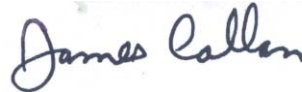


**For:** RMA Employees

**Amended Freedom of Information Act (FOIA) Guidance**

**Approved by:** Acting Administrator, RMA



**1 Overview**

**A Background**

On December 31, 2007, the President signed into law the “Openness Promotes Effectiveness in our National Government Act of 2007” (OPEN Government Act) that:

- promotes accessibility, accountability, and openness in Government by strengthening FOIA
- amended FOIA by:
  - directing that required attorney fees be paid from an agency’s own appropriation rather than from the United States Treasury, Claims and Judgment Fund
  - prohibiting an agency from assessing certain fees, if the agency fails to comply with FOIA deadlines
  - establishing the National Archives and Records Administration, Office of Government Information Services to review agency FOIA compliance.

No changes to the OPEN Government Act’s 9 exemptions were made; however, the OPEN Government Act’s FOIA amendments:

- address a range of procedural issues impacting FOIA administration, including codifying several Executive Order 13392 provisions
- improve agency timeliness and performance when responding to FOIA requests.

<b>Disposal Date</b>	<b>Distribution</b>
September 1, 2009	All RMA Employees

**1 Overview (Continued)**

**B Purpose**

This notice addresses FOIA, Sections 4, 5, 9, and 10 which are especially pertinent to agency personnel, as follows:

- Section 4: Recovery of Attorney Fees and Litigation Costs
- Section 5: Disciplinary Actions for Arbitrary and Capricious Rejections of Requests
- Section 9: Openness of Agency Records Maintained by a Private Entity
- Section 10: Office of Government Information Services.

**2 OPEN Government Act, FOIA Amendments**

**A Section 4: Recovery of Attorney Fees and Litigation Costs**

The Open Government Act, **FOIA**, Section 4 amendment adds 2 new elements to the FOIA attorney fees provision. FOIA's pre-existing attorney fees provision provided that a court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred" in cases in which the "complainant has substantially prevailed." The Open Government Act, **FOIA**, Section 4 amendment:

- defines the circumstances under which a FOIA plaintiff can be deemed to have "substantially prevailed"
- adds a provision that states that a FOIA complainant has "substantially prevailed" if the complainant "obtained relief through either -- (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial"
- changes the method by which attorney fees and costs are paid to FOIA plaintiffs; attorney fees and costs will no longer be paid by the United States Treasury Claims and Judgment Fund, fees and costs will be paid directly by RMA, using funds "appropriated for any authorized purpose."

This means that, if RMA:

- changes its position and, for instance, releases previously withheld documents in the course of the litigation, a plaintiff may become eligible for the recovery of attorney fees
- loses a FOIA lawsuit, RMA must now pay the fees out of its own pocket; that is the fees are now paid from RMA's operating budget rather than the United States Treasury, Claims and Judgment Fund.

2 **OPEN Government Act, FOIA Amendments (Continued)**

**B Section 5: Disciplinary Actions for Arbitrary and Capricious Rejections of Requests**

The Open Government Act, **FOIA**, Section 5 adds reporting requirements for the Attorney General and the Special Counsel. FOIA's pre-existing provision provided that where a "court orders the production of any agency records improperly withheld . . . and assesses against the United States reasonable attorney fees and other litigation costs, and . . . additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding."

The Open Government Act, **FOIA**, Section 5 amendment:

- requires that the Attorney General notify the Special Counsel of each civil action described under this provision and submit a report to Congress on the number of such civil actions in the preceding year
- directs the Special Counsel to submit a report to Congress "on the actions taken by the Special Counsel" under this provision
- adds emphasis to how employees are held accountable for improperly withholding agency records.

**C Section 6: Time Limits for Agencies to Act on Requests**

**FOIA**, Section 6 provides that the statutory time period commences "on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests." Within RMA, this designated "component" is the FOIA Coordinator, Program Support Staff.

This provision addresses the situation where a FOIA request is received by another person or office of an agency that may be designated to receive FOIA requests, but is not the proper component for the request at issue. In such a situation, the component that receives the request in error – provided it is a component of the agency that is designated by the agency's regulations to receive requests – has 10 workdays within which to forward the FOIA request to the appropriate agency component – which should take place within 10 workdays – the statutory time period to respond to the request commences.

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### 2 OPEN Government Act, FOIA Amendments (Continued)

#### C Section 6: Time Limits for Agencies to Act on Requests (Continued)

The bottom line is that when a FOIA request is received, employees should expeditiously forward the FOIA request by either of the following:

- mail to:

RMA, Program Support Staff, Terrie Ray, FOIA Coordinator  
STOP 0821  
1400 INDEPENDENCE AVE SW RM 6624-S  
WASHINGTON DC 20250

- FAX to 202-720-6665, ATTN: Terrie Ray.

#### D Section 9: Openness of Agency Records Maintained by a Private Entity

FOIA, Section 9 provides that under FOIA, a “record” is any information “maintained for an agency by an entity under Government contract, for the purposes of records management.” This provision makes clear that records in the possession of Government contractors for records management purposes are considered agency records for FOIA purposes.

#### E Section 10: Office of Government Information Services

OPEN Government Act, FOIA, Section 10 amendment creates a new office, the Office of Government Information Services, within the National Archives and Records Administration. The Office of Government Information Services office will have 2 main functions, as follows:

- review agency FOIA activities and recommend changes to Congress and the President
- offer mediation services to FOIA requesters as a “non-exclusive alternative to litigation.”

The Office of Government Information Services may also “issue advisory opinions if mediation has not resolved the dispute.”

### 3 Guidance for Managers and Employees

#### A FOIA

Generally, the records in each office are agency records under FOIA.

3 Guidance for Managers and Employees (Continued)

B Requirements

FOIA **requires** that agency records be released to members of the public upon proper written request. There are 9 exemptions to releases, as follows, but all are narrowly construed. In litigation, which is very easy to bring under FOIA, the burden of proving the exemption applies is on the agency. **Thus, there is a strong presumption in favor of release.**

Exemption	Title
1	Matters of National Defense or Foreign Policy
2	Internal Agency Rules
3	Information Exempted by Other Statutes
4	Trade Secrets, Commercial, or Financial Information (Confidential Business Information)
5	Privileged Inter- or Intra-Agency Memoranda
6	Personal Privacy
7	Records or Information Compiled for Law Enforcement Purposes
8	Records of Financial Institutions
9	Geological or Geophysical Information and Data Concerning Well

C Federal Employee FOIA Duties

Every Federal employee has duties under FOIA. Employees shall:

- **search for responsive records**, as follows:
  - search in **every place where a reasonably knowledgeable professional could expect to find responsive records** including RMA records in possession of contractors
 

**Note:** The search obligation goes far beyond the file cabinet or file folders. It includes searching **electronic media, such as computer hard drives, e-mail, electronic calendars, archives, servers, CD's, thumb drives, and the like.**
  - searches performed **must** be reasonably calculated to yield **all** responsive records
 

**Note:** Before initiating a search, make a plan, including logical subject matter files and other places where records on the subject requested could reasonably be found.
  - searches must be **timely** to ensure that responsive records are not lost or destroyed; in most cases searches must be sufficiently prompt to allow FOIA officers to respond to the requester within 20 calendar days; if there is difficulty with the search, employee **must** notify the FOIA officer immediately

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### 3 Guidance for Managers and Employees (Continued)

#### C Federal Employee FOIA Duties (Continued)

- **preserve all responsive records** in whatever form or format the records are found, as follows:
  - in their native format; if a document was created in Microsoft Word, employee **must** preserve the document in Microsoft Word; if employee is having difficulty copying electronic records, enlist the assistance of an information technology specialist
  - records that **may** be responsive to the request, even if employee is not sure the records are responsive, **err on the side of caution**; study the request carefully and talk to others who may be more knowledgeable of the subject matter, if necessary.

#### D Contacts

Direct questions to RMA FOIA Officer, Terrie L. Ray by either of the following:

- e-mail to **terrie.ray@rma.usda.gov**
- telephone at 202-690-5701.