

AGENCY RECORD

I. Goland v. CIA, 607 F.2d 339 (D.C. Cir. 1978).

An agency's possession of a record does not automatically make the record an "agency record" subject to the Freedom of Information Act. The test is "whether under all the facts of the case, the document has passed from the control of [a non-FOIable entity] and become subject to the free disposition of the agency with which the document resides." pp. 346-347.

The court considered two main factors in analyzing whether an agency had control of a record:

- (1) the circumstances attending the document's generation; and
- (2) the conditions attached to its possession by the agency. p. 347

Where an agency is not free to dispose of the record at will, but hold the record, as it were, as a "trustee" for the non-FOIable entity, the record is less likely to be within the agency's control.

II. Marzen v. United States Dept. of Health & Human Services, 632 F. Supp. 785 (N.D. Ill. 1986).

FOIA empowers federal courts to order an agency to produce "agency records improperly withheld" from an individual requesting access. 5 U.S.C. § 552(a)(4)(B). p. 795.

FOIA does not define the phrase "agency records," and the legislative history does not provide meaningful assistance on what sort of materials Congress intended FOIA to encompass. p. 797

[C]ourts have generally focused on whether the record is in the 'possession, control, or custody' of the agency. p. 797.

[A]gency possession or control is prerequisite to triggering any duties under the FOIA.... p. 798.

The mere physical location of records does not convert them into agency records if they were not controlled, generated, or used by the agency for any purpose....

[N]either an agency's access to documents (that is, its unexercised power to obtain them) nor even the agency's physical custody of documents (not created by the agency) is enough in and of itself, to turn documents into agency records." p. 798.

The 'possession, control, or custody' test essentially relies upon how extensively the government uses the records. Although mere physical location at the agency is not enough to create an 'agency record,' only 'limited use' is sufficient. One time, 'transitory possession' is not enough, but use of the record in the performance of the agency's business is enough. The record must in fact be obtained by the agency; the opportunity to obtain it is not enough. p. 798, fn. 9.