

Freedom Of Information Act Overview

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What is FOIA?

Congress enacted the Freedom of Information Act - FOIA - on July 4, 1966. FOIA provides a statutory right of public access to information in the Executive Branch.

“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

The FOIA pertains to federal agency records that exist and can be located in agency files.

FOIA Fundamentals

- ▶ The statutory citation for FOIA is 5 U.S.C. §552
- ▶ EPA FOIA regulations can be found at 40 C.F.R. Part 2

FOIA Fundamentals

Agency Records

What are Agency Records?

Records that are:

- ▶ Created or obtained by an Agency
- ▶ And are under control of the Agency
- ▶ Agency records do not pertain to tangible objects (furniture, equipment, etc)

FOIA Fundamentals

Under FOIA, **any person**, including individuals, corporations, state and local governments, and tribes, can make a FOIA request for Federal **agency records**.

FOIA requesters generally do not have to justify or explain their reasons for making requests.

Some records or portions of records may not be releasable, because they are protected from public disclosure by one of nine FOIA exemptions.

FOIAonline is EPA's Primary FOIA Communication Tool

- ▶ **FOIAonline** is EPA's web-based FOIA program
 - ▶ Allows the public to submit FOIA requests directly to the Agency.
 - ▶ Allows EPA to track, manage, process and create reports on FOIA activities and generate Annual FOIA Report.
 - ▶ FOIAonline website: <https://foiaonline.gov>

What Constitutes a Proper FOIA Request?

- Request for agency records must be submitted in writing. FOIA requests are normally submitted using FOIAonline, but requests may be submitted by mail if the requester has no access to the internet.
- Request must reasonably describe records requested.
- Request must comply with Agency's regulations for making requests.
- Request must indicate whether requester is willing to pay fees or is seeking a waiver of fees (FOIA is tolled while fee waiver request is reviewed by EPA Headquarters).

Time Limits for Responding to a Request

- EPA has 20 working days to respond to a FOIA request.
- In “unusual circumstances,” EPA may extend time limit by providing written notice to requester.
- If time period is extended beyond ten working days, EPA must provide requester with opportunity to narrow scope of request and must make FOIA Public Liaison available.

Unusual Circumstances

- “Unusual circumstances”
 - Need to search for/collect records from multiple offices
 - Search for/collect/examine a voluminous amount of separate and distinct records
 - Requirement to consult with another agency or two or more EPA offices

Types of Requesters and Fee Categories

Four Types of Requesters	Three Fee Categories		
	Search	Review	Duplication
Commercial	Yes	Yes	Yes
Educational or Noncommercial Scientific Institution	No	No	Yes (100 pages free)
News Media	No	No	Yes (100 pages free)
All Others	Yes (First 2 hours free)	No	Yes (100 pages free)

Types of Fees

- ▶ Search fees: time spent looking for material that is responsive to a request; searches may be done manually or by computer
- ▶ Review time: time spent in determining whether the records are exempt from disclosure
- ▶ Duplication fees: process of making a copy of the record

Costs

- ▶ Requests totaling \$14 or less will not be billed.
- ▶ If costs are greater than \$25, FOIA requester must provide an assurance of payment. Time limit for responding to a FOIA request is tolled until assurance of payment received.

How EPA Responds to FOIA Requests

Two Step Process: Search & Review

➤ Search:

- Agencies must conduct a search that is “reasonably calculated to uncover all relevant documents”
- Review agency records manually or by automated means for the purpose of locating records that are responsive to the request.

➤ Review:

- Agencies must review the documents to determine whether any FOIA exemptions apply.
 - ▶ Agencies are to clearly identify the exempt information and apply the appropriate exemption to each redaction.
 - ▶ Agencies must “reasonably segregate” FOIA exempt material and provide what is not exempt.
 - ▶ If “Discretionary Exemption,” agencies must apply the foreseeable harm standard.

FOIA Exemptions

All agency records not exempted from FOIA are subject to disclosure upon request from any person.

Exemption 1: Classified National Security Information

Exemption 2: Internal Personnel Rules and Practices

Exemption 3: Matters Specifically Exempted from Disclosure by Statute

Exemption 4: Trade Secrets and Confidential Business Information

Exemption 5: Intra/Inter-Agency Info Withholdable under Litigation Privileges

Exemption 6: Personal Privacy

Exemption 7: Enforcement Confidential Information

Exemption 8: Records of Financial Institutions

Exemption 9: Geological and Geophysical Well Information

FOIA Exemption 3

Matters Specifically Exempted from Disclosure by Statute

- ▶ National Historic Preservation Act (NHPA) Section 304
- ▶ Contractor bid or proposals information or source selection information before the award of a procurement contract is made

FOIA Exemption 4

Protects trade secrets or commercial or financial information obtained from a person and that is privileged or confidential. It is intended to protect both the submitter of the information and government interests in obtaining information.

- ▶ If the submitter voluntarily provides information, this information will be considered confidential if it is the kind of information that the submitter would not customarily release to the public.
- ▶ If the government requires the submitter to provide the information, the information will be considered confidential if disclosure is likely to either
 - ▶ impair the government's ability to obtain necessary information in the future or
 - ▶ cause substantial harm to the competitive position of the submitter.

FOIA Exemptions 6 and 7(c) and the Privacy Act

The Privacy Act of 1974 provides safeguards and restricts disclosure of Personally Identifiable Information in records maintained by agencies.

FOIA Exemptions 6 and 7(c)

FOIA Exemption 6 covers all information addressing personnel and medical files and similar files, disclosure of which would constitute a *clearly unwarranted invasion of personal privacy*.

FOIA Exemption 7(c) covers personal information collected for enforcement purposes where there is a *reasonable expectation of privacy*.

“Similar files” is interpreted broadly to include any personal information that meets the Ex. 6 threshold requirement. U.S. Dept of State v Washington Post Co., 456 U.S. 595 (1982).

FOIA RESPONSES

- ▶ FOIA Response Letter and all responsive, releasable records are posted on FOIAonline.
- ▶ FOIA Response Letter
 - ▶ Indicates whether records are being released in full, records are being withheld, or the full request is being denied.
 - ▶ Other responses:
 - ▶ No Records Located
 - ▶ Referral to Other Federal Agency
 - ▶ Initial Denial for CBI Review
- ▶ In responding to FOIA requests, EPA is not required to:
 - ▶ Answer questions
 - ▶ Create records
 - ▶ Make future releases

Administrative Appeals

FOIA requester may appeal the response:

- ▶ Appeals are handled by EPA's Office of General Counsel in EPA's National Office
- ▶ If requester not satisfied with OGC decision, requester may sue in court

If Agency fails to respond to a FOIA or fails to respond in time, requester may go directly to court and bypass administrative appeal process.

Applying EPA's FOIA Process with Tribal Documents

Consider FOIA when submitting documents to EPA

- ▶ Submit only necessary documents
- ▶ Mark documents as appropriate to indicate privacy, sensitivity, business confidentiality, or other concern
 - ▶ Markings help provide information about how submitter would treat records.
 - ▶ Note: EPA is not bound by markings on submitted documents.

Questions and Discussion

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