
**FOIA Training
October 8, 2019
U.S. Department of Justice
Time: 1:30 p.m.**

*Dennis C. Barghaan, Jr.
Deputy Civil Chief, Eastern District of Virginia*

AGENDA

1:30 – 1:45 p.m. **FOIA OVERVIEW**

An introduction to the Freedom of Information Act (“FOIA”), including the congressional purpose behind the promulgation of the statute.

1:45 p.m. – 2:00 p.m. **The “Law” of FOIA**

FOIA law. General legal parameters of FOIA: what materials can a requester seek from a federal agency under the statute, which federal agencies are exempt from the statute, which materials are exempt from disclosure under the statute, what information must a FOIA request include, what timelines are agencies required to meet, what administrative and litigative processes are available to dissatisfied requesters?

The Freedom of Information Act



DENNIS BARGHAAN
DEPUTY CIVIL CHIEF
EASTERN DISTRICT OF VIRGINIA

FOIA

What FOIA Was Supposed to Do:



THE LAW OF *FOIA*



THE LAW OF *FOIA*

5 U.S.C. § 552

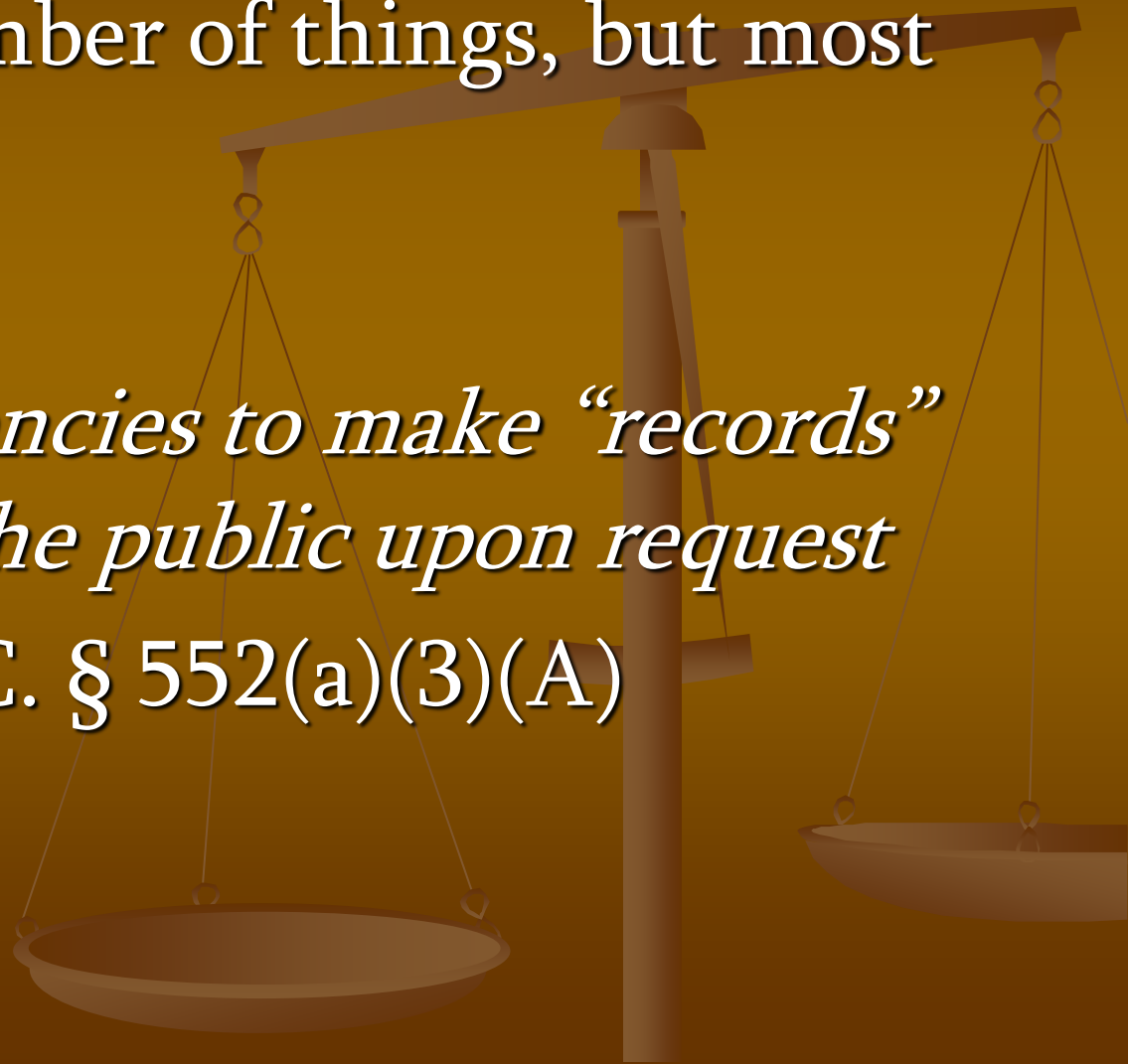


THE LAW OF *FOIA*

FOIA does a number of things, but most importantly . . .

*It requires agencies to make “records”
available to the public upon request*

5 U.S.C. § 552(a)(3)(A)

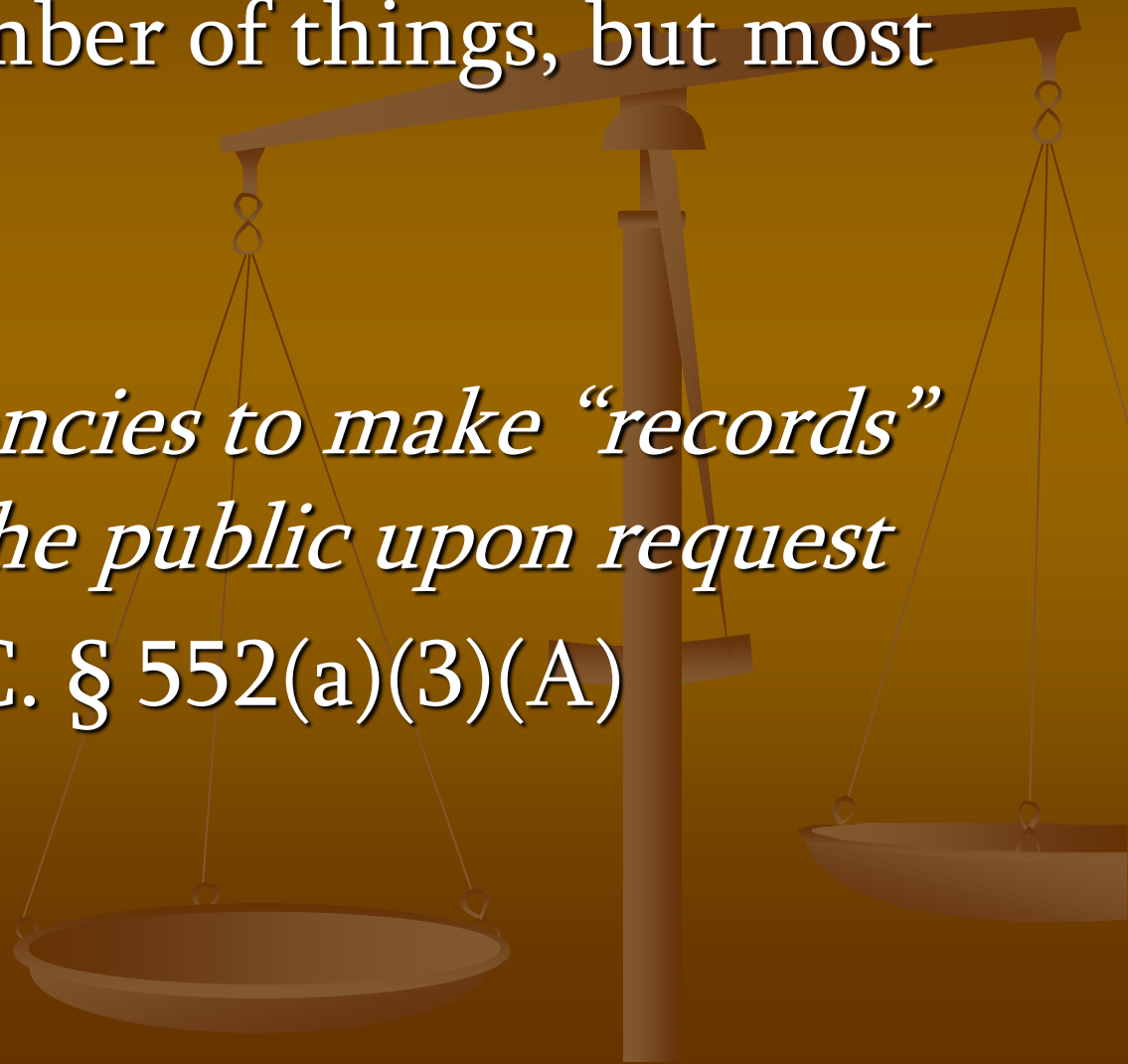


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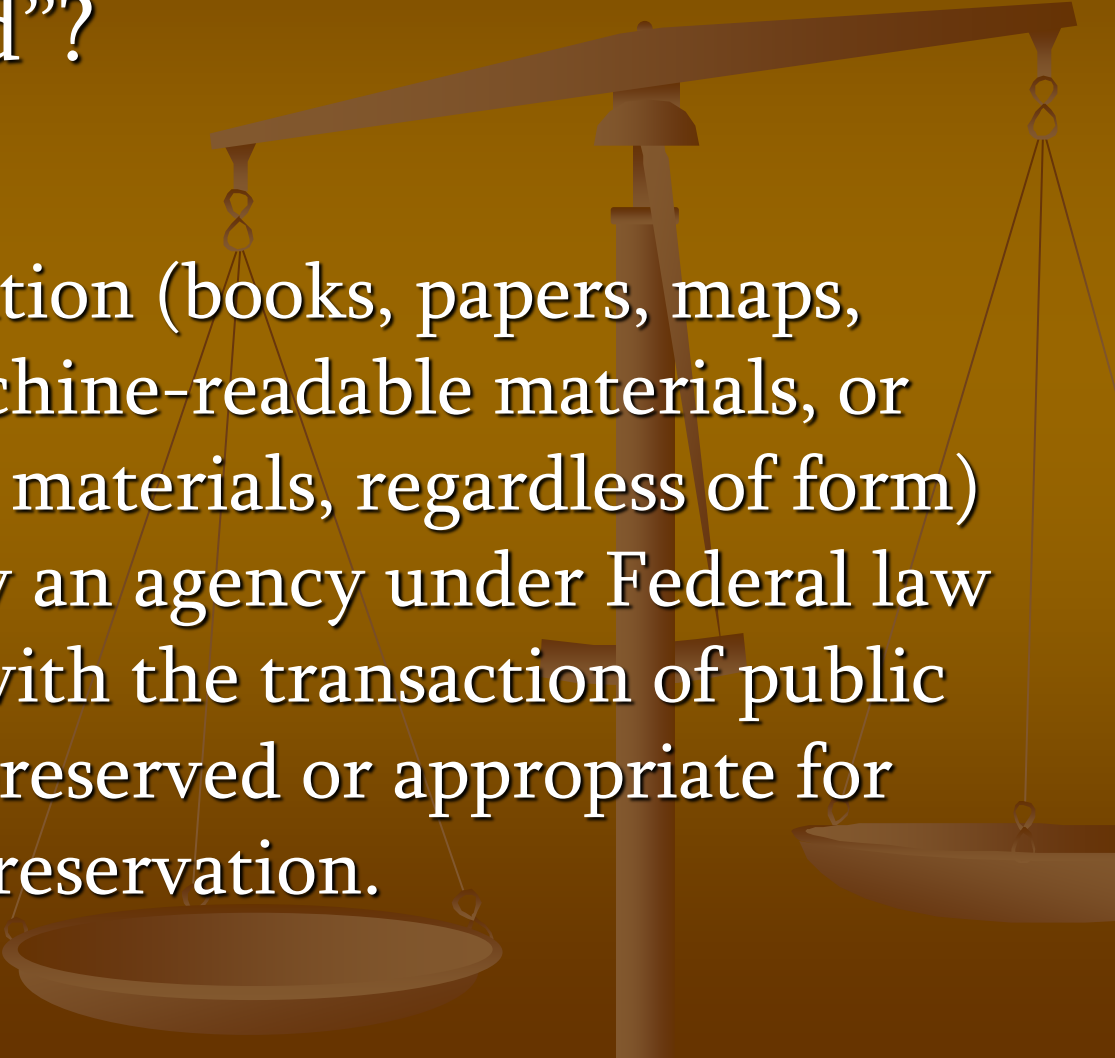
5 U.S.C. § 552(a)(3)(A)



THE LAW OF *FOIA*

What is a “record”?

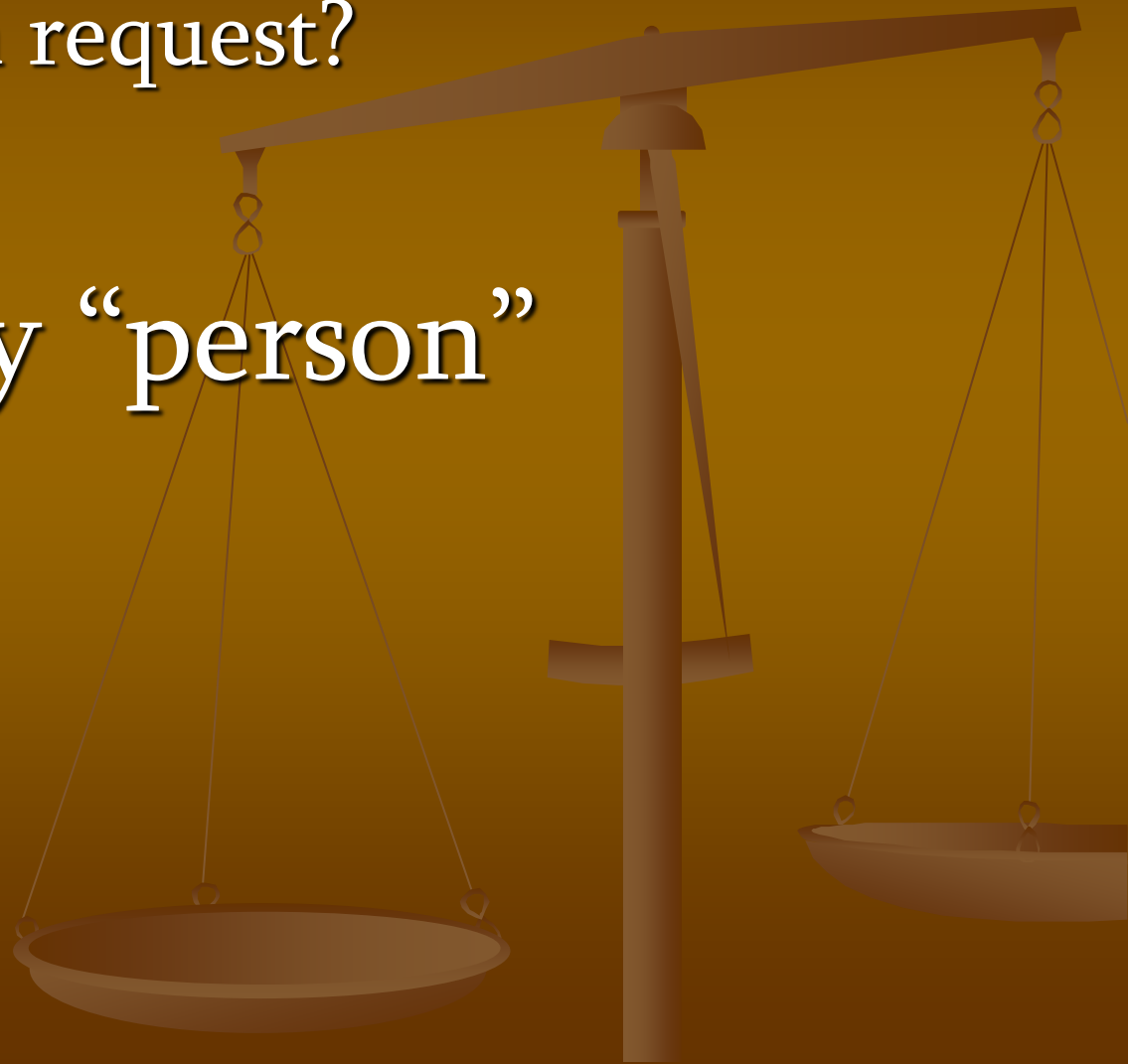
Any documentation (books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of form) made or received by an agency under Federal law or in connection with the transaction of public business that is preserved or appropriate for preservation.



THE LAW OF *FOIA*

Who can make a request?

Any “person”

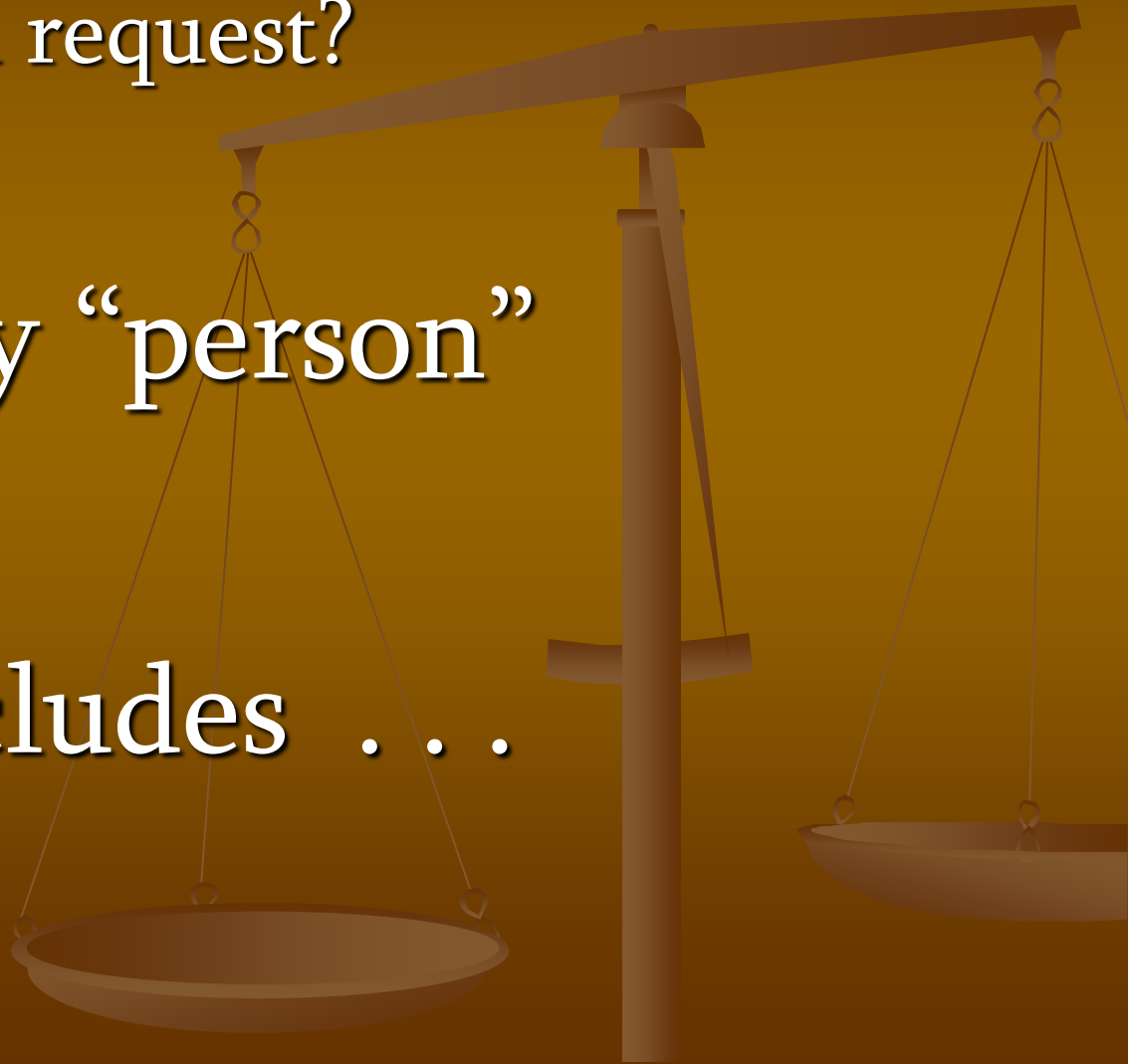


THE LAW OF *FOIA*

Who can make a request?

Any “person”

Includes . . .



THE LAW OF *FOIA*

Who can make a request?

Individuals . . .



THE LAW OF *FOIA*

Who can make a request?

Corporations . . .



**DUNDER
MIFFLIN,^{INC.}**
PAPER COMPANY

THE LAW OF *FOIA*

Who can make a request?

Law firms on behalf of
anonymous individuals or
entities . . .



THE LAW OF *FOIA*

Does a requester have to explain the specific reason *why* they want the documents?

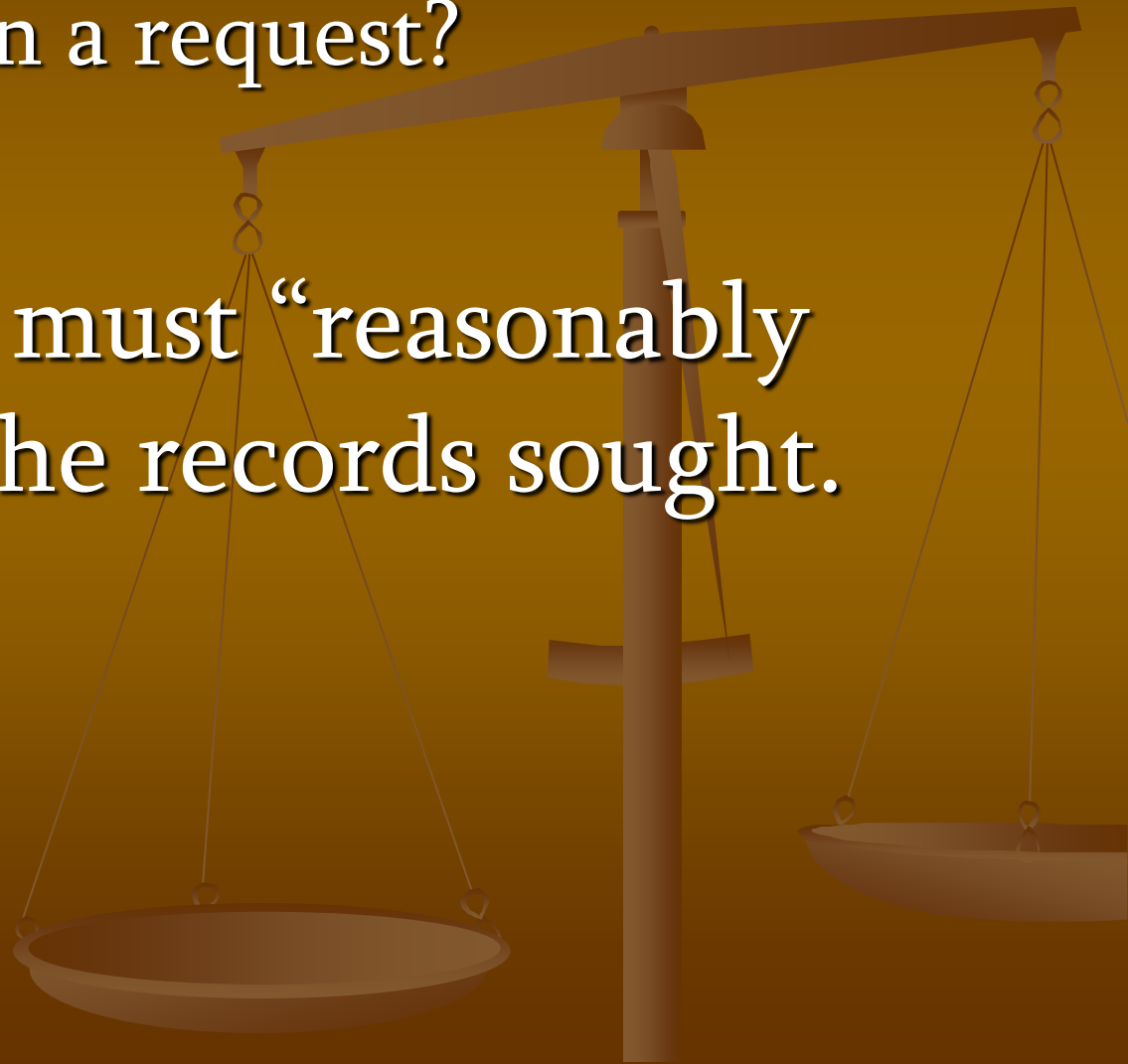
NO!!!!



THE LAW OF *FOIA*

What has to be in a request?

A request must “reasonably describe” the records sought.



THE LAW OF *FOIA*

What has to be in a request?

Agency employees do not become a requester's own personal investigators to find documents.



THE LAW OF *FOIA*

What has to be in a request?

Held *un*reasonable:

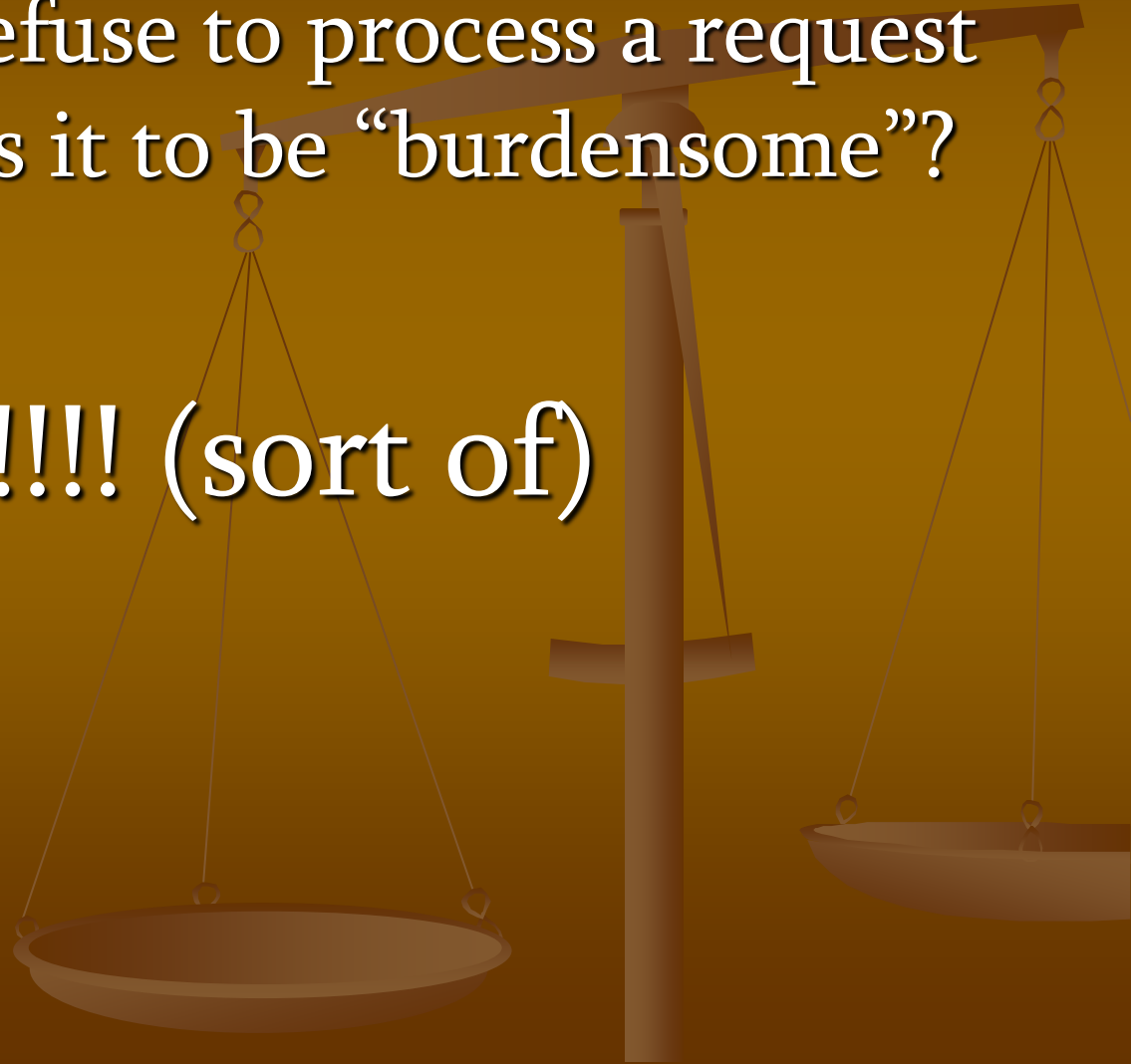
“Documents sufficient to learn the identify of the agency that is reading my mind”

Goldgar v. Office of Admin., 26 F.3d 32 (5th Cir. 1994)

THE LAW OF *FOIA*

Can an agency refuse to process a request simply it believes it to be “burdensome”?

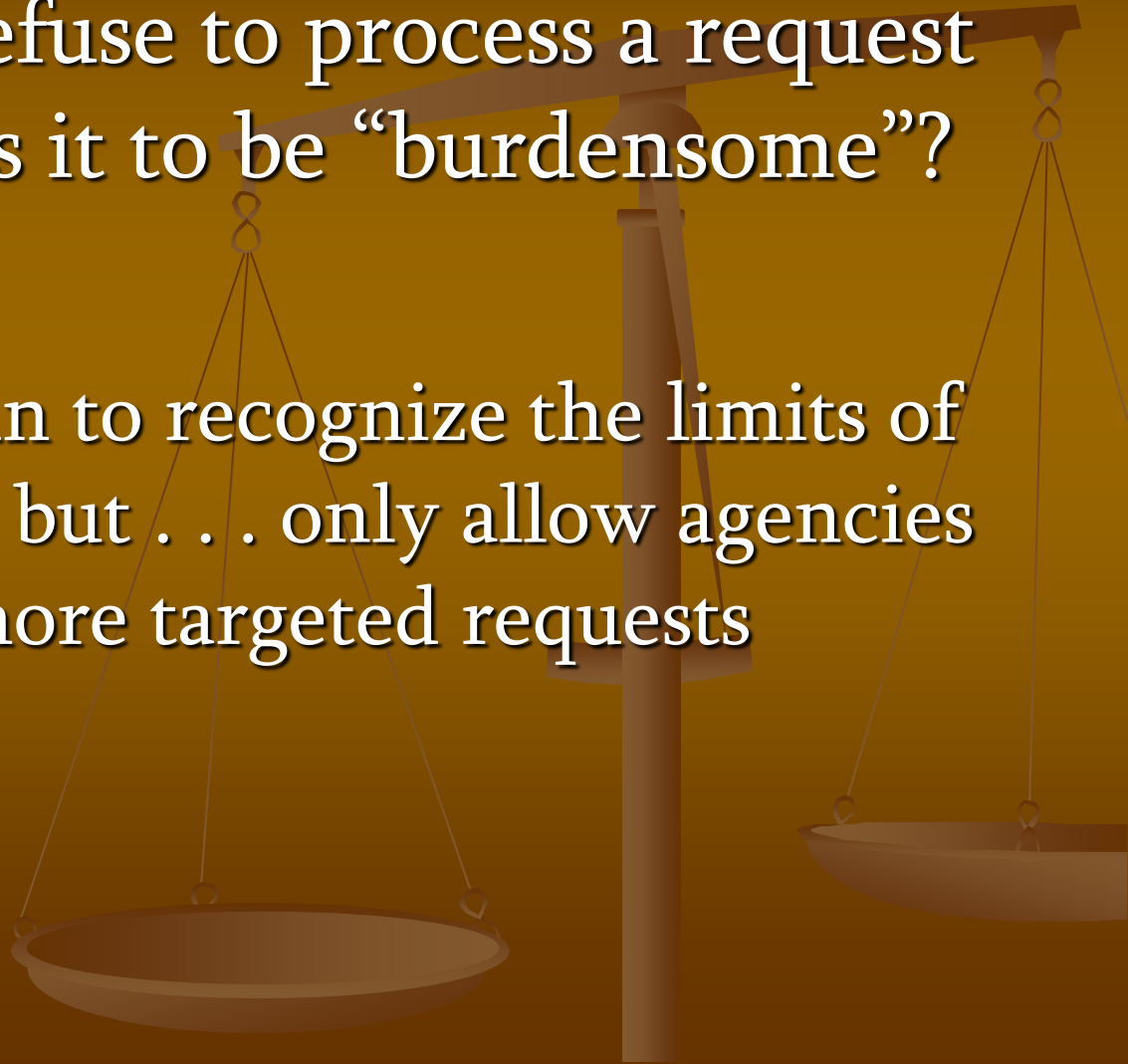
NO!!!!!! (sort of)



THE LAW OF *FOIA*

Can an agency refuse to process a request simply it believes it to be “burdensome”?

Courts have begun to recognize the limits of agency resources, but . . . only allow agencies to ask for more targeted requests



THE LAW OF *FOIA*

How long does an agency have to respond to a request?

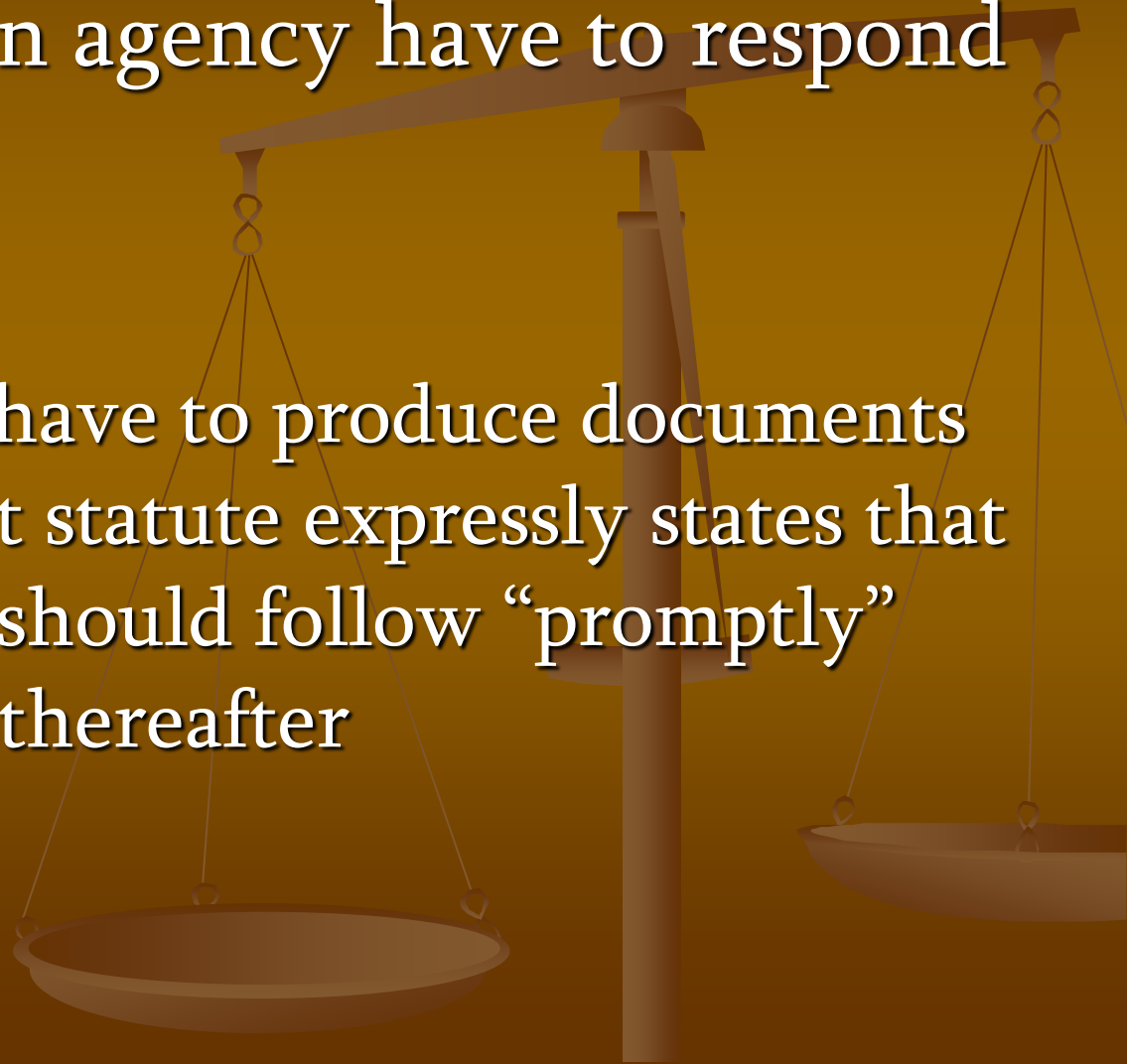
20 days!!!



THE LAW OF *FOIA*

How long does an agency have to respond to a request?

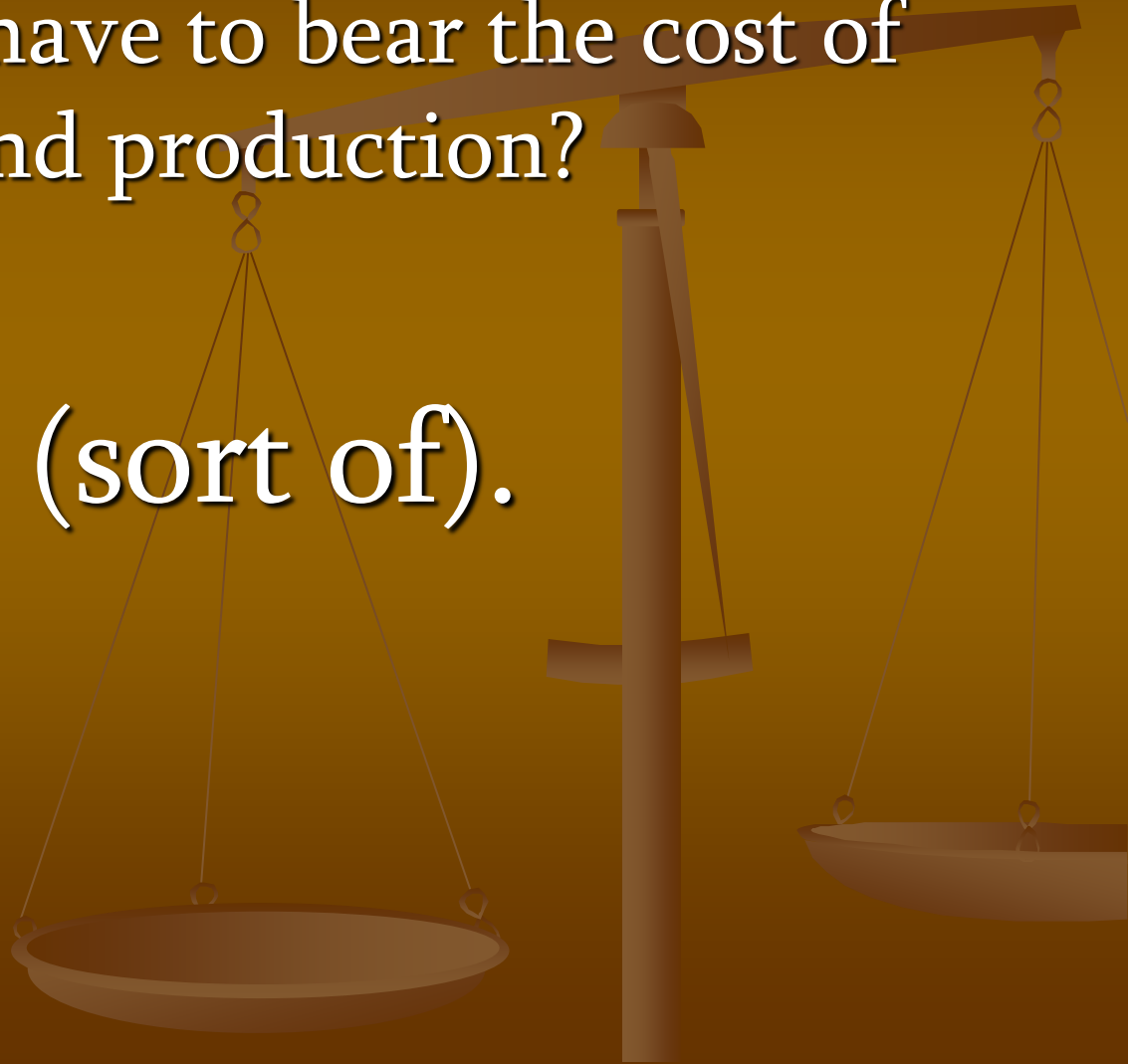
Agency does not have to produce documents within 20 days, but statute expressly states that the documents should follow “promptly” thereafter



THE LAW OF *FOIA*

Does an agency have to bear the cost of FOIA searches and production?

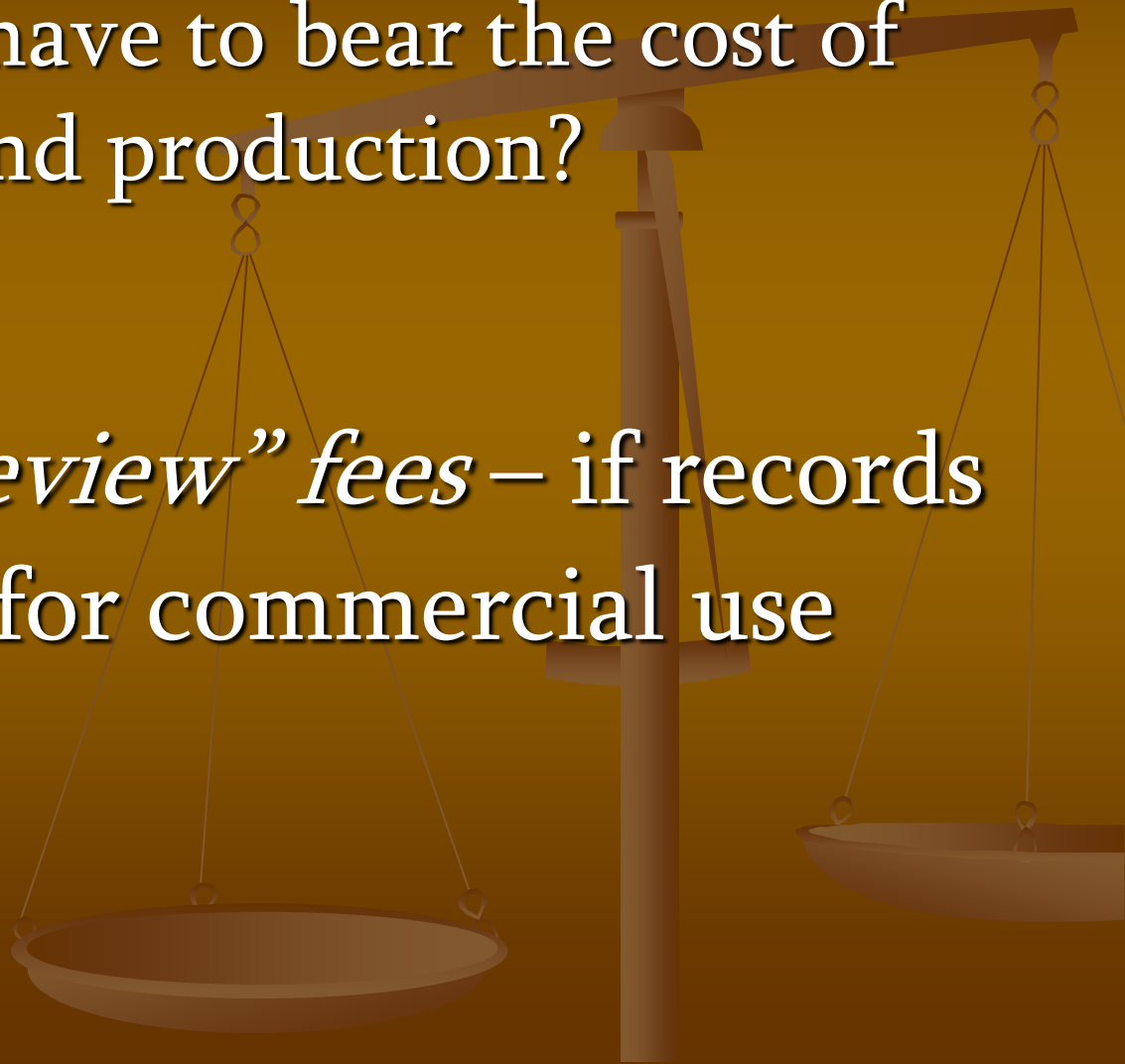
No (sort of).



THE LAW OF *FOIA*

Does an agency have to bear the cost of FOIA searches and production?

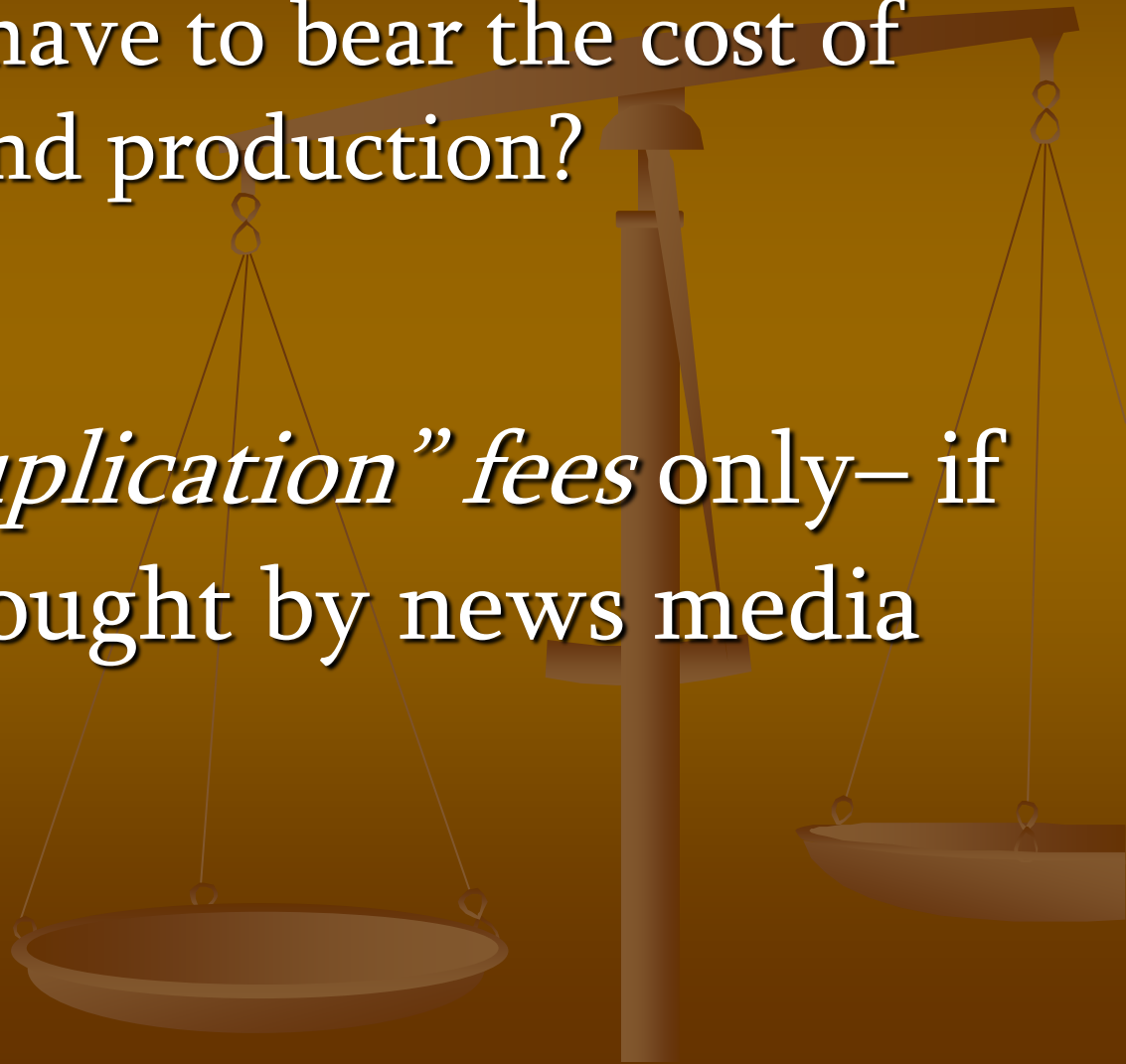
“Search and review” fees – if records are sought for commercial use



THE LAW OF *FOIA*

Does an agency have to bear the cost of FOIA searches and production?

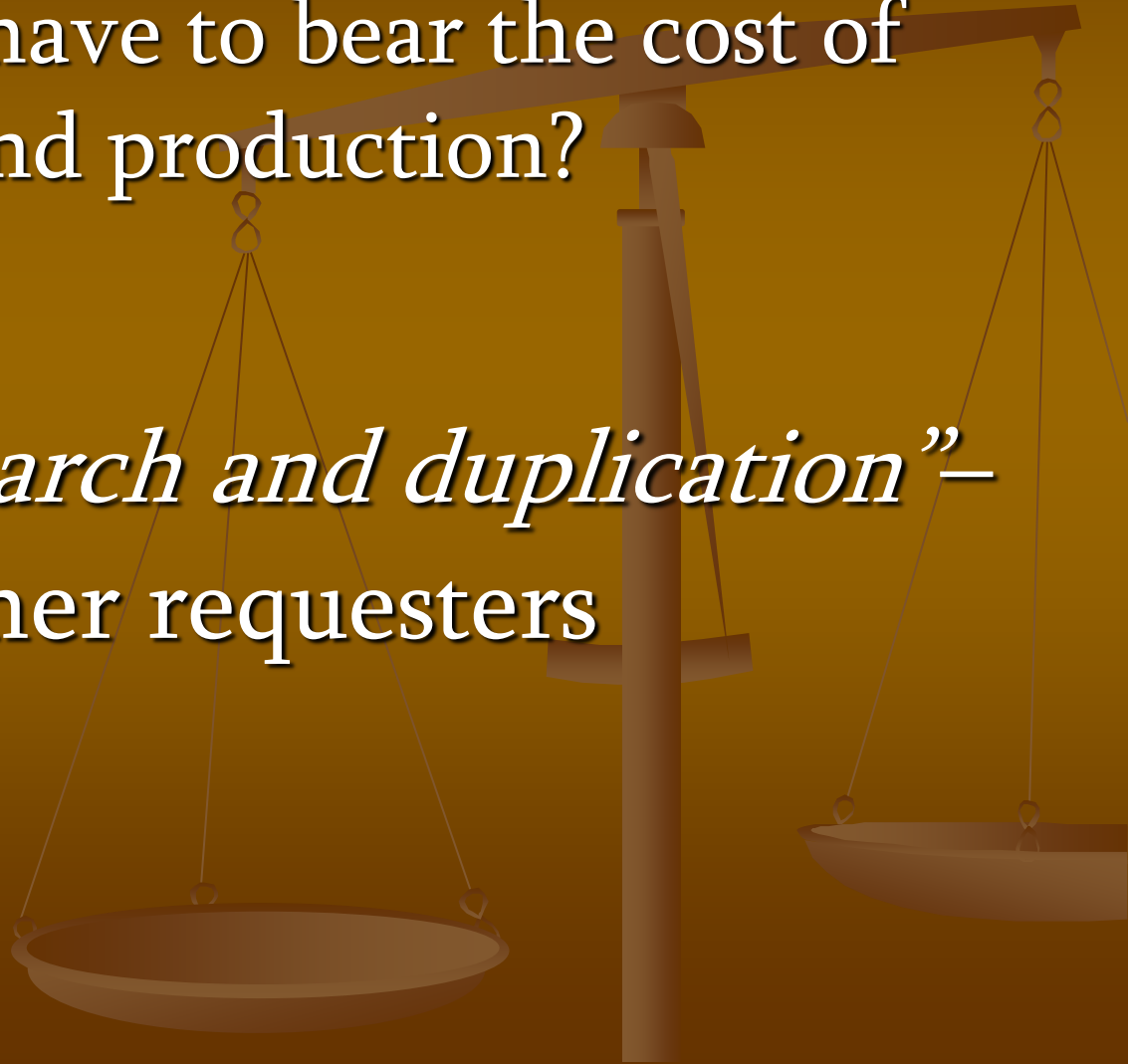
“Document duplication” fees only– if records are sought by news media



THE LAW OF *FOIA*

Does an agency have to bear the cost of FOIA searches and production?

“Document search and duplication”—
all other requesters



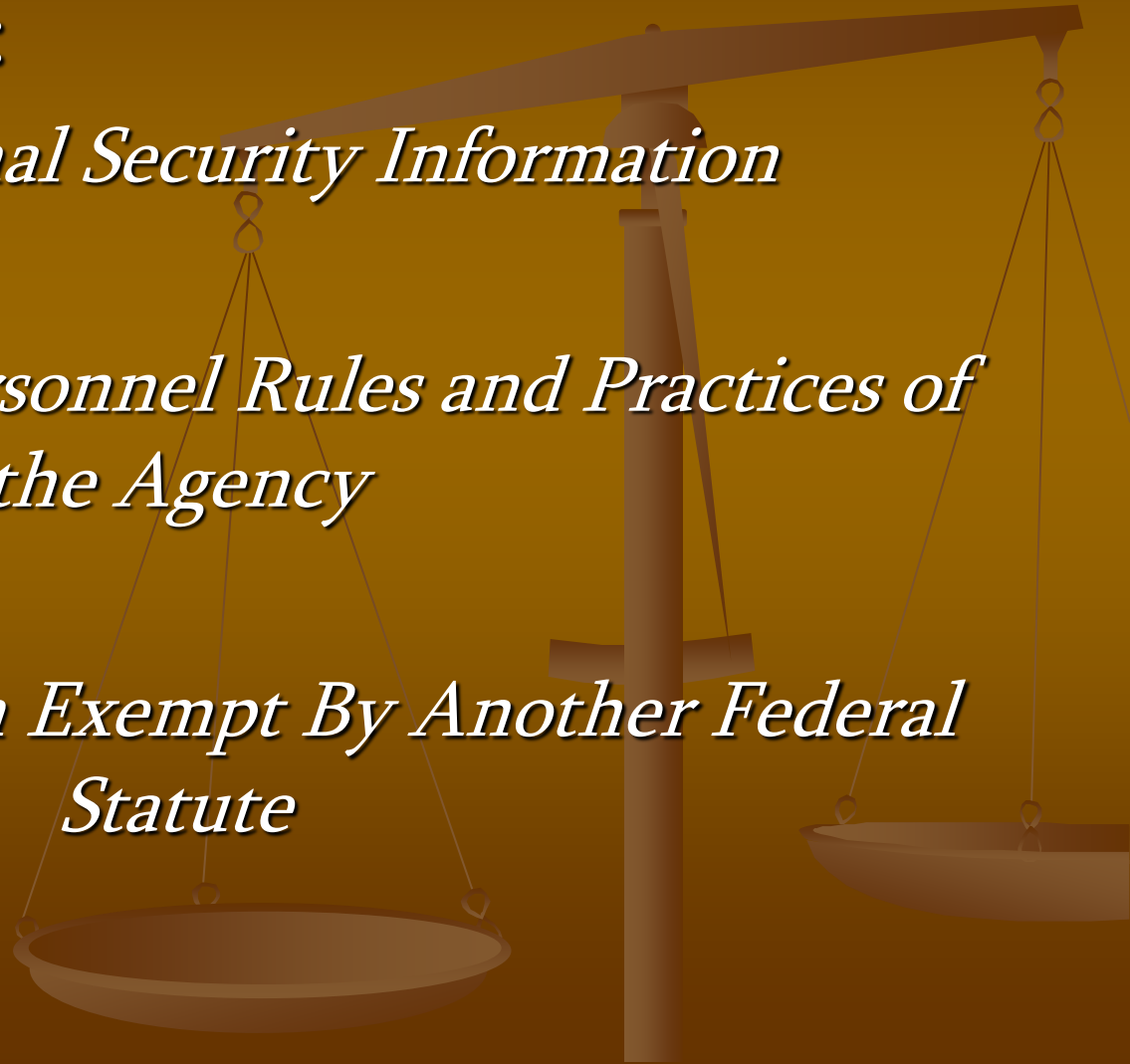
THE LAW OF *FOIA*

The Exemptions:

(b)(1) National Security Information

*(b)(2) Internal Personnel Rules and Practices of
the Agency*

*(b)(3) Information Exempt By Another Federal
Statute*



THE LAW OF *FOIA*

The Exemptions:

(b)(4) Trade Secrets

*(b)(5) Deliberative Process Privilege, Attorney
Work Product, Attorney-Client Privilege*

*(b)(6) Personal or Medical Files (SSNs, home
address)*



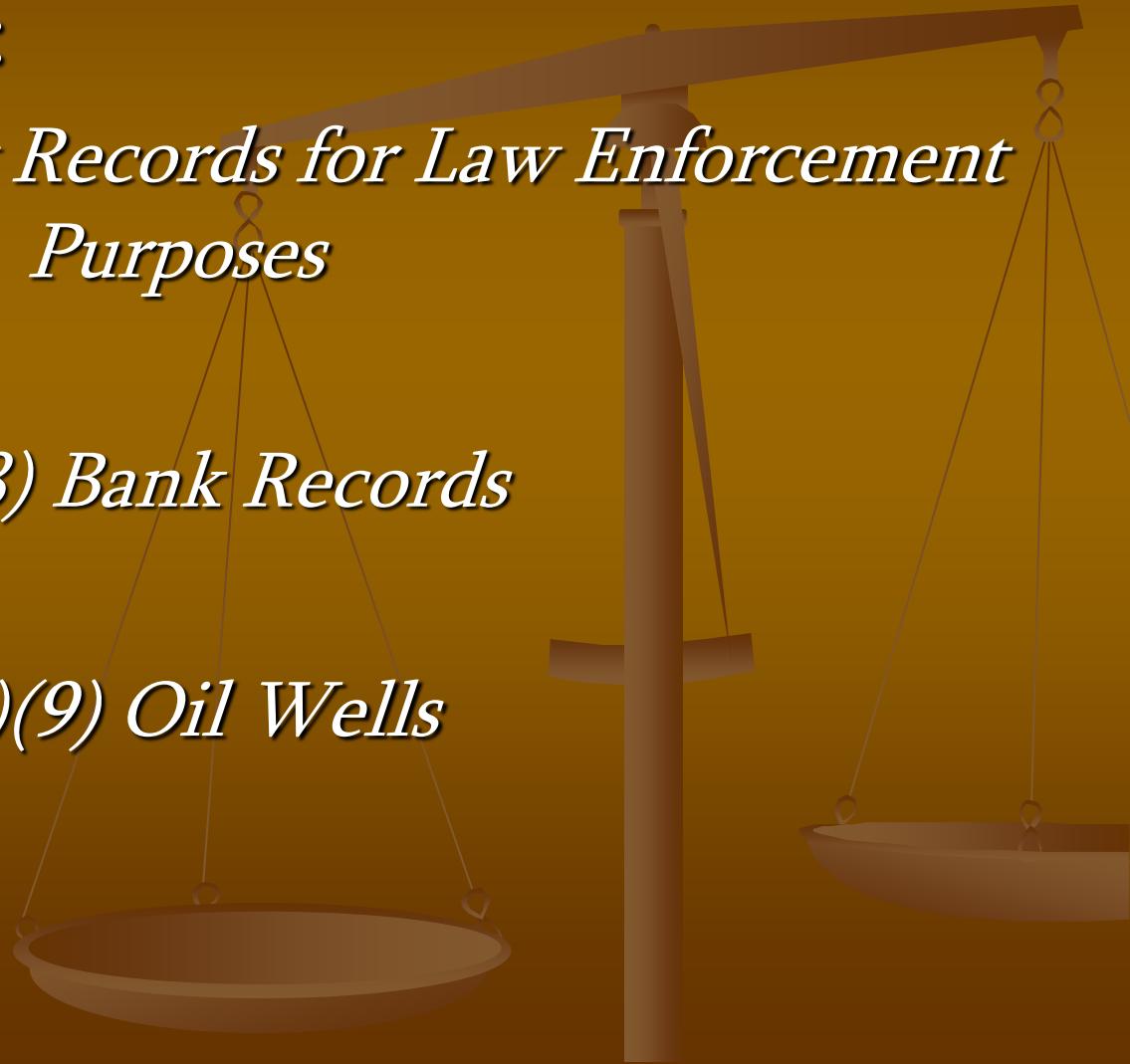
THE LAW OF *FOIA*

The Exemptions:

(b)(7) Investigatory Records for Law Enforcement Purposes

(b)(8) Bank Records

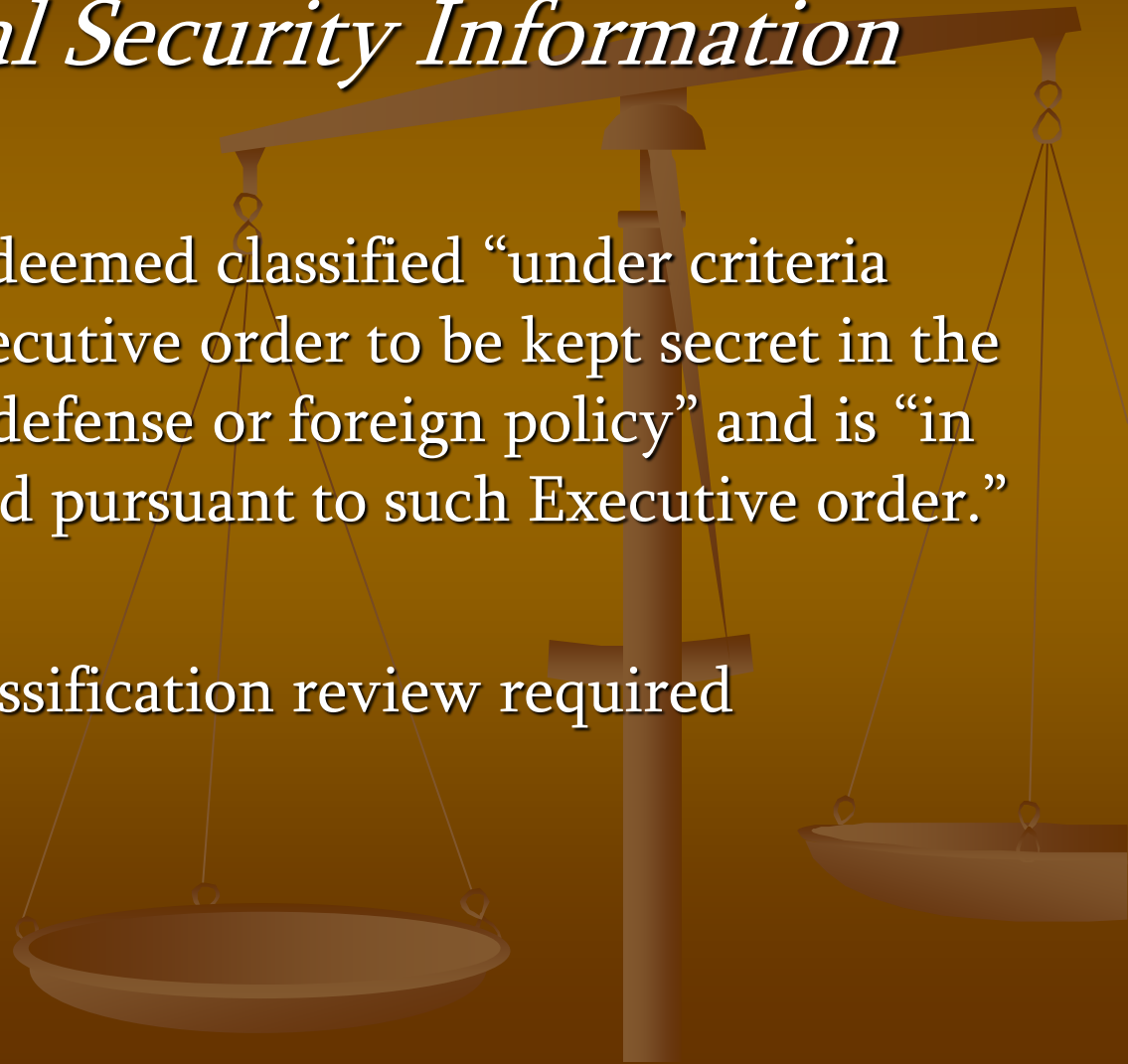
(b)(9) Oil Wells



THE LAW OF *FOIA*

(b)(1) National Security Information

- Covers material deemed classified “under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” and is “in fact properly classified pursuant to such Executive order.”
- No new classification review required



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(b)(3) Information Exempt By Another Federal Statute

- Covers records prohibited from release by other statutes
 - 1) Grand Jury Materials (FRCrP 6(e))
 - 2) 18 U.S.C. § 2517 (prohibits disclosure of materials obtained through use of electronic surveillance, except in limited circumstances).

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(b)(3) Information Exempt By Another Federal Statute

Mark files as containing Rule
6(e) materials



THE LAW OF *FOIA*

(b)(3) Information Exempt By Another Federal Statute

“Grand Jury Material” or “FRCrP 6(e) Material”

“Prohibited From Disclosure Pursuant to 18
U.S.C. § 2517”

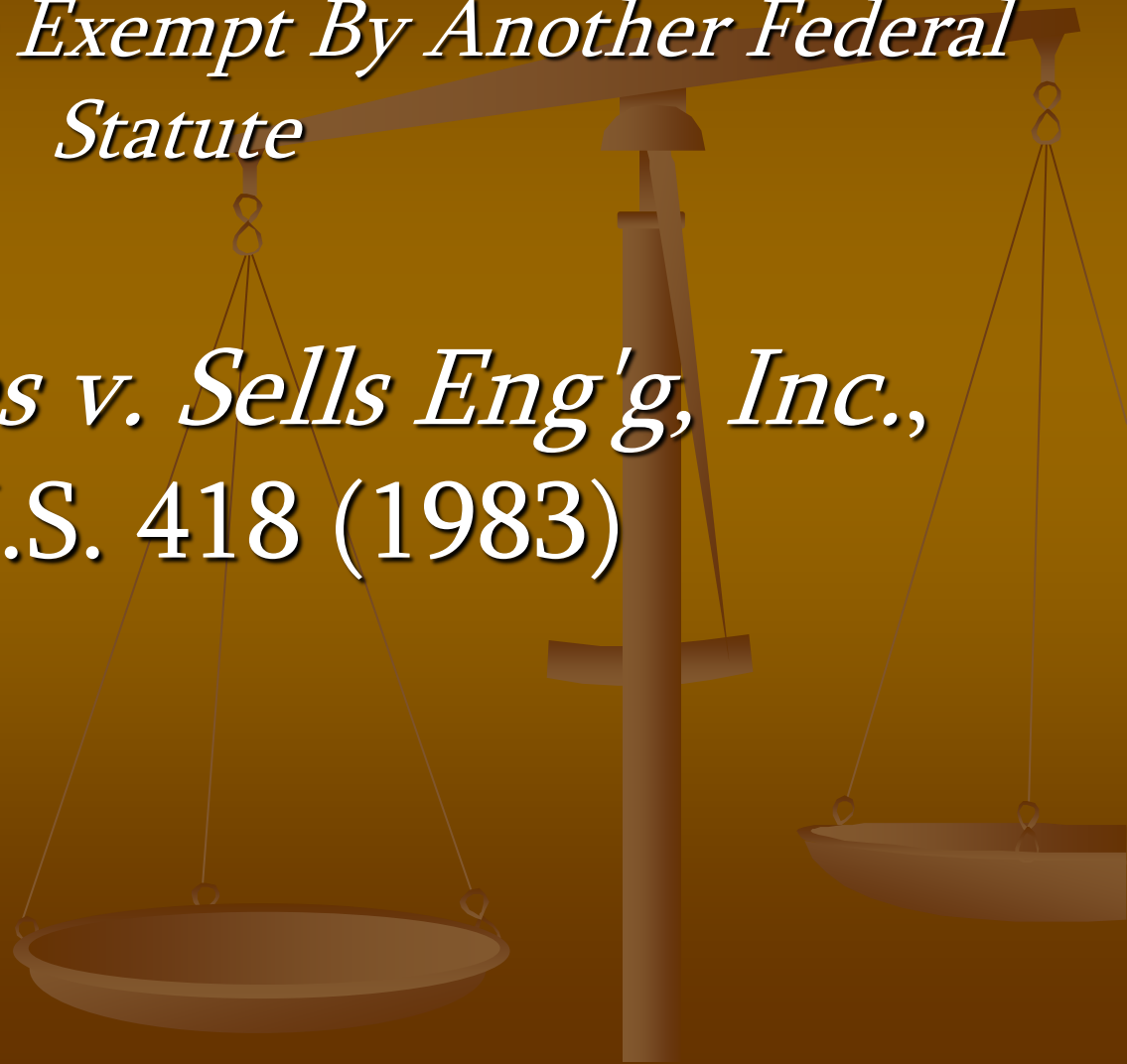
Closed Cases: Should be in sealed envelopes and the following statement should be over the seal:

“Grand Jury Information. Access is limited to assigned AUSAs and their supervisors only.”

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(b)(3) Information Exempt By Another Federal Statute

United States v. Sells Eng'g, Inc.,
463 U.S. 418 (1983)



THE LAW OF *FOIA*

(b)(5) Deliberative Process Privilege, Attorney Work Product, Attorney-Client Privilege

- Intended to cover the traditional privileges that you would invoke in litigation:
 - (1) Deliberative Process Privilege
 - (2) Attorney Work Product
 - (3) Attorney-Client Privilege

THE LAW OF *FOIA*

(b)(5) Deliberative Process Privilege, Attorney Work Product, Attorney-Client Privilege

- Deliberative Process Privilege:
 - Protects candid exchange of ideas leading to decision.
 - Two requirements: (1) Communication must be “pre-decisional” (i.e., antecedent to adoption of agency policy); (2) Communication must direct part of decisional process, in that it makes recommendations or expresses opinions on legal or policy matters.

THE LAW OF *FOIA*

(b)(5) Deliberative Process Privilege, Attorney Work Product, Attorney-Client Privilege

- Deliberative Process Privilege (examples):

- Recommendations
- Briefing Materials
- Drafts



THE LAW OF *FOIA*

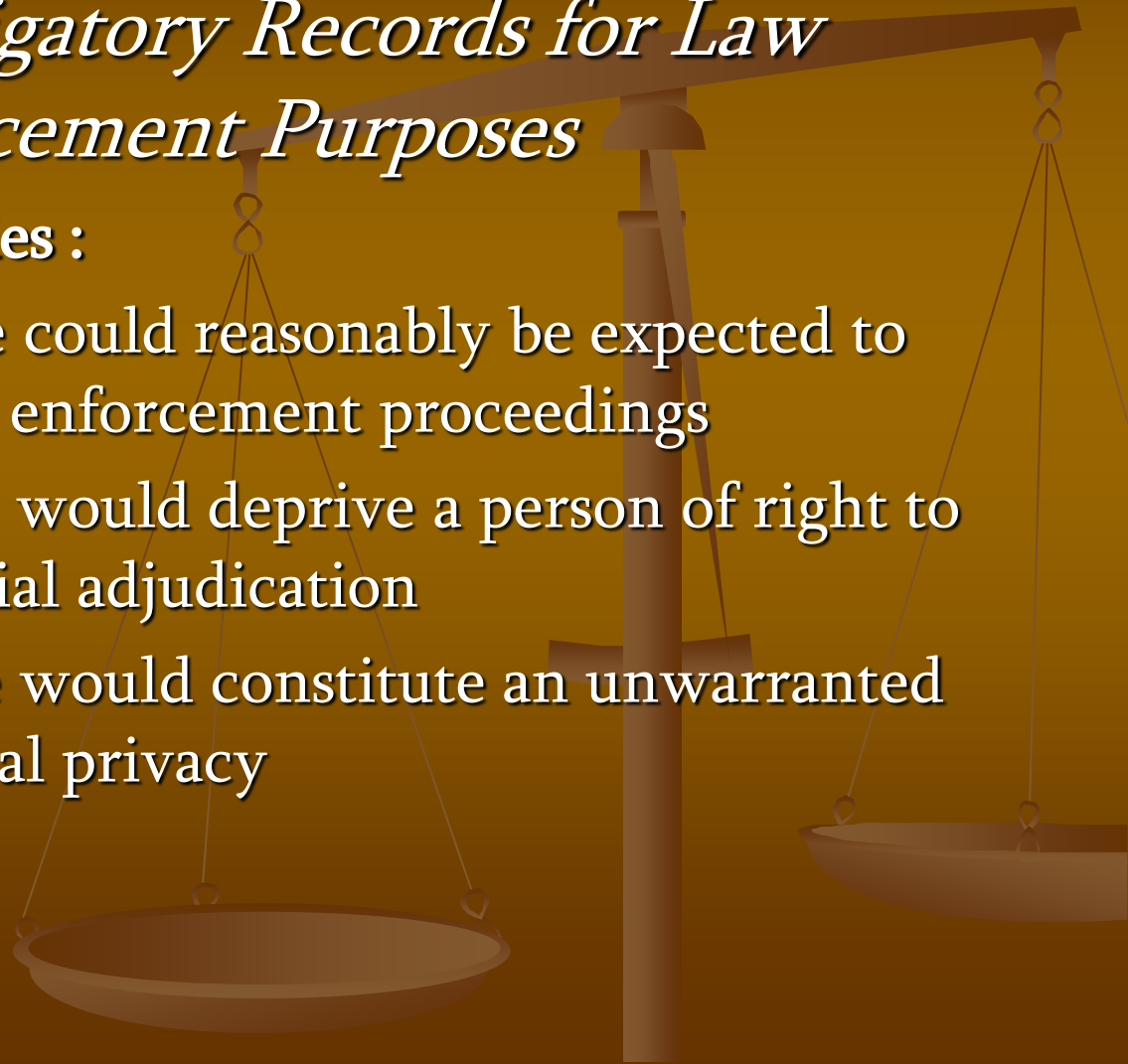
(b)(5) Deliberative Process Privilege, Attorney Work Product, Attorney-Client Privilege

- Deliberative Process Privilege (markings):
 - “Draft”
 - “Pre-Decisional”
 - Date of Document (can indicate created before date of final decision)
 - Author of Document (if not final decisionmaker can indicate pre-decisional)

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(b)(7) Investigatory Records for Law Enforcement Purposes

- Six Different Categories :
 - (b)(7)(A) – Release could reasonably be expected to interfere with law enforcement proceedings
 - (b)(7)(B) – Release would deprive a person of right to fair trial or impartial adjudication
 - (b)(7)(C) – Release would constitute an unwarranted invasion of personal privacy



THE LAW OF *FOIA*

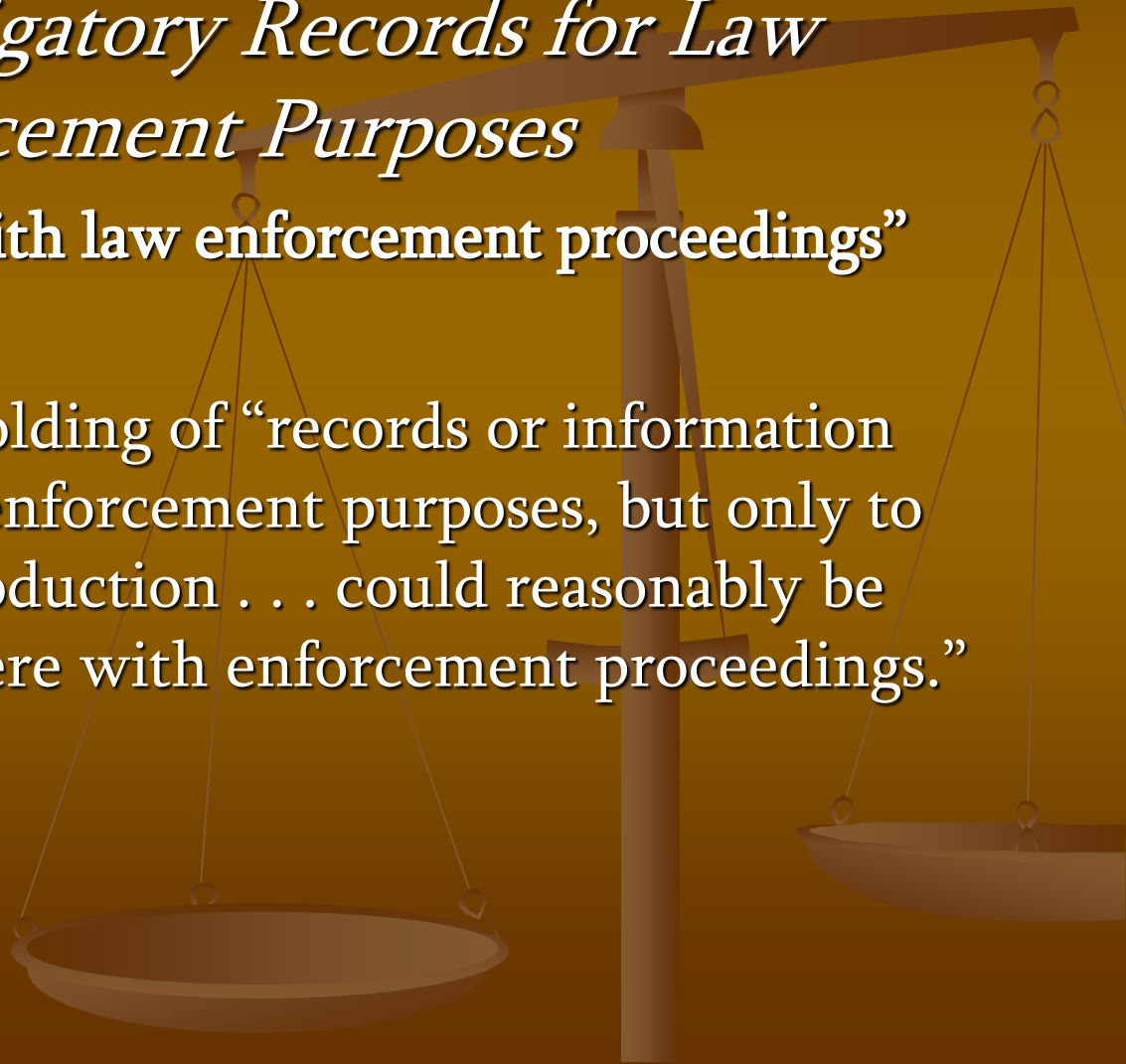
(b)(7) Investigatory Records for Law Enforcement Purposes

- Six Different Categories :
 - (b)(7)(D) – Records contain confidential source information
 - (b)(7)(E) – Release would expose law enforcement techniques or procedures
 - (b)(7)(F) – Release could reasonably be expected to endanger life or safety of an individual

THE LAW OF *FOIA*

(b)(7) Investigatory Records for Law Enforcement Purposes

- (b)(7)(A) “interfere with law enforcement proceedings”
 - Authorizes withholding of “records or information compiled for law enforcement purposes, but only to the extent that production . . . could reasonably be expected to interfere with enforcement proceedings.”



THE LAW OF *FOIA*

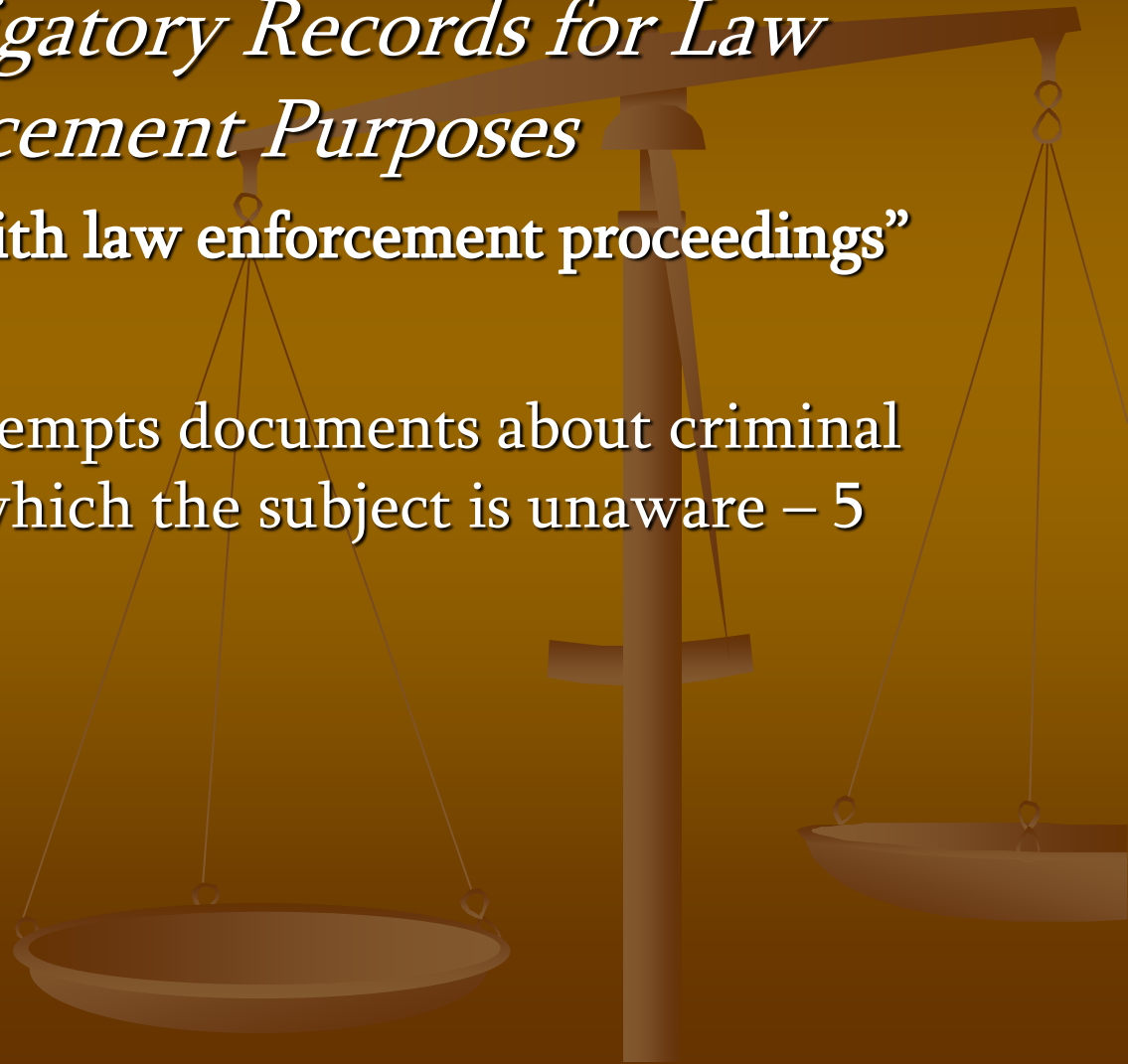
(b)(7) Investigatory Records for Law Enforcement Purposes

- (b)(7)(A) “interfere with law enforcement proceedings”
 - Two-Part Test: (1) whether law enforcement proceeding is pending or prospective; and (2) whether release could reasonably be expected to cause some articulable harm.
 - EOUSA *very* careful about this exemption, and tempting the courts – appeal unlikely to be considered “pending”

THE LAW OF *FOIA*

(b)(7) Investigatory Records for Law Enforcement Purposes

- (b)(7)(A) “interfere with law enforcement proceedings”
 - FOIA *expressly* exempts documents about criminal investigations of which the subject is unaware – 5 U.S.C. § 552(c)(1)



THE LAW OF *FOIA*

(b)(7) Investigatory Records for Law Enforcement Purposes

- (b)(7)(E) -- Release would expose law enforcement techniques or procedures
- Authorizes withholding of information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”

THE LAW OF *FOIA*

(b)(7) Investigatory Records for Law Enforcement Purposes

- (b)(7)(E) -- Release would expose law enforcement techniques or procedures (examples):
 - (1) guidelines that pertain to the prosecution or investigative stage of a law enforcement matter; (2) law enforcement manuals; (3) policy guidance documents; (4) settlement guidelines; (5) monographs; and (6) emergency plans.

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(b)(7) Investigatory Records for Law Enforcement Purposes

- (b)(7)(E) -- Release would expose law enforcement techniques or procedures (markings):
 - “For Official Use Only – Law Enforcement Sensitive”



THE LAW OF *FOIA*

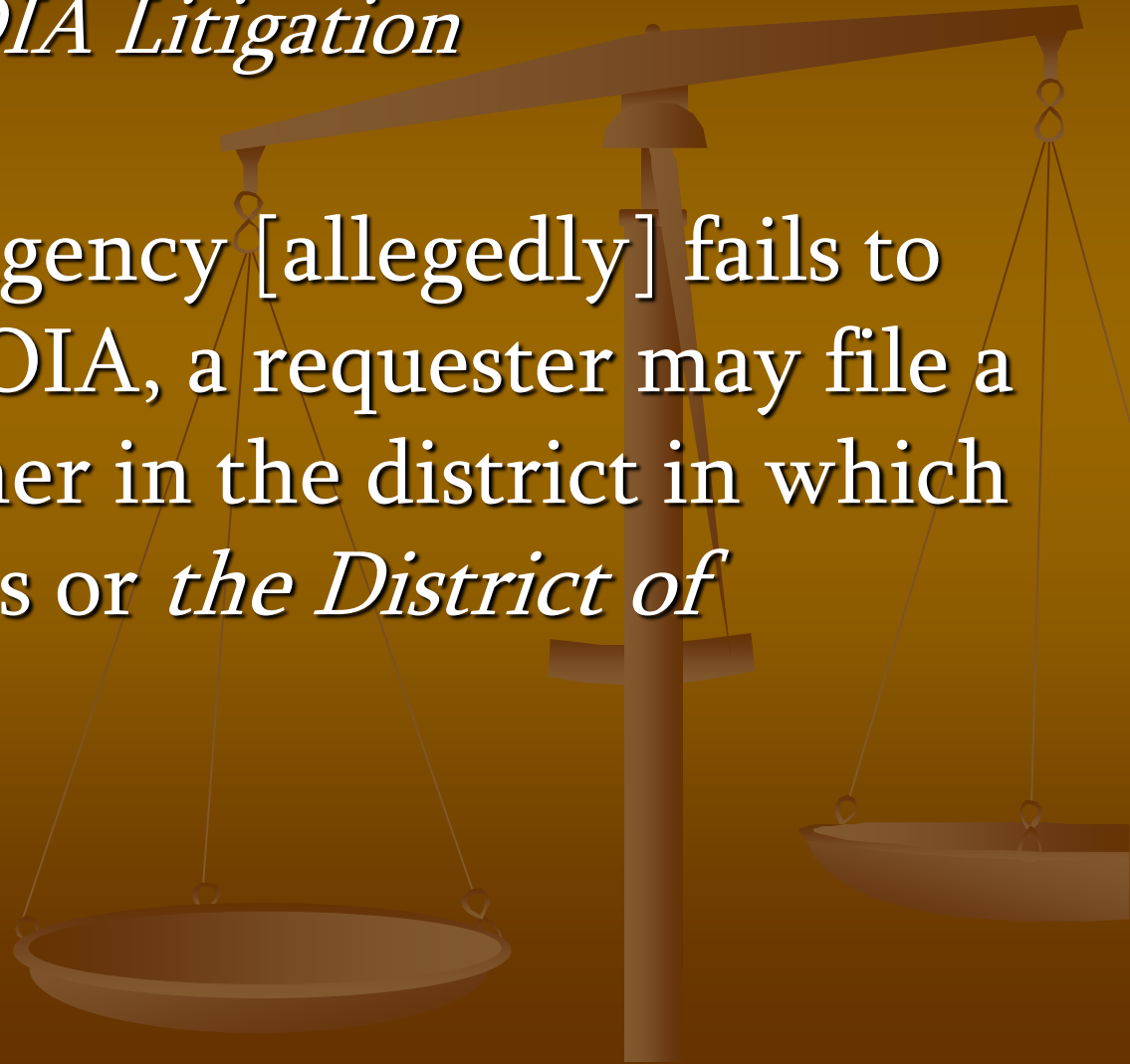
FOIA Litigation



THE LAW OF *FOIA*

FOIA Litigation

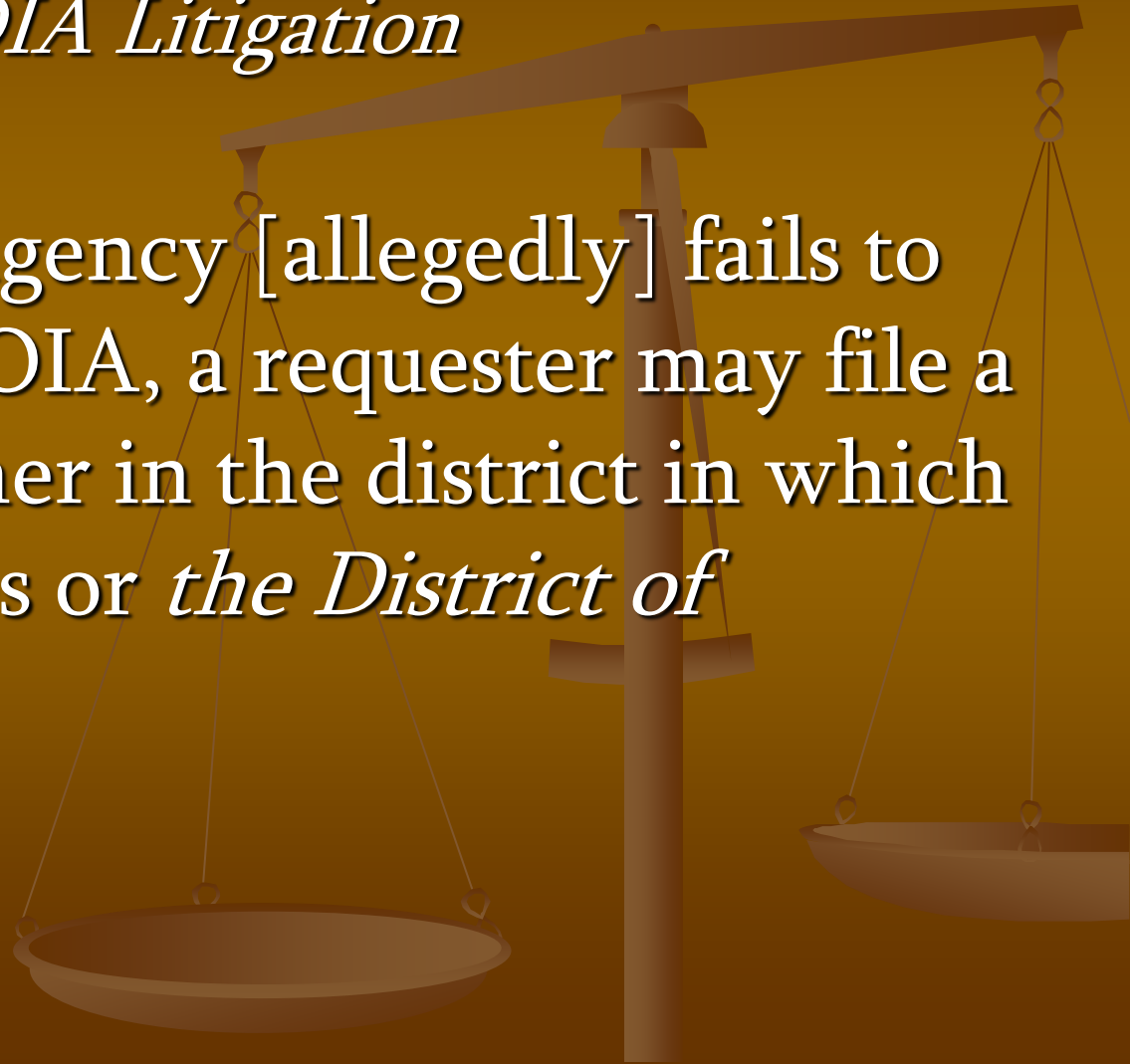
- Whenever an agency [allegedly] fails to comply with FOIA, a requester may file a civil action either in the district in which he/she/it resides or *the District of Columbia*.



THE LAW OF *FOIA*

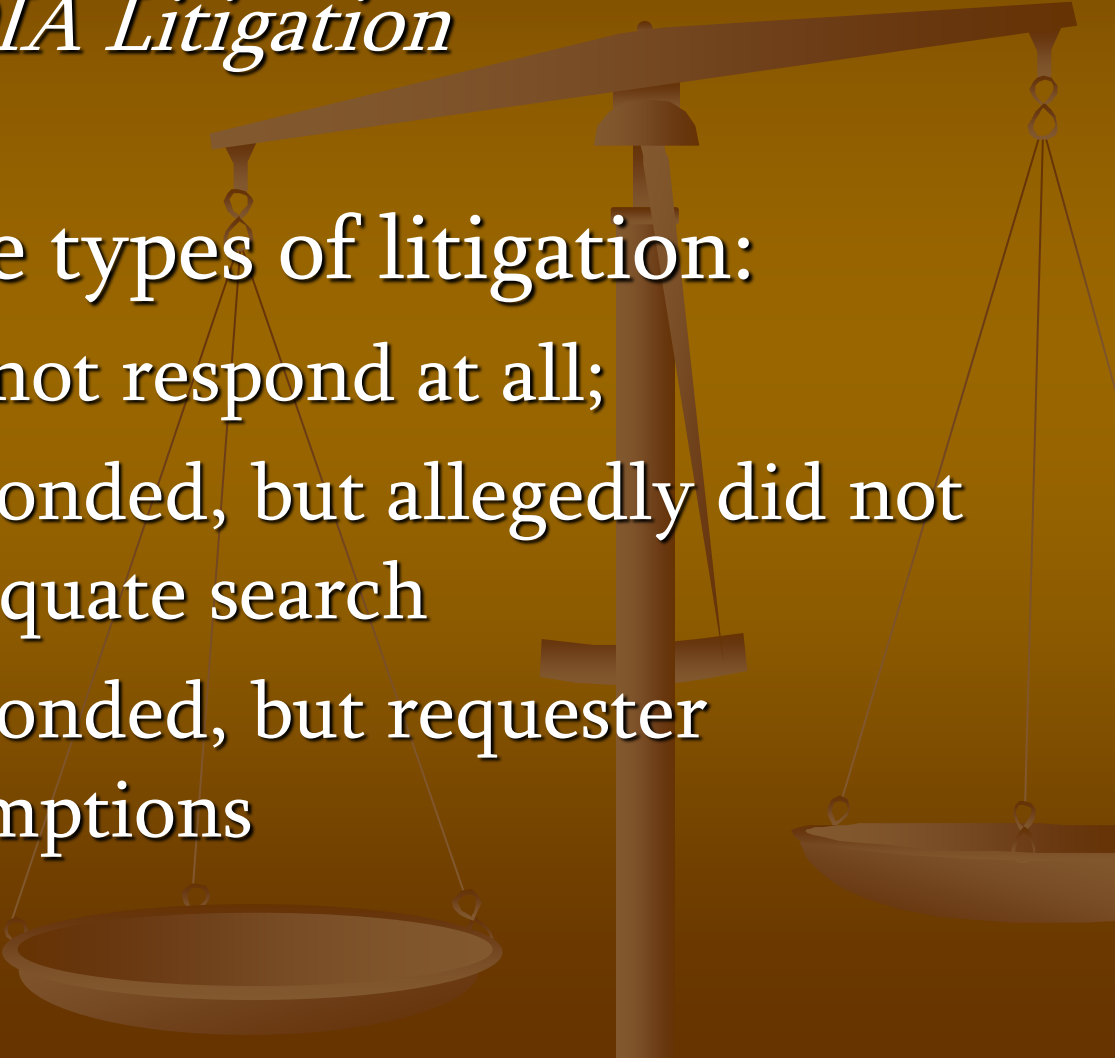
FOIA Litigation

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THE LAW OF *FOIA*

FOIA Litigation

- Generally, three types of litigation:
 - (1) agency did not respond at all;
 - (2) agency responded, but allegedly did not perform an adequate search
 - (3) agency responded, but requester challenges exemptions
- 

THE LAW OF *FOIA*

FOIA Litigation

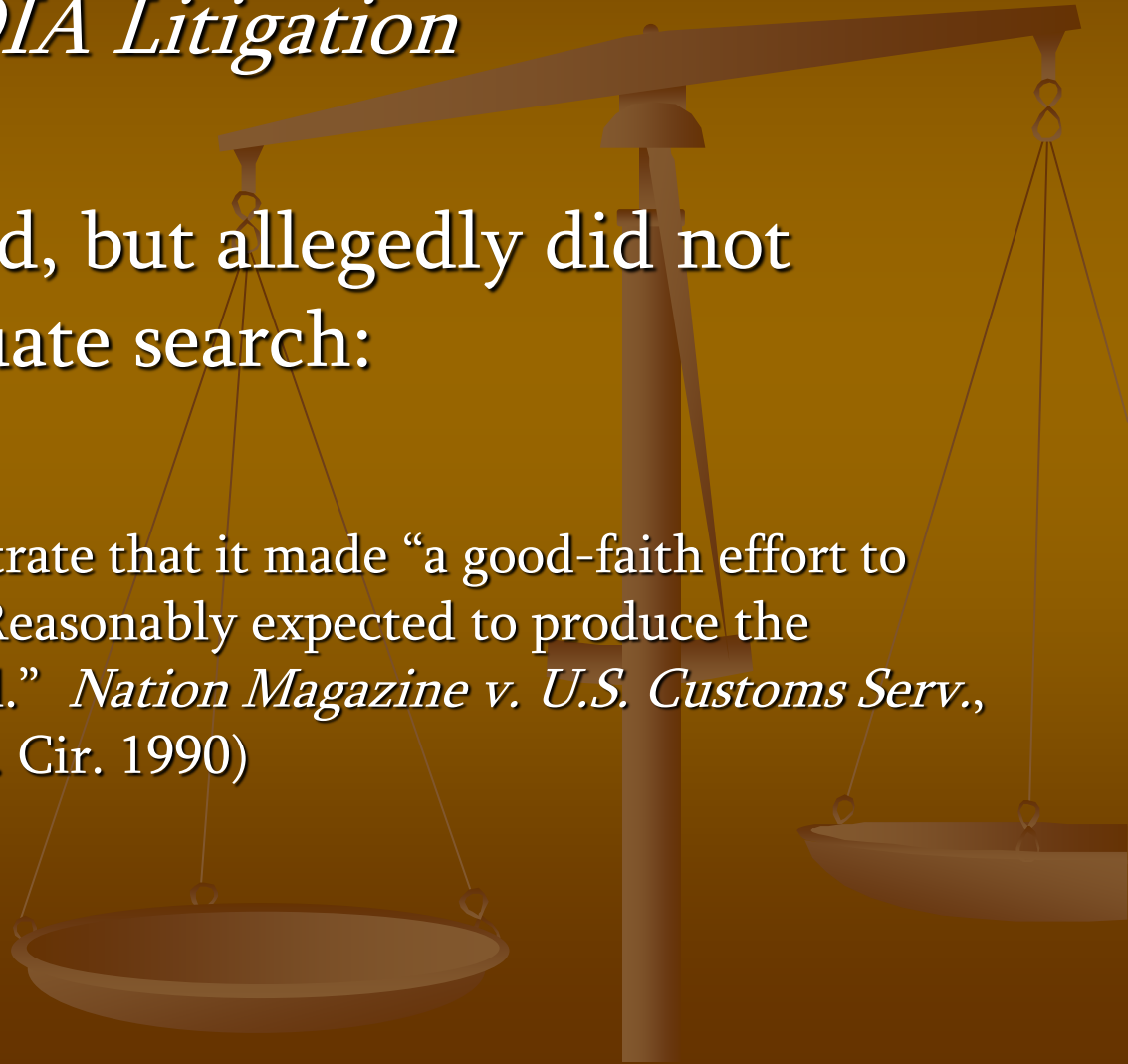
- Agency did not respond at all:
 - Usually, not much of a defense to these (*unless* . . . “*Open America*” affidavit)
 - USAO negotiates production schedule with the requester



THE LAW OF *FOIA*

FOIA Litigation

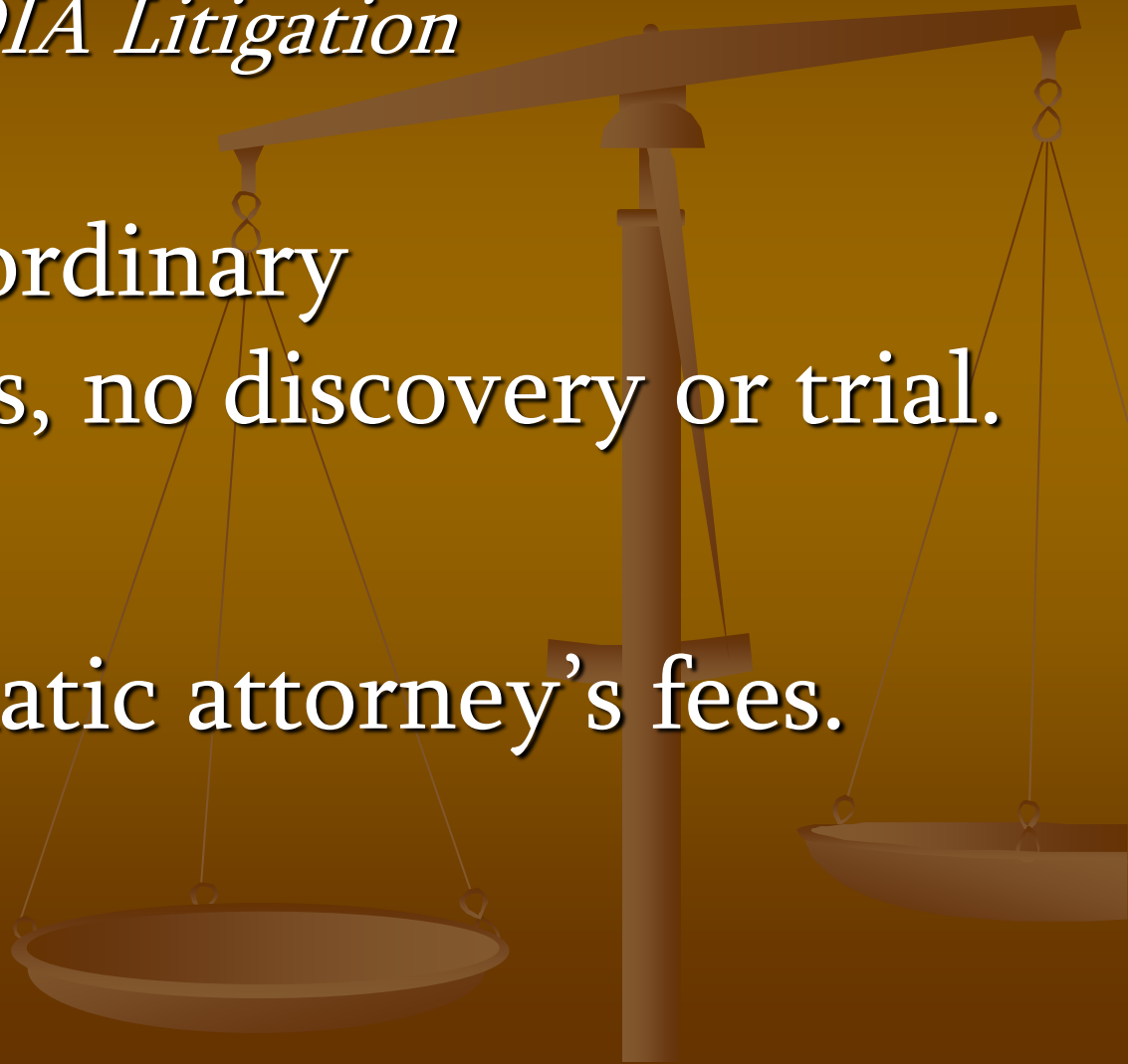
- Agency responded, but allegedly did not perform an adequate search:
 - Agency must demonstrate that it made “a good-faith effort to conduct a search . . . Reasonably expected to produce the information requested.” *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1990)



THE LAW OF *FOIA*

FOIA Litigation

- Absent extraordinary circumstances, no discovery or trial.
- But ... automatic attorney's fees.



THE LAW OF *FOIA*

FOIA Litigation

- *Price v. Dep't of Justice*, 855 F.3d 676 (D.C. Cir. 2017)
 - Rejects viability of plea agreement FOIA waiver because it “offends public policy”
 - “The government has not pointed us to any legitimate criminal justice interest served by including a waiver of FOIA rights in Price’s plea agreement.”