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Exchange Program

Freedom of Information Act in the United States and in Portugal

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Public Administration

"When we talk about public administration, we have in mind a whole set of collective needs whose satisfaction is assumed as a fundamental task by the community, through services organized and maintained by it."

- Diogo Freitas do Amaral[1]

[1]In: AMARAL, Diogo Freitas do. *Curso de Direito Administrativo*. Coimbra: Almedina, 2021 (Vol. I, 4th edition), p. 25

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Abstract

This article aims at comparing the application of the U.S. Freedom of Information Act (FOIA) with the Principle of Free Access to Administrative Documents (PFAAD) in Portugal. The first part of the article explains how the administrative law works in both countries. Next, the article concentrates on the Principle of Free Access to Administrative Documents in Portugal and the FOIA in the U.S, individually. In addition, I will analyse one real-life case for each country to better understand of how this right works in these countries. Since the administrative system is different in both countries, I will also do a brief introduction on how the administrative system works in Portugal and in the US. The two examples that will be presented and analysed are given to understand the practicality and the range of the Freedom of Information Act in an individual's life, and to compare how this institute happens in different administrative systems.

Keywords: Administrative Law; Administrative tribunals; FOIA; Portugal; United States; Security; Government; Public Administration; Free Access Administrative Documents; Principle; Freedom of Information Act.

Acronyms

- Art.º – Article
- CPA – Administrative Procedure Code (Portugal)
- CPTA – Administrative Tribunals Procedure Code (Portugal)
- CRP – Constitution of the Portuguese Republic
- DL – Decree-Law
- FOIA – Freedom of Information Act
- LADA – Law of Access to Administrative Documents (Portugal)
- N. º – Number
- PFAAD – Principle of Free Access to Administrative Documents
- US – United States of America
- USC – The United States Constitution

I. Introduction

I chose this subject because I contacted it myself during my practicals in college this semester. And I found it to be an interesting part of administrative law, therefore I wanted to deepen my knowledge on this matter. On the way to learn more about the Freedom of Information Act (FOIA), I will develop this paper to compare how different countries have diverse ways to deal with the subject in hand. I will briefly present how the Administrative Systems work in the respective countries, so it will be easier to understand how the Freedom of Information Act and the Free Access to Administrative Documents[2] work in those systems, but I will, mostly, focus on how these institutes work in Portugal and the United States. I will, also, direct my work to the judicial side and not so much to the theoretical side. I also intend to present real-life cases that happened in both countries and compare the two systems to show how different they work.

I hope to be able to convey, as best as possible, the importance of this institution to protect civilians on their right to access essential information that should not be "hidden" from them by the Government. At a time of mass production of documents by public and private entities, it is particularly important to regulate the conditions under which citizens can access these documents. In fact, alongside the process of mass production of documents, there was also a general trend towards the promotion of open administrations, in which citizens are recognized as having the right to consult documents concerning their person, as well as the existing information in administrations on issues that interest them. It is therefore useful to recall the most salient aspects of this access regime, a matter that we will try to address succinctly but clearly in this article.

Knowing that the administrative system in Portugal is different from the US, we need to take into consideration that similar cases will have different outcomes, due to this major difference, I am curious to know the process of when a case is made against the state on both countries, and what will be its outcome.

For the United States, I'm going to analyse a murderer request of FOIA, where the FBI refused to give access to several important documents that, supposedly, could

[2] Free translation from the term used in Portugal.

help the requestor. Whereas for Portugal, I'm going to analyse a university request on having access to multiple documents regarding the professional path of a professor from that institution.

II. Portugal

An Introduction to the Administrative System

In historical and current terms, there are two management models presented by VASCO PEREIRA DA SILVA: the executive system and the judiciary system. In an initial phase, these two systems presented great differences between them, but over time they were brought closer together. We talk about systems since these models were later exported to other countries, so they did not resign themselves to being just a model adopted in the country where they emerged.

The French system spread to continental Europe, examples of which are countries such as Portugal, Spain, Italy, and Germany, although, in the case of Germany, there are specific characteristics that led to the construction of the German Administrative Law.

The British system was mainly exported to Anglo-Saxon countries. Maurice Hauriou, one of the main names in Administrative Law, was responsible for the emergence of the names "judicial administration system" and "executive administration system". In addition, the author stated that even countries whose administration system is French have historically passed through the Judicial Administration phase.

On the other hand, FREITAS DO AMARAL adopts a different position from the one presented by VASCO PEREIRA DA SILVA, stating the distinction between the traditional European system (which existed between the 17th and 18th centuries) and modern systems. These last systems can be framed as the system of judicial administration and the system of executive administration. For FREITAS DO AMARAL the traditional European system is characterized by the undifferentiation of administrative and jurisdictional functions and by the non-subordination of the public administration to the principle of legality, which contributed to the lack of guarantees for individuals. The principle of separation of powers was not yet enshrined, so the King was both the supreme administrative and the supreme judge, as was the case with other public authorities. This panorama was profoundly changed in 1688 with the outbreak of the Revolution in England and 1789 with the French Revolution. With these revolutions there was a recognition of the Rights of Man as natural rights before and superior to those of the State or political power. Consequently, the rule of law was born.

Characteristics of the Judicial Administration system

Firstly, it is necessary to proceed to the characterization of each one of the administration systems so that later it is possible to conclude the differences between them. Therefore, in the first place, concerning the system of judicial administration, also called the English, British or Anglo-Saxon system. This system is in force today in most Anglo-Saxon countries, and through the USA it influenced Latin American countries, namely Brazil, due to the similarities that this country has with the USA. The main traditional features of this administrative system can be mentioned:

a) Decentralization of administrative powers: The Administration is not centralized and does not concentrate all the powers, so there are two bodies that have power: namely the Central Administration (Central Government) and the Local Administration (Local Government). There is no concept of the State as a legal person since the Public Administration does not have powers other than those granted to individuals.
b) Subjection of the Administration to the common courts: This is the well-known unit of jurisdiction. The common courts also called "courts of law", judge both disputes concerning the Public Administration and disputes between those who are not employees of the Public Administration, that is, individuals. Therefore, the Public Administration is subject to the application of the law by ordinary judicial courts and not by administrative courts (since the latter does not exist in this system). The law is equal for all citizens and no authority can invoke privileges and immunities. So, we have a unique jurisdiction since there are no courts specifically charged with judging the Administration. Administrative matters are judged by the common courts, so there was no differentiation of matters.
c) Subordination of the Administration to the Common Law: All people are governed by the same Law, the so-called "Common law of the land", both the King and the officials, councillors, and anonymous citizens. There is no Administrative Law, but Common Law is applied by the common courts. Consequently, the Administration is subject to the Common Law, so the Administration does not have exorbitant powers or privileges of public authority. Despite this, even though there is no Administrative Law, there are rules that regulate the Administration and how it issues its decisions, rules that form the so-called "Administrative Procedure".
d) Judicial enforcement of administrative decisions: The Administration does not have powers to enforce its decisions, so if you want to enforce these decisions you will

have to go to a court. This is not to say that the Administration in the British system could not perform any administrative act without resorting to the courts, since the question of execution-only arises when the administrative order is not voluntarily carried out by an individual. As a result, if the individual does not fulfil his duty, the Administration will have to resort to a court to obtain a sentence, to ensure that the individual complies. The intervention of the courts only happens when the individual does not voluntarily comply with what the Administration orders unilaterally. We can thus see that the Administration acts without having self-protection since it cannot by itself employ coercive means, needing to resort to the courts. Thus, the Anglo-Saxon system is characterized by the hetero protection guaranteed by the courts.

e) Legal guarantees of the administered: In this system, the Administration is not responsible for the acts practiced by its agents to the administered, but the courts seek to prevent possible abuses of power by the Public Administration.

Characteristics of the Executive Management system

Secondly, as for the Executive Administration system, also known as the French or Continental system, we can immediately point out its emergence in France through a revolution carried out by the Council of State and its development throughout the 19th century. This system has been in force in Portugal since 1832 and in most of western continental Europe and in many former colonies that became independent in the 20th century. Its main features are:

a) Centralization of administrative powers: The Public Administration has a highly centralized and hierarchical structure. This centralization has its origins in the Napoleonic tradition and reflects the characteristics of French history. The latter has exorbitant powers, standing out in a very visible way from the other citizens, which makes it very different from individuals. These powers are unusual powers, different from normal powers, which go beyond and differ from the powers of individuals, and which allow the Administration to pursue certain public tasks. As an example of one of these powers, we have the power of prior execution.

b) Subjection of the Administration to the Administrative Courts: In this system, the principle of separation of powers plays a very important role. This principle establishes that the Administration and Justice are separated and not confused. Thus, ordinary judicial courts do not interfere with the functioning of the Public Administration. It was in this context that, in 1799, the Administrative Courts were

created, which were not true courts but were different from ordinary courts. The Administrative Courts were independent and impartial bodies of the Administration, responsible for overseeing the legality of administrative acts. This system had its jurisdiction characterized by the existence of an order of judicial courts and order of administrative courts, and in the latter, there were different levels of jurisdiction characterized by the existence of two courts: Central Administrative Courts and the Supreme Administrative Court.

c) Subordination of the Administration to Administrative Law: The resolution of the Administration's disputes is carried out by the administrative courts. In this system, a special branch of Law was created – Administrative Law – which regulates how the Administration can use its special powers of authority (the typical exorbitant powers of the Administration in the French system). This branch of law departs from private law and is different from common law.

d) Privilege of prior execution: Administrative Law grants the Administration "exorbitant" powers over citizens, in comparison with the "normal" powers recognized by Civil Law for individuals in their relations with each other. The Administration has the power of self-protection since it determines the law to be applied. Unilateral decisions by the Administration are, as a rule, enforceable. In this system, we have both declarative and executive self-guardianship present. That is, in the French system, the Administration has declarative self-reliance, which allows it to unilaterally declare the law to be applied, and executive self-reliance, which allows it to execute its decisions without recourse to the court. For this very reason, these decisions can be imposed by the Administration using coercion without the need for any prior intervention by the judiciary. The Administration thus has the power, by itself, to oblige the individual to obey the rules imposed by it, through coercive measures, not needing to go to court to do so.

e) Legal guarantees of the administered: They are achieved through recourse to administrative courts where public subjective rights are invoked against the State. The State is responsible for all acts carried out by its employees and guarantees the respective compensation to individuals, when applicable, thus assuming responsibility towards the citizens.

To sum up, the traditional characteristics that were exposed of each of these systems, and that are presented as opposites to each other, have undergone approximations over time.

Today, specialization in the field of administrative litigation has replaced the earlier issue of duality or unity of jurisdiction. Specialization is an advantage as administrative disputes are very complex, so the specialized training of judges would make them judge better. Nowadays specialization is something very relevant. The France/Portugal degree of specialization occurs in all instances. On the other hand, in England, it only occurs in the first instance; and finally, in the USA/Brazil, we see specialization at the level of the top bodies.

Over time, these two systems have also influenced other countries and their diffusion all over the world has taken place.

As a result, we can conclude that the existing debate on the elements that characterize both systems is merely historical since, nowadays, these models are not distinguished from one another due to the convergence of their characteristics.

Principle of Free Access to Administrative Documents

The principle of open administration or open file (art. 17º CPA) – which is not to be confused with the right to procedural information, since it is carried out regardless of whether a procedure is in progress – "is one of the pillars of the Republic on which a vast set of rights, freedoms and guarantees of citizens is based, whether understood in its most restricted scope – of access to documents, data and administrative processes –, or understood in its wider scope – which also includes the active and accessible dissemination of documents, data and information by the Public Administration, as well as policies to promote public participation".

As mentioned by JORGE MIRANDA and RUI MEDEIROS[3], in addition to the general right to information set out in no. bilateral relations and have as a counterpart obligation to provide de facto, as is the case of the right of access to administrative

[3] In "Constituição Portuguesa Anotada", Tomo I, General Introduction, Preamble, Arts. 1º to 79.º, 2nd ed., Coimbra Editora, Coimbra, 2010, p. 853.

information. The right to information, provided for in article 268º of the CRP, is a corollary of the principles of publicity and transparency of administrative action and respect for the legitimate rights and interests of citizens, in a double aspect of:

a) Right to procedural information: "citizens have the right to be informed by the Administration, whenever they so request, about the progress of the processes in which they are directly interested, as well as the right to know the definitive resolutions that have been taken on them" (article 268º, nº 1 CRP);
b) Right to non-procedural or extra-procedural information, access to administrative files and records or the principle of open administration (open file): "citizens also have the right of access to administrative files and records, without prejudice to the provisions of the law in matters relating to internal and external security, criminal investigation and personal privacy" (art. 268º, nº 2 CRP).

Thus, nº 1 of art. 268º of CRP guarantees the right to information of citizens in general, embodied in the obligation of an open and transparent administration to make known to the addressees the definitive resolutions that have been taken on them, as well as to inform citizens who request it, about the progress of the processes in which they are directly interested. In addition to article 268º of the CRP, we have nº 1 of article 117º of the CPA which tells us that "*The person responsible for directing the procedure can determine to interested parties the provision of information, the presentation of documents or things, the submission to inspections and the collaboration in other means of evidence*".

As for the right to procedural information, this principle is developed in the arts. 82º to 85º of the CPA, and access to information of a procedural nature includes the indication of the service where the procedure is located, the acts and steps taken, the deficiencies to be addressed by the interested parties, the decisions adopted and any other requested elements.

In addition, the duty to information depends on the ownership of direct interest (*vide* nº1 of article 82º of the CPA) and covers the possibility of consulting processes that do not contain classified or secret documents (*vide* art. 83º of the CPA). These rights also extend to anyone who proves that they have a legitimate interest in knowing the requested elements (*vide* nº1 of article 85º of the CPA).

On the other hand, nº2 2 of art. 268º of the CRP enshrines the right of citizens, in general, to access administrative files and records, without the need to demonstrate any interest, although it makes provision for the law in matters relating to internal and external security, criminal investigation, and personal privacy. The CPA also refers to this principle, in its art. 17º, however, referring the densification of the respective regime to a specific law.

Accordingly, the conjugation of nº 1 of art. 268º of the CRP with arts. 82º and the following from the CPA, only those who intervene or are directly interested in each procedure that is in progress are holders of the right to procedural information. As for nº 2 of art. 268º of the Constitution enshrines, with the exceptions, the right of citizens in general to access administrative files and records – regardless of whether an administrative procedure is in progress and whether they express any interest –, whose regime is embodied in the Law on Access to Administrative Documents (Law nº 26/2016).

Regarding the provisions of nºs 1 and 2 of article 268º of the CRP, the Judgment of the Supreme Administrative Court (Case number: 0394/18), of 08.08.2018[4]:

> "These two norms enshrine the right of those administered to information before the Administration, a right that is analogous to rights, freedoms and guarantees [Article 17º CRP], thus enjoying the protection regime prescribed in Article 18º of the Constitution, that is, «are directly applicable and are binding on public and private entities», and the law «can only restrict them in the cases expressly provided for in the Constitution, and the restrictions must be limited to what is necessary to safeguard other constitutionally protected rights or interests». Thus, this right, although fundamental, is not an absolute right, since the Basic Law admits its limitation for «compatibility» with others of equal value, although always under the aegis of the «principle of proportionality» in terms of «necessary»".

It is important to explain that an administrative document is any support of information in written, visual, sound, electronic or another material form, in the possession of the bodies and entities referred to in the previous number or held in their name (art. Administrative and Environmental Information and Document Reuse -

[4] Acórdão do Supremo Tribunal Administrativo (dgsi.pt)

LADA). Some of these documents are nominative, *i.e.*, a nominative document is an administrative document that contains, about an identified or identifiable natural person (art. 3, nº 1, al. b) of LADA), appreciation or value judgment, or information covered by the reserve of the intimacy of private life. A third party only has the right of access to nominative documents if they have the written authorization of the person to whom the data relate or if they demonstrate a direct, personal, and legitimate interest that is sufficiently relevant under the principle of proportionality.

Therefore, the authorization of the people who have personal data in these documents will be necessary, so that they are shared. However, if the data subject does not authorize their information to be disclosed, they must be expunged when sending the documents.

Moreover, according to article 6º, nº 6 of the LADA: "A third party only has the right of access to administrative documents that contain commercial, industrial or company secrets if they have written authorization from the latter or demonstrate substantially that it holds a sufficiently relevant direct, personal, legitimate and constitutionally protected interest after considering, within the framework of the principle of proportionality, all the fundamental rights involved and the principle of open administration, which justifies access the information".

In nº 9 of the mentioned article, it also provides: "Without prejudice to the considerations provided for in the previous numbers, in requests for access to nominative documents that do not contain personal data that reveal ethnic origin, political opinions, religious or philosophical convictions, trade union membership, genetic, biometric or health-related data, or data relating to the intimacy of a person's private life, sex life or sexual orientation, it is assumed, in the absence of another indicated by the applicant, that the request is based on the right of access administrative documents".

Additionally, as mentioned, individuals, also, have the constitutionally protected rights of procedural information: according to art. 268º, nº 1 of the CRP, and the right to non-procedural or extra-procedural information, access to files and administrative records provided for in art. 268º, nº 2 CRP.

Therefore, it can be concluded, concerning the legitimacy found in art. 9º, nº 1 of the CPTA, which reads that "without prejudice to the provisions of the following number and art. 40º and within the scope of the special administrative action established in this

code, the author is considered a legitimate party when he claims to be a party to the material relationship at issue". Thus, in principle, only those who claim to be the holder of the administrative legal relationship from which the conflict arises can appear to litigate in court. This is the so-called criterion of the "controversial material relationship".

The Act in real-life

To understand better the regime explained previously, it is going to be presented a real-life case that was assessed in the Southern Central Administrative Court on October 19th, 2017 (Case number: 856/17.8BELRA[5]).

The University L[6] appealed the judgment handed down on 07/27/2017 by the Administrative and Tax Court of Leiria, which upheld the Plaintiff's request and summoned the Respondent Entity to provide part of the documents requested by the Applicant. In the arguments it presented, it made the following conclusions:

"a) The Court *a quo*, in the learned judgment appealed from, decided to order the Appellant to grant the Respondent access to the following documents: Curriculum Vitae of Doctor Maria, coordinator of the Management course, all the process related to the teaching career of Doctor Maria, namely the admission process to the Polytechnic Institute of Leiria and the role of coordinator of the Management course, all eventual works published by Doctor Maria as a professor at the University L; all processes related to the admission of professors of the courses coordinated by Dr. Maria.

b) Access to nominative data in the extra-procedural scope must be granted proportionally, with a balance between the conflicting rights.

c) The required documents contain nominative data; access to such documents should only be provided after expunging the nominative data contained therein.

d) Regarding the works published by Dr. Maria as a professor at the Polytechnic Institute of Leiria, the Institute was not obliged to provide access to them."

[5] http://www.dgsi.pt/jtca.nsf/-/50E0D50165FA1C0B802581C400366D71

[6] Due to privacy matters, the name of the parties is not mentioned.

As it is elementary, it is necessary to appreciate the questions that are imposed as a matter of priority and whose verification prevents the knowledge of any others.

The court is required to know all the questions that the parties have submitted to its consideration, except for those whose decision is prejudiced by the solution given to others, hence it is urgent to consider the question raised by the particular Appellant on whether the contested decision was vitiated by an error of judgment for not having considered that (i) Access to nominative data in the extra-procedural scope must be granted proportionately, with a balance between the conflicting rights; (ii) The documents required contain nominative data, and access to such documents must be provided after the expunge of such data contained therein and, (iii) About the works published by Dr. Maria as a professor at the University, he was under no obligation to provide access.

In the judgment appealed against, it was decided to summon the Appellant Entity to provide the Applicant, within 10 days, with access to the following documents:

1st) Curriculum Vitae of Dr. Maria, coordinator of the Management course.

2nd) The entire process related to the teaching career of Dr. Maria, namely the admission process to the Polytechnic Institute of Leiria and the role of coordinator of the Management course.

3rd) All eventual works published by Dr. Maria as a professor at the Polytechnic Institute of Leiria.

4th) All processes related to the admission of professors of the courses coordinated by Dr. Maria.

Bearing all this in mind and focusing in the case, the documents in question are administrative documents relating to "procedures for public procurement" and "human resources management" so that, in our view, they are of free access, considering the need to guarantee the transparency of administrative activity and open administration (art. 3º, nº1, paragraph a) and art. 10º of LADA) under penalty of delaying the rights of the Applicant, so the Court *a quo* correctly decided to order the summons of the Appellant to provide the documents in question.

Nevertheless, the documentation to be delivered must be duly scrutinized to be purged of the information regarding the reserved matter (nº 8, of article 6º, of LADA),

which was indicated in the reasoning of sub judice sentence, but not included in the decision.

The Public Administration, notified under the terms and for the purposes of article 146º of the CPTA, held that the appeal must be dismissed.

To sum up, To contextualize, according to articles 35º, nºs 1 to 7, art. 268º, nºs 1 and 2, of the CRP, and articles 82º to 85º of the CPA, the administrator (private and/or interested party) has the right to access to administrative archives and records, which constitutes a fundamental right, similar to the rights, freedoms and guarantees, enshrined in articles 172º and 189º of the CRP, whose regime is established in broad terms, substantiating the principle of the so-called open archive, which can only be restricted to the strict extent necessary to safeguard other rights or interests that are also constitutionally protected.

Another legal presupposition of the procedural means of the subpoena for information or the issuing of a certificate is the failure to fully satisfy requests made in the exercise of the right to procedural information or the right of access to files and administrative records, under the terms of article 104 ° of the CPTA, in its then-applicable version.

By the provisions of article 5º of the LADA: "everyone, without the need to state any interest, has the right of access to administrative documents, which includes the rights of consultation, reproduction and information about their existence and content". However, article 6º, nº 5 establishes access restrictions in the following situations: "A third party only has the right of access to nominative documents:

a) If they have written authorization from the data subject that is explicit and specific as to its purpose and as to the type of data to which it wants to access.

b) If it can reasonably demonstrate that it holds a sufficiently relevant direct, personal, legitimate, and constitutionally protected interest, after consideration, within the framework of the principle of proportionality, of all fundamental rights in the presence and the principle of open administration, which justifies access to information."

From what has been said, it appears that the Court *a quo* correctly decided to order the summons of the Appellant to provide the documents in question.

Concluding, the documentation to be delivered must be duly scrutinized to be purged of the information regarding the reserved matter (nº 8, of article 6º), of LADA), which was indicated in the reasoning of the learned sub judice judgment but was not included in the decision.

It emerges from what has just been exposed that the judgment appealed from must be maintained in these terms, and in the same terms, the appeal must be dismissed, a point of view supported in the opinion of the Public Administration.

III. United States

An Introduction to the Administrative System

The common law legal system, due to its inherent characteristics, constituted an obstacle to the development of Administrative Law as an autonomous branch of Law. The idea of judicial supremacy, which gave the judicial system a power of control over the acts of public authorities (administrative act), to the point where there is no special administrative jurisdiction as existed in the French-style administrative system, represented a strong reason for the late recognition of the autonomy of Administrative Law.

The liberal revolutions of the 18th century have different characteristics, providing a different type of government and administration.

Regarding the French Revolution that took place in 1789, it is important to highlight the deep distrust that existed in relation to judges on the part of the Administration. Just think of the laws that were published in 1790 and 1795, which prohibit judges from hearing about litigation against administrative authorities. This gave rise to an interpretation of the principle of separation of powers that was completely different from that which prevailed in England.

While the executive branch could not interfere in matters relating to the jurisdiction of the courts, the judiciary also could not interfere in the functioning of the Public Administration (strict separation between executive and judicial powers). US administrative law should not be seen as a revolutionary right, as was French law. The emergence of this branch of law in the U.S. derives from a greater need for State action in the social and economic area, through the Agencies. Therefore, US Administrative Law became known as “Agency Law”. Administrative agencies are provided for in Article 1, Section 1 of the US Constitution. Administrative agencies can create their own internal rules and regulations.

The Administrative Procedure Act of 1946 sets the standards for the exercise of legislative power by administrative agencies. The rules that are established in this law also help the federal courts whenever they have lawsuits that challenge the rules and

regulations created by the agencies. However, there may also be independent administrative agencies (such as the Securities and Exchange Commission).

As a rule, the President is said to have limited powers regarding the dismissal of the highest body of these agencies, but the truth is that the President is intimately involved in the appointment of Heads or filling vacancies in these agencies, playing a very influential role in the activities pursued by the same Internal Administrative Agencies. The American administrative organization is, consequently, limited to the Agencies. This organizational model, even though it was adopted in a pioneering way, took more than 100 years to be implemented in the United States (it was implemented in 1887) Franklin Roosevelt was the man behind what is called the *New Deal*, which was the given name to a series of programs implemented in the United States with the objective of recovering and reforming the economy through greater state intervention. The state used the "regulatory agency model" to promote greater intervention in the economic and social order, correcting market failures. With this model, the intention was to improve and at the same time update the State's performance.

With greater intervention by the State, the powers and competences of the Administration will be expanded. It is precisely during this period that the Agencies gain strength and proliferate across the country.

The phenomenon of state regulation of the economy did not occur until the 20th Century. However, in 1929 the Great Depression began and was one of the causes the so-called "Wall Street Crash" in New York. The liberal ideals of non-state interventionism were now being questioned. At that moment, it was verified that not even the Market/Economy was able to recover on its own. It was needed a state intervention.

The Agencies

Most agencies are under the supervision of the President of the US. Examples of this are the Drug Enforcement Administration (D.E.A.) and the Federal Bureau of Investigation (FBI). Federated states have, also, other administrative agencies that are focused on state-specific issues (such as transportation, education, public health). There is also a relevant particularity about these agencies, which cannot create rules or regulations that go against federal agencies.

The rules and regulations created by administrative agencies can be applied as law. They contribute to a faster resolution of smaller cases, giving some leeway to

ordinary American courts, allowing more judicial remedies to be available for other more significant cases.

Administrative agencies may represent law-making bodies with limited powers and delegated by the Congress. These agencies specialize in specific matters relating to the social, economic, cultural, environmental fields. The members of these administrative agencies are specialists in the respective area in which they are inserted.

Regarding the American Revolution that took place in 1776, it is important to highlight, on the other hand, the distrust that existed regarding the exercise of executive power, resulting in a greater attribution of powers to the judiciary and the legislature. Contrary to what happened in France, given that the Administration had the powers of authorities.

In 1946, the Administrative Procedure Act was enacted, responsible for standardizing the decision-making procedure of Agencies, establishing three types of procedures:

1. Rulemaking – Administrative agencies use the legislative power to create rules and regulations. Laws are made based on the government policies that are in effect and by the area in which they are located. The conferred power to create regulations is subject to judicial review.

2. Adjudication – Administrative adjudication represents the exercise of judicial powers by the administrative agency. Who delegates these powers is the Congress. In this case, we are faced with a power in which agencies are allowed to judge conflicts between individuals and the Administration or the Government inclusively. The judgment decision was divided into formal or informal adjudication. Informal adjudication decisions are made after inspections, conferences or negotiations have been carried out. Formal adjudication involves a hearing (similar to a trial) with testimony, written record, and final decision.

In addition, the Administrative Law judge decides based on a verdict established on legal arguments. This decision is subject to appeal to the highest administrative authority of the Agency. Judicial reviews of the decisions are limited to questions of law only (legality).

3. Investigation – the administrative agencies are empowered to carry out investigations. Only the Congress can enable administrative agencies to obtain information about activities that may be regulated by federal legislation. The form of investigation depends on the nature of the issue to be decided. The investigations are carried out in private, so that harmful publicity won't influence the result. Also, hearings are not part of the investigation, although they can be carried out.

The importance of regulatory agencies is evidenced by the high degree of independence from the executive and other powers. The three competences of the three institutionally constituted powers that were present are:

- Administrative competences – pursuit of interests related to the field in which they are inserted.
- Judicial powers – resolution of conflicts between Individuals and the executive or administration power.
- Legislative competence – is the possibility of creating rules and regulations. In the 1970s, a broad process of deregulation of the economy began, in which the government reduced the restrictions imposed on various economic sectors and regulatory agencies reduced their intervention on private entities. As for judicial review, it has been extended through the hard-look doctrine.

The principle which allows courts to assess the question of the legality and reasonableness of decisions taken by agencies, was created with the intention to discipline the decisions taken and restrict the illegitimate exercise of discretionary power. Several executive orders were issued with the aim of restricting the autonomy of the agencies.

As for presidential control over agency actions, this is intensified through the work of the Office of Management and Budget, in charge of supervising the agencies' budget proposals, or through the Office of Information and Regulation affairs) linked to the OMB[7] and responsible for ensuring that the agencies' actions comply with the policy outlined by the President.

The distrust that existed in the United States towards the model of regulatory agencies meant that the control exercised by the constituted powers (legislative and judicial) over the acts of the agencies was tightened.

[7] Office of Management and Budget

After the moment that gave rise to the *New Deal*, criticisms of the independent agency management model began to emerge. Independent agencies were thought to end up serving the interests of the most influential private or political groups.

The regulations were subject to prior control (rules review) - need to analyse the project before starting the regulatory procedure and subsequent control (legislative veto).

Lastly, in 1990, the Negotiated Rulemaking Act was enacted, allowing the holders of interests affected by a regulation of a particular agency to participate in its drafting.

The Freedom of Information Act

The Freedom of Information Act (FOIA) is a federal statute that allows any person to request any agency record for any reason, except to the extent records are claimed as exempt from disclosure under one or more of the nine exemptions of the Freedom of Information Act. This model has been copied worldwide and celebrated as a structural necessity in a real democracy.

The nine exemptions categories that authorize government agencies to withhold information are:

1. Classified information for national defence or foreign policy.
2. Internal personnel rules and practices.
3. Information that is exempt under other laws.
4. Trade secrets and confidential business information.
5. Inter-agency or intra-agency memoranda or letters that are protected by legal privileges.
6. Personnel and medical files.
7. Law enforcement records or information.
8. Information concerning bank supervision.
9. Geological and geophysical information.

In addition to the exemptions, there are also exclusions. The Congress provided special protection in the FOIA for three narrow categories of law enforcement and national security records. The provisions protecting those records are known as "exclusions".

The first exclusion protects the existence of an ongoing criminal law enforcement investigation when the subject of the investigation is unaware that it is pending, and disclosure could reasonably be expected to interfere with enforcement proceedings.

The second exclusion is limited to criminal law enforcement agencies and protects the existence of informant records when the informant's status has not been officially confirmed.

The third exclusion is limited to the FBI and protects the existence of foreign intelligence or counterintelligence, or international terrorism records when the existence of such records is classified. Records falling within exclusion are not subject to the requirements of the FOIA.

In contrast to the pre-FOIA Administrative Procedure Act (APA), FOIA allows "any person" to submit a request. In contrast to many states FOI Laws[8], FOIA applies only to executive agencies and does not reach Congress, the courts, private entities, or the President's inner circle. Following receipt of a written request, agencies must turn over "reasonably described" records promptly—within twenty working days absent "unusual circumstances" – unless the records or portions thereof fall under one of nine enumerated exemptions. Adverse determinations are subject to administrative appeal and judicial review. The requester has no obligation to explain why she seeks records or to publicize them once obtained, and in practice the overwhelming share of materials obtained through FOIA have not been disseminated to the general public.

There are over 100 agencies, and each is responsible for handling its own FOIA requests. The FOIA applies to federal agencies, which are defined as any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including certain offices in the Executive Office of the President), or any independent regulatory agency. The FOIA does not apply to the Judicial Branch (Courts) or the Legislative Branch (Congress). It also does not apply to state and local governments. The FOIA is administered on a decentralized basis, meaning each of over 100 agencies is responsible for receiving, processing, and responding to its own FOIA requests.

[8] Freedom of Information Laws

The agency will typically first search for the records and then review them to determine what can be disclosed. While FOIA allows for many records to be released, there are also nine exemptions that protect certain types of information, such as personal privacy and law enforcement interests. The length of time to respond to a request will vary depending on its complexity and any backlog of requests.[9]

FOIA is sometimes described as a "citizen enforcement" or "private attorney general" regime. Like other such regimes, it relies on adversarial legal process, rather than inquisitorial or collaborative methods, to secure public values. Public-oriented inquiries by concerned citizens and their advocates, however, make up only a small fraction of the 700,000-plus FOIA requests submitted each year. Studies have consistently shown that the bulk of requests come from businesses seeking to further their own commercial interests by learning about competitors, litigation opponents, or the regulatory environment. Beyond businesses and trade groups, other significant classes of FOIA users include individuals seeking records related to their government benefits or immigration proceedings, as well as eccentrics and political opposition researchers who flood the system with repeated requests.

Whereas, in "private attorney general" regimes typically identify some desired end, such as reducing pollution or discrimination, and empower citizens to bring lawsuits in service of that end, in FOIA, there is no specific, substantive policy that is being served. The filing of a FOIA request creates the legal norm – the obligation to disclose records responsive to that request – which then may be the basis of an enforcement action. Citizen suits regarding the environment or civil rights are meant to vindicate a set of highly reticulated environmental laws and civil rights laws.

In fact, the only law that FOIA actions vindicate, at least in any direct sense, is the Act's own disclosure requirement. The system of legal entitlements that FOIA creates is so broadly accessible, and potentially so divorced from public policy goals in any given instance, that it seems better characterized not as a private attorney general regime but rather as a personal enforcement regime.

FOIA is strikingly decentralized not only on the requester side but also on the government side. Although the White House issues occasional implementation guidance and may consult with agencies on requests involving "White House equities," the overall

[9] https://www.foia.gov/

degree of FOIA presidentialization is low. The Act applies to more than one hundred federal agencies, many of which maintain one or more offices dedicated to processing FOIA requests.

"Over the past quarter-century, the FOIA strategy has swept the globe. Spurred by an international right-to-know movement, the majority of the world's countries, and virtually all of the wealthier countries, have adopted laws that replicate FOIA's basic features, including the focus on official records; affordance of access rights to any individual or association; reliance on private requests to trigger disclosure obligations; independent or quasi-independent review of denial decisions; and exemptions for the protection of national security, public safety, personal privacy, commercial secrets, and internal deliberations.

Within the general FOIA framework, countless permutations are possible. Congress has revised FOIA numerous times, and scholars have suggested many additional reforms, from increased user fees to stronger prioritization of media requesters to the creation of a more powerful centralized oversight body comparable to Mexico's Institute for Access to Information and Data Protection. Some of these reforms could have significant consequences. Yet, if it is important to avoid oversimplifying the FOIA strategy and to recognize the possibilities for internal variation, it is also important to avoid overlooking – and naturalizing – the core elements of FOI laws that do not vary across jurisdictions. "[10]

National Security Secrecy

FOIA was developed over the 1950s, 1960s, and 1970s against the backdrop of, and partly in response to, the rise of National Security Secrecy. A web of nondisclosure policies and protocols began to take shape following World War II, and in 1951, President Truman established the first executive-wide classification system to govern nonmilitary as well as military information "the safeguarding of which is necessary in the interest of national security." As the classification system swelled during the Cold War, concerned members of Congress and the media began to call for a new statute that could disrupt the culture of secrecy it had fostered.

[10] Taken from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2907719, pp. 1105-1107

The original FOIA met resistance in this regard. In the 1973 case of EPA v. Mink[11], the Supreme Court rejected as "wholly untenable" a claim that the Act allowed plaintiffs to "subject the soundness of executive security classifications to judicial review." One year later, Congress amended FOIA over President Ford's veto with the express purpose of overruling Mink and fixing the "over classification" problem, which had "by common consensus transformed the classification […] scheme into an 'extravagant […] system of denial."

The effort failed. Even though the 1974 amendments prescribe *a de novo* standard of review, courts have consistently afforded agencies great deference when classified information is at issue. In most Exemption 1 cases, courts grant the government summary judgment without allowing discovery or performing in camera inspection of the requested records, making it "virtually impossible for individual litigants to counter the opinions of agency personnel." Courts have been similarly deferential to intelligence agencies' assertions of Exemption 3, which incorporates certain nondisclosure provisions of other statutes, including the CIA Act of 1949, the CIA Information Act of 1984, the National Security Act of 1947, and the National Security Agency (NSA) Act of 1959. The D.C. Circuit held in 1996 that the increasingly powerful National Security Council is exempt from FOIA altogether as a "non-agency" within the meaning of the statute. "Meaningful victories in national security FOIA cases," in the experience of leading litigators, "remain legal unicorns." Exemptions 1 and 3, furthermore, have been used by the intelligence agencies to shake free not only from record requests but also from FOIA's affirmative disclosure obligations, with the result that these agencies "rarely, if ever," publish the rules governing their activities.

While the courts were developing these doctrines, the national secrecy state grew and grew. By 2004, some suspected that "as many as a trillion pages" were classified in the United States, or the equivalent of "200 Libraries of Congress." Commentators from across the political spectrum describe the classification system as "staggeringly large" and "out of control." FOIA has proven so profoundly unresponsive to the rise of national security secrecy – and therefore to the rise of government secrecy – that we might even say there is an element of transparency theatre in the conceit that the Act secures the people's right to know. "In the war for executive accountability," as one veteran civil

[11] https://supreme.justia.com/cases/federal/us/410/73/

liberties lawyer has reflected, "FOIA is a slingshot attempting to pierce the tank armour of government secrecy and over-classification."

Some doctrine, such as Professor ADAM SAMAHA, believe that "FOIA never had a chance" to curb over classification, given its design. If so, then it behoves us to consider alternative designs.

"FOIA's ability to constrain classification depends not only on the willingness of sophisticated requesters to bring lawsuits, but also on the willingness of judges to order disclosure with at least some regularity in the absence of a noninformational injury and in the face of an executive branch claim that doing so would cause national security harm. The collapse of *de novo* review under Exemption 1 casts doubt on whether the latter precondition can be met. Even if judicial review could be strengthened through legislation or otherwise, the combination of FOIA's request-driven structure and the sheer size and complexity of the classification system consigns the Act to a peripheral role. Only by addressing the standards, procedures, or incentives that govern the classification (and declassification) process could Congress hope to push back against national security secrecy in a systematic manner.

At the time FOIA was passed in 1966 and then overhauled in 1974, such a statute was conceivable. Prior to 1966, Congress had never clearly accepted the legitimacy of the executive-wide classification system. As public support for the presidency plummeted during the Vietnam War and the Watergate scandal, a policy window opened in which Congress was willing and able to overcome partisan division and presidential vetoes to enact a series of framework statutes with the aim of reining in the executive branch, including on national security matters. Committees of both houses actively considered bills that would legislate a security classification system. Rather than seek to revamp the classification process, however, Congress opted in the end for the indirect FOIA model and the pointillistic resolution of secrecy disputes on a case-by-case basis. In doing so, the Congress effectively blessed the modern classification regime for the first time; conceded the definition of "national security" to the executive; channelled civil society resistance to the national security state away from the political arena and toward the courts; and arguably created a perverse incentive for officials to classify more, not less, to avail themselves of Exemption 1."[12]

[12] Taken from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2907719, pp. 1121-1122

The Congress also failed to develop a framework for declassifying or otherwise affirmatively disclosing national security information that no longer needs to be kept secret. Even today, following a wave of declassification-promoting reforms in recent years, the entire appropriated budget of NARA – which houses both the National Declassification Center and the Information Security Oversight Office and plays a leading role on declassification as well as records management – is smaller than the annual cost of implementing FOIA.

There may well be deep structural forces in the American state that would oppose any effort to minimize classification; from this perspective, FOIA's weakness in the national security field seems predictable, if not overdetermined. It is, nonetheless, important to appreciate the limitations of the Act in this field and the way they relate to its "reactionary," request-driven design. Not only did FOIA's legislative sponsors fail to solve or even seriously confront the over classification problem when they empowered private parties to bring lawsuits in pursuit of specific records, but they also helped to entrench and legitimate the emerging classification system. The result is a freedom of information law that leaves the Cold War national secrecy state largely intact, while substantially limiting the space for government secret-keeping – and decisive action – on domestic policy matters.

How to make a request?

To get information under the FOIA typically an individual must make a FOIA request. To make a request, it is simple. This a written request in which the individual describes the information they want, and in which format they need the information to be in. It is asked that the requester gives as much detail as possible about the information and the documents they need.

It is important to know that the FOIA does not require agencies to do research for the requester to analyse data or answer written questions, or even to create records in response to the individual's request.

Finally, it is needed to know that the FOIA requires that the federal agencies release certain information automatically without the need for the individual to make a request.

In terms of the time that it takes to respond each request varies depending on the complexity of the request itself and the backlog of request already pending at the agency. In some circumstances, the agency will be able to respond to the request within the standard time limit established by FOIA, which is approximately one month. In other circumstances more time may be needed before the request can be completed.

When an agency requires an extension of time, it will notify the individual in writing and provide the individual with an opportunity to modify or limit the scope of the individual's request. Which means that, alternatively, the individual may agree to a different timetable for the processing of said request. However, under certain conditions, the individual may be entitled to have the request processed on an expedited basis.

United States Department of Justice v. Landano

To understand better the FOIA, it is going to be presented a real-life case from 1993. The case is about a convicted murderer who filed a FOIA request with the FBI, seeking information to support a Brady claim (Brady v. Maryland).

To contextualize, the Brady v. Maryland, Maryland, 373 U.S. 83 (1963), was a landmark United States Supreme Court case that established that the prosecution must turn over all evidence that might exonerate the defendant (exculpatory evidence) to the defence.

Respondent Landano was convicted in New Jersey state court for murdering a police officer during what may have been a gang-related robbery. In an effort to support his claim in subsequent state-court proceedings that the prosecution violated *Brady* v. *Maryland,* 373 U. S. 83, by withholding material exculpatory evidence, he filed Freedom of Information Act (FOIA) requests with the Federal Bureau of Investigation (FBI) for information it had compiled in connection with the murder investigation. The FBI released several hundred pages of documents but refused to release several other documents under the confidential informant exemption. Before the Court, the FBI asserted that all its sources should be presumed confidential and that "the presumption could be overcome only with specific evidence that a particular source had no interest in confidentiality." With this action by the FBI, Landano filed an action in the Federal District Court, seeking disclosure of the requested files' contents.

The FBI claimed that it withheld the information under Exemption 7(D), which exempts agency records compiled for law enforcement purposes by law enforcement authorities during a criminal investigation if the records' release "could reasonably be expected to disclose" the identity of, or information provided by, a "confidential source." The court held that the FBI had to articulate case-specific reasons for nondisclosure of information given by anyone other than a regular informant, and the Court of Appeals affirmed in relevant part. It held that a source is confidential if there has been an explicit assurance of confidentiality or circumstances from which such an assurance could reasonably be inferred.

However, it rejected the Government's argument that a presumption of confidentiality arises whenever any individual or institutional source supplies information to the FBI during a criminal investigation and declined to rule that a presumption may be based on the investigation's subject matter.

Rather, it held that, to justify withholding under Exemption 7(D) of the Freedom of Information Act, 5 U. S. C. § 552 (FOIA), exempts from disclosure agency records "compiled for law enforcement purposes [...] by criminal law enforcement authority during a criminal investigation" if release of those records "could reasonably be expected to disclose" the identity of, or information provided by, a "confidential source" § 552(b)(7)(D). This case concerns the evidentiary showing that the Government must make to establish that a source is "confidential" within the meaning of Exemption 7(D).

Under Exemption 7(D), the question is not whether the requested *document* is of the type that the agency usually treats as confidential, but whether the source spoke with an understanding that the communication would remain confidential. According to the Conference Report on the 1974 amendment, a source is confidential within the meaning of Exemption 7(D) if the source "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred" (S. Rep. No. 93-1200, at 13). In this case, the Government has not attempted to demonstrate that the FBI made explicit promises of confidentiality to sources. That sort of proof, apparently, [often] is not possible:

The FBI does not have a policy of discussing confidentiality with every source, and when such discussions do occur, agents do not always document them (Tr. of Oral Arg. 7-8, 47-48). The precise question is how the Government can meet its burden of

showing that a source provided information on an implied assurance of confidentiality. The parties dispute two issues: the meaning of the word "confidential", and whether, absent specific evidence to the contrary, an implied assurance of confidentiality always can be inferred from the fact that a source cooperated with the FBI during a criminal investigation.

The Court, therefore, was asked to decide whether the Government is entitled to a presumption that all sources supplying information to the Federal Bureau of Investigation during a criminal investigation are confidential sources, however, take in mind that the Government has to provide detailed explanations relating to each alleged confidential source.

The Government has argued forcefully that its ability to maintain the confidentiality of all its sources is vital to effective law enforcement. A prophylactic rule protecting the identities of all FBI criminal investigative sources undoubtedly would serve the Government's objectives and would be simple for the FBI and the courts to administer. But the Court is not free to engraft that policy choice onto the statute that Congress passed. For the reasons before mentioned, and due to the consistency with the Court's obligation to construe FOIA exemptions narrowly in favour of disclosure, [see, *e. g.*, *John* Doe, 493 U. S., at 152; *Department of Air Force* v. *Rose*, 425 U. S. 352, 361-362 (1976)], the Court held that the Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI in the course of a criminal investigation.

More narrowly defined circumstances, however, can provide a basis for inferring confidentiality. For example, when circumstances such as the nature of the crime investigated and the witness' relation to it support an inference of confidentiality, the Government is entitled to a presumption.

To sum up, the Court held that the FBI was not entitled to a presumption of confidentiality. Citing legislative history, the Court reasoned that confidentiality does not depend on whether the agency typically regards the requested document as confidential, "but whether the particular source spoke with an understanding that the communication would remain confidential." The Court, however, agreed with the FBI that certain circumstances may arise that will support an inference of confidentiality.

IV. Conclusion

By doing this article, for the "Lincoln – FDUL Online Students Exchange Program", I had the opportunity to deepen my knowledge about the Administrative Systems in Portugal and in the United States and how importance the free access to documents that held information (directly or indirectly) about a citizen can be, as seen in both cases presented.

With the completion of this article, I also concluded that the Freedom of Information is a symbol of how an individual can protect themselves and inform themselves by requesting a document. I also learned in more detail how does the American Administrative System and the Agencies Model work since it's not something I have had studied in such detail as I had during writing this article.

The Portuguese and the United States Free Access institute are very different, especially due to the different judicial and administrative systems. The major difference I notice, legally, is that the United States Freedom of Information Act has exemptions, that can restrict the free access of an individual to a document. Such as Classified information for national defence or foreign policy; Internal personnel rules and practices; Information that is exempt under other laws; Trade secrets and confidential business information; Inter-agency or intra-agency memoranda or letters that are protected by legal privileges; Personnel and medical files; Law enforcement records or information; Information concerning bank supervision; Geological and geophysical information.

With these exemptions, we can immediately conclude that it can be difficult for someone to request a document in certain circumstances, especially if the Government believes that a certain document shouldn't be given to the individual in interest. However, in our point of view, an individual should not see their freedom restricted by the Government, for any reason, since the documents are related to the individual – directly or indirectly. Therefore, if the individual is related to the document in any way, they should have the right to access it, and not be restrict by exemptions. However, the FOIA department already asks for the individuals to give as much detail in their requests as possible, so if a document may seem like takes part of an exemption, may not take part if the requester fundaments their request. In addition, exemptions 1 and 2 can give a sensation of unclearness by the State towards their citizens, as individuals can't access those documents, which goes against the principle of the open file.

Whereas Portugal doesn't only have exemptions in the cases where the document in not related directly to the requester. Which means that if and individual requests a document about another person there are certain conditions where that document can't be accessed by the request, unless they have the authorization by the person whose document is about. In a world where laws about privacy and personal data protection is becoming more important, we consider that exemptions, such as: contain personal data that reveal ethnic origin, political opinions, religious or philosophical convictions, trade union membership, genetic, biometric, or health-related data, or data relating to the intimacy of a person's private life, sex life or sexual orientation, are justified and should exist.

Nonetheless, the art. 6º, nº 5 of LADA, determinates that in nominative documents a third party only has the right of access to nominative documents if they have the written authorization of the person to whom the data relate or if they demonstrate a direct, personal, and legitimate interest that is sufficiently relevant in accordance with the principle of proportionality, "A third party only has the right of access to nominative documents: a) If it has written authorization from the data subject that is explicit and specific as to its purpose and as to the type of data to which it wants to access".

I really liked to do write this article because I got to deepen my knowledge about this subject, that is very important and is present prominently in everyone's lives, and that we don't know much about. Also, to analyse the advantages and disadvantages of both institutes and how different they are, – even though the base of them is the same: individuals have the right to access documents that are directly and indirectly related to them – was very interesting and enriching. Learning more about how the Freedom of Information Act and the Principle of Free Access to Administrative Documents functions, in theory, was an important asset for my formation as a Law student.

On the other side, something that fascinate me was to investigate how these two institutes work in real-life. I chose two cases very different to each other so it would be possible to understand the range of cases that the administrative liability can take. In fact, there aren't any prohibited cases, if the defendant requests a document and said document isn't given to them, they can file a lawsuit and fundament the reasons as to why they need that document.

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