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*“National Security” Information
and the Freedom of Information Act*

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Abstract by Raymond R. Janairo

In 1966, Congress enacted the Freedom of Information Act (FOIA) in order to give the public better access to government information. Under the “(b)(1) exemption,” FOIA authorizes the executive branch’s withholding of properly classified information, determined on the basis of criteria the President sets by Executive Order, in the interest of national defense or foreign policy. “Instead of limiting secrecy to information legitimately related to national security,” many critics argue that FOIA is the source of excessive secrecy regarding government information. Moreover, the judiciary’s deference to the executive’s use of the (b)(1) exemption only exacerbates this secrecy and renders FOIA only slightly effective in carrying out its purpose. These critics are concerned that government officials are using the (b)(1) exemption to hide details of embarrassing as well as illegal activity.

The author argues that the Bush Administration has expanded upon the excessive secrecy of past administrations. The Administration has done this by relaxing classification standards after the September 11 attacks, encouraging officials to withhold “sensitive but unclassified information,” and lobbying to exempt “critical infrastructure information” from FOIA disclosure. Arguably, “sensitive but unclassified information” is information that should be disclosed under FOIA, but the author provides evidence that bureaucrats tend to classify these documents for fear of criminal disclosure penalties. In 1997, the President’s Commission on Critical Infrastructure Protection expanded the concept of national defense to encompass the nation’s infrastructure (i.e., energy, banking and finance, telecommunications, transportation and vital human services). After September 11, in order to promote information sharing between the government and these private interests, Congress created the “critical infrastructure” exemption. Noting several issues with the definition and scope of the exemption, the author theorizes that this exemption could only aggravate the excessive secrecy concern. To counteract this problem, the author “suggests three aspects of legislation necessary to ensure that FOIA’s purposes are served while still protecting national security”: first, Congress should establish a single statutory framework to address classified, sensitive but unclassified, and critical infrastructure information; second, at the minimum, the statute should define these terms and standards for keeping information secret; and finally, Congress should encourage less deferential review of secrecy claims by requiring in camera inspection of documents of national security.