would mean that it's not disclosed in response to a FOIA request based on a substantive review of that document. But for other types of information, where there is no exemption that applies – there's no B3 Exemption, it doesn't fall under any of the other exemptions for Proprietary Business Information, or for Personal Privacy data, or Law Enforcement Information, and it's just protected because there's a federal regulation, or Government-wide policy, or even a statute that doesn't qualify as a B3 Exemption, a marking will have no impact in those cases as to whether the information has to be disclosed.

Devin:

So, in speaking only of unclassified information, are there any unclassified information markings, like CUI or any other protection markings out there that exempt information from FOIA?

Bryan:

No, there are not. There's no such thing as a marking being completely determinative of a FOIA request, or determinative to a FOIA reviewer, as to what they should do ultimately with that

FOIA request. It always comes down to – the basis is always on the substance of the information in the document.

Devin:

So, should a FOIA reviewer completely ignore the markings on a document?

Bryan:

No, not necessarily, those markings can be informative, but they are not determinative. Markings can inform whether they are CUI or otherwise, as to the content of that document, where it comes from, that an exemption even might apply – but that marking doesn't ultimately determine for the FOIA reviewer what the disposition is for that FOIA request.

Devin:

Well, Bryan, thanks for coming for this. I think that really clears up some of the questions that we get frequently about CUI and FOIA and how they work together and how they overlap in this world of responding to requests that we get, but also trying to protect information in the most responsible way. Thanks for your time.