

FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554 FCC DIRECTIVE	FCC DIRECTIVE	
	FCC INST 1179.1	
	Effective Date: December 2006	Expiration Date: December 2011

TO: Commissioners, Bureau/Office Chiefs
 Division/Branch/Section Chiefs, and Field Offices

SUBJECT: Freedom of Information Act (FOIA) Requests

1. **PURPOSE:** To implement standard procedures for use within the Federal Communications Commission (FCC) in receiving, processing, and reporting on Freedom of Information Act (FOIA) requests. This directive supplements procedures in the FCC Rules and Regulations 47 C.F.R. §§ 0.460 and 0.461.
2. **CANCELLATION:** This instruction supersedes FCCINST 1179.1 dated June 2000.
3. **BACKGROUND:** The FOIA, 5 U.S.C. § 552(a)(3), as amended, made many federal records available for public inspection. The Act ensures public access to these information resources in a reasonable, timely fashion.

The FOIA was amended in 1995 when the Electronic Freedom of Information Act Amendments (EFOIA) were signed into law, requiring agencies to treat electronically generated information in generally the same way as paper records. EFOIA also promotes the use of advanced information technology in order to achieve efficient disclosure of information to the public by electronic means. Executive Order 13392 reaffirms the importance of FOIA and requires federal agencies to make their program "citizen-centered and results-oriented."

DISTRIBUTION:
 A, B, C, D, E, F

ORIGINATOR:
 Performance Evaluation & Records Management
 Office of the Managing Director

4. RESPONSIBILITIES:

- A. The Chairman of the FCC delegated responsibility to the Office of General Counsel (OGC) to serve as the Chief FOIA Officer for the agency. As Chief FOIA Officer, the General Counsel is responsible for overseeing and monitoring the efficiency and effectiveness of the FOIA program.
- B. The Office of Managing Director, Performance Evaluation and Records Management (PERM) is responsible for the administration and day-to-day management of the FOIA program. PERM serves as the FOIA Public Liaison and the FOIA Requester Service Center.
- C. General Counsel:
 - (1) Serves as the principal FOIA Officer for the Commission and is responsible for the efficient and appropriate compliance with the FOIA.
 - (2) Monitors FOIA implementation throughout the agency.
 - (3) Reviews and reports, through the Chairman, on the agency's performance implementing FOIA.
 - (4) Facilitates public understanding of the purpose of the FOIA.
 - (5) Issues policy documents.
 - (6) Serves as the FOIA coordinator for the Chairman and Commissioners.
 - (7) Provides consultation to B/Os and PERM when requested.
 - (8) Consults with PERM when requested with respect to the category of the requester. If there is a disagreement, OGC will make the final determination on the category of the requester.
 - (9) Acts on requests for waiver of search, copying or review fees.
 - (10) Prepares recommendations to the Commission on the disposition of applications for review (FOIA appeals) and represents the Commission in court actions involving FOIA matters.
- D. Office of Managing Director (OMD)/Performance Evaluation and Records Management (PERM):

- (1) Manages the FCC's FOIA program and the FOIA Requester Service Center.
- (2) Serves as the central control and contact point on all requests for records received pursuant to the FOIA, acknowledging receipt of all incoming FOIAs, processing and distributing initial FOIA requests to appropriate Bureaus and Offices (B/Os for response, monitoring the B/O progress in responding to requests, preparing and submitting all routine reports on the disposition of requests, and notifying Financial Operations (FO) of the amount to be billed to the requester.
- (3) Where multiple Bureaus/Offices are likely to have responsive records, assigns lead Bureau/Office to prepare the initial response with the assistance of other Bureaus/Offices.
- (4) Serves as the FOIA Public Liaison. Responds to inquiries on the status of FOIA requests and addresses concerns about the service. Resolves disputes.
- (5) Ensures service-oriented responses to FOIA requests and FOIA related inquiries.
- (6) Reviews monthly report of delinquent accounts to ensure that requesters who have an outstanding financial obligation to the Commission do not obtain FOIA services until the debt is satisfied.
- (7) In consultation with the OGC, prepares the required annual report for submittal to the Department of Justice.
- (8) Maintains B/O records of FOIA requests, actions, and responses and disposes of these records in accordance with the provisions of the General Records Schedule 14 which pertains to FOIA records.
- (9) Establishes and maintains a FOIA home page on the FCC Website to explain the scope of the FCC's FOIA program to encompass electronic records and to provide requesters with the option of submitting FOIA requests electronically. At a minimum, the FCC FOIA home page shall contain general information about the FOIA program, frequently requested information, a listing of the principal FOIA contacts at the FCC, and a FOIA (EFOIA) request form.
- (10) Establishes and maintains a FOIA home page on the FCC Intranet to expand the availability of FOIA documents to FCC staff. At a minimum the FCC FOIA Intranet page shall contain FCC B/O

contact names and information, weekly FOIA reports, copies of incoming FOIA requests, and copies of initial FOIA responses.

- (11) Manages the Privacy Act program. The Privacy Act of 1974, as amended (5 U.S.C. § 552a) is a companion to the FOIA. The Privacy Act and the FOIA have different procedures and exemptions. Employees who are involved with processing public requests should become familiar with procedures under both Acts. For additional information on the FCC's Privacy Act program, see 47 C.F.R. §§ 0.551-0.561 and FCCINST Directive 1113 (the Privacy Act Manual). For a listing of the Commission's systems of records, see <http://intranet.fcc.gov/omd/perm/privacyact/prasystemreocrd.html>.

E. Bureau/Office Chiefs:

- (1) Designate an internal coordinator as point of contact to manage B/O FOIA actions. Encourage coordinators and others routinely involved with FOIA to attend FOIA training at least once a year from a recognized source of FOIA expertise (preferably the Department of Justice FOIA training).
- (2) Review response to FOIA requests, exercise final approval authority, and sign all FOIA correspondence as the responsible official. This responsibility may be delegated as appropriate.

F. Bureau/Office FOIA Coordinators:

- (1) Manage requests within B/O to ensure response within 20 working days or within an extension as permitted by law. B/O will make every effort to act on the request within 20 working days. B/O may extend that time by an additional 10 business days under certain circumstances (see 47 C.F.R. § 0.461 and section 5, Procedures below) or by agreement with the FOIA requester.
- (2) Inform requesters of any necessary extensions.
- (3) Notify PERM when a new response date has been extended or negotiated. Forward a copy of the letter of extensions and requests for additional time to PERM.
- (4) Notify PERM when a request has been withdrawn.
- (5) Review and act on requests for expedited processing of FOIA requests in accordance with 47 C.F.R. § 0.461(h). Expedited processing shall be granted to a requester demonstrating a

compelling need that is certified by the requester to be true and correct to the best of his/her knowledge and belief. Notice of the determination as to whether to grant expedited processing shall be provided to the requester within 10 calendar days.

- (6) Determine applicable fees and receive requester's agreement to pay fees prior to fulfilling the request. Document all determinations that lead to a decision to charge or not to charge a FOIA requester. This can be done either by using FCC Form A-306, "Computation on FOIA Request" (available at <http://intranet.fcc.gov/omd/perm/foia/COMPUTATION%20OF%20FOIA%20PROCESSING%20CHARGES%20form%20A-306.doc>) or by including in the written response the assessed charges, if any. Notify requesters by letter that they will be receiving under separate cover a bill for payment and instructions for payment.
- (7) Mail response to the requester.
- (8) Forward an electronic copy of the FOIA response letter to PERM.
- (9) Complete FCC Form A-393, Information for Annual Report to Congress (available at <http://intranet.fcc.gov/omd/perm/foia/FOIA%20SUMMARY%20form%20A-393.doc>). Completion of form is optional if information is explicitly included in the response letter.
- (10) Keeps records documenting all responses and fee determinations in accordance with the provision of the General Records Schedule 14 which pertains to FOIA records.

G. Mail Branch:

Immediately delivers all mail identified as a FOIA request to PERM.

5. PROCEDURES:

A. General:

As codified in 5 U.S.C. § 552(a)(6)(A) and (B), the FOIA requires a determination of "whether to comply" with a FOIA request within 20 working days. This 20 day period begins upon date stamped by PERM and logged into the FOIA database. The FCC may take an extension of 10 or more working days in "unusual circumstances" by providing the requester a written notice. Use of the additional 10 working days may be claimed for the following reasons:

- (1) it is necessary to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- (2) it is necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
- (3) it is necessary to consult with another agency having a substantial interest in the determination of the request or among two or more components of the Commission.

If it is not possible to locate the records and make the determination within the extended period, as described in section 0.461(g) of the Commission's rules, the requester will be provided an opportunity to limit the scope of the request so that it may be processed within the extended time period, or an opportunity to arrange an alternative time frame for processing the request or a modified request, and asked to consent to an extension or further extension. Agreement of extensions should be documented in writing.

B. Receipt:

The Mail Branch, or the receiving B/O, will deliver all letters identifiable as requests for the inspection of records or as FOIA requests to PERM. The request will be given a control number and date stamped by PERM in order to establish the agency's date of a proper request.

PERM will ensure that the proper B/Os receive the FOIA request within eight working hours or less. The B/Os must establish sufficient safeguards to ensure compliance with the relevant response period.

C. Processing. Prior to forwarding a request to a B/O for response, PERM will:

- (1) Determine the classification of a FOIA request on the basis of the interpretative guidelines issued by the Office of Management and Budget (codified in FCC rules at § 0.466) and/or through additional "use" information obtained from the FOIA requester.
- (2) Determine and note on the cover sheet the proper time code to be used for processing a FOIA request.
- (3) Send a copy of requests for a waiver of review, search or copying fees (pursuant to 47 C.F.R. § 0.466 or 0.470(e)) to OGC.

- (4) Scan non-electronic materials and mount the FOIA requests to the agency's Intranet FOIA site on a daily basis.

D. Responding:

- (1) Upon receipt, the B/O FOIA coordinator will:
 - (a) Determine if the FOIA request has been directed to the appropriate office. If it is determined that the FOIA request has been misdirected, promptly return the request to PERM for appropriate handling rather than forwarding it to another B/O.
 - (b) If a request is not specific enough, either notify the requester in writing or by telephone requesting a more complete description of the material requested. Clarification obtained orally must be confirmed in writing.
 - (c) Thoroughly search files and records for material requested. The cut off date for the search of records is the date the FOIA request is received, unless the requester specifies a date. See 47 C.F.R. § 0.461(f)(6). However, if a requester specifies an earlier or later date, it should be accommodated unless there are compelling reasons not to do so.
 - (d) When requested records have been removed to storage in a Federal Records Center (FRC), use Form A-113, "Request for Recall of Records" to retrieve the records. Across the top print in block letters "FOIA Request" and notify the requester in the written response that the files have been requested and that she/he will be told when the records are retrieved from FRC.
 - (e) When records have been accessioned as permanent records to the National Archives, the FOIA requester should be advised in writing to contact the National Archives and Records Administration (NARA) for access.
 - (f) Make a determination of whether the request for release is routinely available, i.e., for material normally available for public inspection such as license files or other public files (47 C.F.R. §§ 0.453, 0.455). If the request is routine, notify requester in writing of three options for obtaining the requested material:

- (i) material is available for inspection and may be reviewed in person at the Commission's offices in Washington, D.C. between 8:30 am and 5:30 pm;
 - (ii) copies can be obtained (at their expense) from the FCC's duplicating contractor; or
 - (iii) copies can be obtained (at their expense) from the FCC's FOIA fee schedule. If the requester for such materials wants the Commission to locate the materials and make the copies, the requester will be charged fees.
- (g) If the records are not routinely available for public inspection, determine whether any of the FOIA exemptions in section 6 of this instruction (see also 47 C.F.R. § 0.457(d)) apply.
- (h) If making an adverse determination, the B/O shall notify the requester of that determination and of his/her appeals rights. A requester has the right to administratively appeal any adverse determination, including for example: denials of records in full or in part; "no records" responses, denials of requests for fee waivers; and denials of request for expedited treatment.
- (i) If records requested were generated outside the FCC and submitted under a request for confidentiality (47 C.F.R. § 0.459) or are deemed confidential (47 C.F.R. § 0.457), provide the original source with a copy of the FOIA request. If no request for confidentiality was submitted, the Commission assumes no obligation to consider the need of non-disclosure but, in unusual instances, may determine on its own motion that materials should be withheld from public inspection.
- (j) If the records are the property of another agency, the request will be referred to that agency and the requester will be so advised.
- (k) Estimate search and review fees in accordance with the criteria established by 47 C.F.R. §§ 0.467 and 0.470. Factors to consider include time required and the grade of persons conducting the search and review. No fees will be assessed if the fees would be equal to or less than \$10. See 47 C.F.R. § 0.470(f) and section 6 below for more detailed

information on fees. Initial FOIA letters will include a paragraph setting forth the applicable fees or the reason there are no fees for processing the request (see section E(1)(g) below).

- (2) Granting or denying a request is done at the B/O level based upon the provisions of the FOIA, FCC regulations, and precedents established by the courts and the FCC.
- (3) The OGC will provide advice in any case when requested. However, the OGC must be advised when the B/O Chief feels that decisions to grant/deny a request breaks new ground – establishes instances of a new or different precedent – or when the B/O Chief is uncertain of an issue’s reasonable potential for reversal on appeal. In addition, the OGC and PERM must always be given prior notice of disclosure when it involves:
 - (a) Information gathered by monitoring radio communications and other materials covered by Section 705 of the Communications Act, 47 U.S.C § 705;
 - (b) Materials covered by a FOIA exemption; and
 - (c) Data possibly protected by the Privacy Act (see FCCINST 1113.1).

E. Reporting:

- (1) The response letter should be prepared after a determination has been made. The response letter should contain the following elements:
 - (a) Include the FOIA control number; the nature of the request and the agency’s construction of it.
 - (b) Describe any time extension and the reason for it (*e.g.*, needed to search records of multiple Bureaus) in response letter.
 - (c) Identify records that are being released. If no responsive records are found, so state.
 - (d) Describe the records or portions that are being withheld and the authority for the withholding, citing applicable exemption(s) and a clear explanation of the reasons the exemption was exercised.

- (e) State the cut-off date used.
 - (f) Explain when and where records are available.
 - (g) Notify requester of and provide explanation of FOIA fees. If no fees are being assessed, provide explanation.
 - (h) Include procedures and time limits for appealing the denial to the OGC. Use the following or similar language: “If you believe this to be a denial of your request, you may file an application for review with the FCC’s Office of General Counsel within 30 days of the date of this letter. 47 C.F.R. §§ 0.461(j) and 1.115.” If a request for confidential treatment is denied, cite 47 C.F.R. § 0.461(i) (10 days to seek review of denial of confidentiality request in context of an initial FOIA decision).
 - (i) Include address, name, and title of persons responsible for denial.
- (2) When the response is prepared and sent to the requester, forward a signed electronic copy of the final response letter to PERM. A hard copy is necessary only if the electronic copy is not signed.
 - (3) When applicable, a copy of the letter releasing materials will be sent to the non-FCC source originally providing the records to the FCC in confidence. Material submitted in confidence may not actually be disclosed unless the submitter agrees to disclosure or the time for appeals by the submitting party has passed as provided in Section 0.461(a) of the Commission’s rules.
6. **FEES:** Federal agencies are obliged to safeguard the public treasury and should not provide search, review, and duplication services at reduced or no cost except under circumstances provided for by the Act.
- A. Search and Review Fees
 - (1) An hourly fee shall be charged for recovery of full, allowable direct costs of searching for and reviewing records requested under 47 C.F.R. § 0.460(e) or § 0.461, unless such fees are restricted, reduced, or waived pursuant to 47 C.F.R. § 0.470. No fees will be assessed if the fees would be equal to or less than \$10. See 47 C.F.R. § 0.470(f).

- (2) Search fees may be assessed for time spent searching, even if the Commission fails to locate the records or if the records are determined to be exempt from disclosure.
- (3) The Commission shall charge only for the initial review. The Commission shall not charge for subsequent review at the appeal level for an exemption already applied. However, records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs of such subsequent review, under these circumstances, are properly assessable.
- (4) If the estimated fees are minimal (47 C.F.R. § 0.470(f)) no fees will be assessed. The threshold amount under this rule is \$10.00.
- (5) If the estimated fees are likely to exceed the greater of \$25 or the amount which the requested indicated he/she is prepared to pay then the B/O shall notify the requester of the estimated amount of fees. Such notice shall offer the requester the opportunity to confer with Commission personnel with the objective of revising or clarifying the request. See 47 C.F.R. § 0.467(e).
- (6) When a request exceeds \$250 and the requester has no history of payment, then the B/O may require the requester to make an advance payment of the full amount before processing the request.
- (7) If estimated fees exceed \$250 and the requester has a history of prompt payment, then the B/O shall notify the requester by written response and obtain satisfactory assurance of full payment.
- (8) When a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing), PERM shall require the requester to pay the full amount owed plus any applicable interest as provided in section 0.468 and make an advance payment of the full amount of the estimated fee before processing the new or pending request.
- (9) In the cases of subparagraphs (5)-(7) above, the administrative time limits prescribed will begin only after the agency has obtained satisfactory assurance of full payment or received the fee payment. See 47 C.F.R. § 0.469.

B. Fees are assessed as follows:

- (1) Commercial use requesters: When the Commission receives a request for documents for commercial use, the B/O will assess charges that recover the full direct cost of searching for, reviewing, and duplicating the records sought.
- (2) Educational and non-commercial scientific institution requesters and requesters who are representatives of the news media: The Commission shall provide documents to requesters in these categories for the cost of reproduction only, pursuant to 47 C.F.R. § 0.465, excluding reproduction charges for the first 100 pages, provided however, that requesters who are representatives of the news media shall be entitled to a reduced assessment of charges only when the request is for the purpose of disseminating information.
- (3) All other requesters: The requester is entitled to the first 100 pages and the first two hours of search time free of charge. The requester cannot be billed for review time.

7. EXEMPTIONS:

- A. The FOIA provides specific areas in which records are exempt from mandatory disclosure. When the public interest is served by release of the records, release may be justified despite the applicability of the exemption. However, the Commission may be prohibited from disclosing some types of records (e.g., classified documents). Also, unless authorized by the Commission, B/Os should not disclose any information that falls within Exemption 5. A large number of administrative law and court decisions are available for direction in this area. See, e.g., the Department of Justice Freedom of Information Act Guide & Privacy Act Overview (most recent edition), found at <<http://www.usdoj.gov/04foia/foi-act.htm>> or in Westlaw under the FOIA-GUIDE library.
- B. The exemptions and their citations are:
 - (1) Classified documents concerning national defense and foreign policy – (A) “specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense or foreign policy” and (B) “are in fact properly classified pursuant to such Executive Order” (5 U.S.C. § 552(b)(1)(A)(B));
 - (2) Internal personnel rules and practices – matters “related solely to the internal personnel rules” (5 U.S.C. § 552(b)(2)). This exemption covers matters of a trivial nature, and more substantial internal matters which, if disclosed, would risk circumvention of a legal requirement;

- (3) Information exempt under other laws – information “specifically exempted from disclosure by statute [other than the Privacy Act, 5 U.S.C. Sec. 552b], provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld” (5 U.S.C. § 552(b)(3));
- (4) Confidential business information – “trade secrets and commercial or financial information obtained from a person and privileged or confidential” (5 U.S.C. § 552(b)(4));
- (5) Internal communications – “inter-agency or intra-agency memorandums or letters which would not be available by law to party other than an agency in litigation with the agency” (5 U.S.C. § 552(b)(5));
- (6) Protection of privacy – “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” (5 U.S.C. § 552(b)(6));
- (7) Investigatory files – “records or information compiled for law enforcement purposes, not only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency of authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) 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, or (F) could reasonably be expected to endanger the life or physical safety of any individual” (5 U.S.C. § 552(b)(7));

8. EXCLUSIONS:

The Freedom of Information Reform Act of 1986 provided a new mechanism for protecting sensitive law enforcement records under certain circumstances. In particular, the statute created three record exclusions which authorized agencies, under specified circumstances, to treat records as not subject to the requirements of the FOIA. See 5 U.S.C. § 552(c)(1)-(3). These are rarely invoked and involve criminal law enforcement or foreign intelligence situations. You should consult OGC before attempting to invoke these exclusions and should notify PERM of the initiation of consultation with OGC in this matter.

9. APPLICATION FOR REVIEW

A. General. There are two types of application for review:

- (1) When B/O denies the initial request for information in whole or in part, the requester may appeal to the Commission for review of that decision.
- (2) When the B/O's initial decision grants access to records provided to the FCC on a privileged or confidential basis, the source of the original materials may file an application for review requesting that the record be withheld from disclosure.

B. Appeals by Requesters:

- (1) The letter denying a FOIA request will be signed by the denying official and will notify the requester of the right to appeal to the Commission. The requester should be notified that he/she has 30 days from the date of the written ruling to file a written application for review which must be mailed or delivered to the OGC.
- (2) The Commission will attempt to act on the appeal within 20 working days after its filing. Applications for review are submitted to the full Commission for a vote. Decisions on applications for review shall include the names of the Chairman and Commissioners.

C. Appeals by Source of Original Materials:

- (1) If the FOIA request pertains to materials for which confidentiality has been requested, or material listed in 47 C.F.R. § 0.457(d), the person submitting the information will be provided with a copy of the incoming FOIA request, 47 C.F.R. § 0.461(d)(3).

- (2) If the FCC grants the request for the inspection of such records, the source of the material is provided a copy of the decision and notified that release of the material will be held in abeyance for 10 working days after the date of the written ruling so that the source may file for a review of the decision. The written request for review will be delivered or mailed to OGC detailing the basis for requesting the protection.
- (3) The Commission will attempt to resolve the question within 20 working days.

D. Courts:

- (1) A party may appeal the Commission's decision to withhold records to the appropriate United States District Court pursuant to the jurisdictional provisions of 5 U.S.C. § 552(a)(4)(B).
- (2) Decisions to disclose records may also be appealed under provisions of the Administrative Procedure Act or the Privacy Act.

Anthony J. Dale
Managing Director

Stocked:
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On the Intranet: http://intranet.fcc.gov/omd/perm/directives/1179_1.html