



# THE FREEDOM OF INFORMATION ACT

An Informational Overview

**CENTERS FOR MEDICARE &  
MEDICAID SERVICES**

**OFFICE OF STRATEGIC OPERATIONS  
& REGULATORY AFFAIRS**

**1<sup>ST</sup> EDITION**

***CMS***  
CENTERS for MEDICARE & MEDICAID SERVICES

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## INTRODUCTION & BACKGROUND

### **What is the Freedom of Information Act (FOIA)**

The Freedom of Information Act (FOIA) is a Federal law that gives “any person,” including U.S. citizens, foreign nationals, organizations, associations, and universities the right to obtain information from a Federal Government Agency (codified at 5 U.S.C. Section 552).

The FOIA applies to Executive Branch departments, agencies, and offices; Federal regulatory agencies; and Federal corporations. The FOIA does not apply to Congress, the Federal courts, and parts of the Executive Office of the President that function solely to advise and assist the President.

Under the FOIA, you can obtain all “agency records”—such as print documents, photographs, videos, maps, e-mail, and electronic records—that were created or obtained by a Federal agency and are, at the time you file a request, in that agency’s possession and control.

When understanding the FOIA today, you should look beyond the statute to the agency regulations, the judicial opinions, and the government FOIA policies. Each branch of government plays a role in developing FOIA law.

## **Brief history of the FOIA**

The FOIA was enacted in 1966 and was the first law that gave Americans the right to access information from their government. The FOIA was the innovation of Congressman John Moss (D-CA), who began a 12-year struggle to obtain passage of the law by the U.S. Congress.

Virtually every executive branch department testified against Moss's bill, asserting it would cripple the operations of Federal agencies if they could not operate in secret when they deemed it appropriate. Moss called panels of newspaper reporters, editors, educators, and scientists. They largely supported the need for a more open government. He also conducted ongoing investigations of some of the most blatant and unjustified cases of withholding information, receiving wide press coverage.

When Democrats won the White House, Moss assumed that passage of FOIA legislation would proceed more smoothly. However, Lyndon Baines Johnson (LBJ) didn't particularly like the concept of a public right to government information. Congressman Moss enlisted the help of Republican Congressman Donald H. Rumsfeld (R-IL) who rallied some Republican support for FOIA. That, plus the threat of political repercussion for the Democrats in the 1966 elections, forced LBJ to reluctantly sign the Act on July 4, 1966.

## **Amendments and other legislation**

The FOIA was amended: in 1974—after the Watergate scandal—to force greater agency compliance; in 1986, to provide broader exemption protection for law enforcement information; and in 1996, to allow for greater access to electronic information.

## **The Open Government Act of 2007 implemented the following provisions regarding the FOIA:**

- 1. Routing:** An agency is responsible for sending misrouted requests to the appropriate office within 10 business days.
- 2. Tolling:** An agency may stop the clock only once during the process time of a request for non-fee related matters. The clock may be stopped as many times as necessary for fee issues.
- 3. Fee:** An agency may not charge for search time if it does not meet the response time unless “unusual or exceptional circumstances” apply. (For example, records exist in more than one office; records are voluminous; records require consultation with another agency; or the office is making a reasonable effort to reduce backlog.)

### **President Obama's FOIA memorandum**

On January 21, 2009, President Obama issued a memorandum to all department and agency heads on the FOIA. The President directed that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.” In addition, the President instructed each agency not to withhold information because “public officials might be embarrassed by disclosure, because errors and failure might be revealed or because of speculative or abstract fears.”

## Attorney General Holder's FOIA guidelines

On March 19, 2009, Attorney General Eric Holder rescinded the October 12, 2001, Attorney General Memorandum, and established a new set of guidelines:

1. Chief FOIA Officers "must recommend adjustments to agency practices, personnel, and funding as may be necessary."
2. An agency should review records with the presumption of openness. They should ask what can be disclosed rather than what can be withheld.
3. Information should not be withheld because the Agency may do so legally. An agency needs to ask "if information can be released" rather than, "if information can be withheld."
4. When full disclosure of a record is not possible, an agency should consider making a partial disclosure.
5. Records cannot be withheld merely to protect public officials from embarrassment, or to prevent errors and failures from being revealed.

## Annual reports

On or before February 1 of each year, an agency must submit to the Attorney General an annual report which includes the following:

- The number of determinations made by the agency not to comply with information requests;
- The number of appeals and the results of those appeals;
- The number of requests pending before the agency by September 30 of the preceding year;
- The number of requests received and processed by the agency;
- The median number of days needed to process a request;
- The total amount of fees collected for processing requests;
- The number of FTEs devoted to processing information requests; and,
- The total amount spent by the agency for processing information requests.



## PROCESS

### What are agency records?

The Supreme Court has articulated a basic, two-part test for determining what constitutes “agency records” under the FOIA.

#### **An agency record is:**

- Created or obtained by an agency; and
- Under agency control at the time of the FOIA request.

#### **Factors an agency must consider when making a record determination:**

- The intent of the record’s creator to retain or relinquish control over the record;
- The ability of the agency to use and dispose of the record as it sees fit;
- The extent to which agency personnel have read or relied upon the record; and
- The degree to which the agency integrated the record into its record keeping system or files.



## Agency record vs. a personal record

Personal records are those maintained by agency employees, but not for agency official use. An agency must consider three factors when determining if a record is personal:

1. The purpose for which the document was created;
2. The degree to which the agency has integrated the record into its filing system; and,
3. The extent to which the record's author or other employees used the record to conduct agency business.



## EXEMPTIONS & EXCLUSIONS

### The FOIA exemptions

The FOIA has nine exemptions for releasing certain information for public disclosure:

Exemption 1	National Security Information
Exemption 2	Internal Personnel Rules and Practices
Exemption 3	Information exempt under other laws
Exemption 4	Confidential Business Information
Exemption 5	Inter- or intra-agency communication that is subject to deliberative process, litigation, and other privileges
Exemption 6	Personal Privacy
Exemption 7	Law Enforcement Records
Exemption 8	Financial Institutions
Exemption 9	Geological Information

## Law enforcement exclusions

The FOIA excludes three special categories of law enforcement-related records:

1. Investigation involving a possible violation of criminal law
2. Confidential Informant Protection
3. National Security Investigations



## REQUESTER'S ROLE

### **Who can make a FOIA Request?**

"Any person" (such as U.S. citizens, foreign nationals, organizations, associations, and universities) can make a FOIA request. An attorney or other representative with proper authorization may make a FOIA request on behalf of "any person." Also a State or a State agency may make a FOIA request.

### **Who may not make a FOIA Request?**

The FOIA has two categories of individuals who may not make a request:

1. A fugitive from justice who is requesting records relating to his/her fugitive status; and
2. A foreign government or international government organization, directly or through a representative, that is requesting information from a U.S. intelligence agency.

### **The relevance of a requester's identity**

The Supreme Court has ruled that a FOIA requester's identity "has no bearing on the merits of his or her FOIA request."

## How to send a FOIA request?

The FOIA requires each agency to maintain information about how to make a request. Such information may include a handbook, reference guide, indexes, and descriptions of information locator systems. This information is available on an agency's website. Obtaining government records under the FOIA may be more productive if he or she first determines the *appropriate* agency involved.

The Centers for Medicare & Medicaid Services website is [www.cms.gov](http://www.cms.gov).

## Does a FOIA requester have to explain his or her reason for a request?

A requester generally does not have to explain the reasons for making a request. However, specific circumstances affect the manner in which an agency processes requests:

- Expedited process
- Waiver of fees
- Award of attorney fees to a FOIA plaintiff
- Balance between private and the public's right to know

## The proper form for a FOIA request

A FOIA request must "reasonably describe" the records such that a professional agency employee familiar with the subject could locate the record with a "reasonable amount" of effort. The courts have ruled that "FOIA was not intended to reduce a government agency to full-time investigators on behalf of requesters."

A FOIA request must be made in accordance with the agency's published FOIA regulations (<http://www.hhs.gov/foia/45cfr5.html>).



## AGENCY ROLE

### Responding to FOIA requests

The FOIA requires each agency to make its disclosable records promptly available upon request. It does not, however, always require an agency to make requested records available by mailing them to the requester. An agency can make the records available in one central location such as in a “reading room” (see page 22).

### Agency regulations

An Agency is responsible for publishing its own regulations that inform the public about the following:

- The procedure and address for submitting requests;
- The fee schedule for search, review, and duplication of documents;
- The fee waiver criteria; and,
- The administrative appeal procedure.

To ensure the requester is able to follow proper procedure, an agency should strictly adhere to its own regulations.

### An agency is not required to do any of the following:

- Answer a question posed as a FOIA request;
- Create a record in response to a request;

- Modify exempt information to disclose it;
- Add explanatory material to any record disclosed;
- Seek the return of a record over which there is not control;
- Recreate a record that had been properly disposed; or
- Seek the delivery of a record held by a private entity.

## **Release of agency information**

The FOIA does not provide for limited disclosure, such as permitting viewing, but not copying of documents. The FOIA also provides no mechanism that would allow only the requester to see the requested information. Once the agency has disclosed information, it becomes public.

## **Form or format of release**

An agency must make every reasonable effort to provide records in the form or format asked for by the requester. An agency also must make every reasonable effort to maintain its records in a form or format that is reproducible.

## **Information provided to the requester**

Notification to a requester should contain the following information:

- Time and location where the agency will make records available;
- Fees, if any, that must be paid prior to obtaining access;
- The records that are responsive to the request;
- The date of receipt of the request or appeal; and,
- The agency interpretation of the requested information.

An agency will provide a FOIA requester with the best copy available of a record. If the agency discovers some problem with the quality of its photocopy of a disclosed record, the agency should address this in its correspondence.

## **Information provided upon release**

An Agency must provide the requester with certain specific administrative information about the action taken on the request—including an estimate of the amount of denied information, unless doing so would undermine the protection provided by an exemption.

Additionally, the Electronic FOIA Amendments of 1996 (P.L. 104-231), require an agency to indicate the amount of information excised at the point in the record where the agency made the excision, wherever it is “technically feasible” to do so.

## **A denial determination**

A requester who is denied information, must be informed of the following:

- Reasons for denial;
- The right to appeal; and,
- The name and title of each person responsible for the denial.

## **Administrative appeals of agency denials**

CMS customarily provides an administrative appeal notification in all of their “no record” responses to FOIA requesters.

A requester has the right to administratively appeal any adverse determination an agency makes on his or her FOIA request. An agency must make a determination of an administrative appeal within twenty working days after its receipt. An administrative appeal decision upholding an adverse determination must also inform the requester of the provisions for judicial review of the determination in the Federal courts.





## AGENCY DOCUMENT SEARCH

### **Interpretation of FOIA requests**

An agency should reasonably consider the terms and contents of each FOIA request—even if the request “is not a model of clarity.” An agency must not read a request so strictly that the requester is denied information the agency knows exists, even if the information is in a different form than requested.

### **Burdensome requests**

An agency may consider the request burdensome if the requester did not describe the request sufficiently to allow a proper and reasonable search. The key factor is the ability of an Agency’s staff to reasonably ascertain exactly which records are being requested, and to locate them. The courts have held only that an agency is not required to conduct wide-ranging, “unreasonably burdensome” searches for records. Note: A request is not burdensome merely because it is a large request.

## **Perpetual FOIA requests**

A requester may not compel an agency to automatically release new records as the agency creates them. Essentially a requester cannot make requests for “future” records not yet created.

## **Agency searches for responsive records**

As a general rule, an agency must undertake a search that is “reasonably calculated to uncover all relevant documents.” The reasonableness of an agency’s search depends, in part, on the scope of the request; the description of the records sought and how the agency conducts its search in light of the request. An agency’s inability to locate every single responsive record does not undermine an otherwise reasonable search.

## **Electronic searches**

The Electronic FOIA amendments now require an agency to make “reasonable efforts” to search for requested records in electronic form or format “except when such efforts would significantly interfere with the operation of the agency’s automated information system.”

## **The “reasonably segregable” obligation**

The FOIA requires that an agency must release “any reasonably segregable portion of a record” after appropriate application of the Act’s nine exemptions (see page 8). Courts will closely examine the propriety of agency segregability determinations, even if the requester does not raise the issue of segregability at the administrative level or before the court.

## **Inexplicably intertwined material**

If an agency determines that nonexempt material is so “inextricably intertwined” that disclosure of it would “leave only essentially meaningless words and phrases,” the agency may withhold the entire record.

## **Consultations**

An agency should consult with any other agency or other agency component whose information appears in the responsive records. This is especially the case if the other agency or component is better able to determine whether the information is exempt from disclosure.

An agency may also consult with any other agency that holds an equity in, or special expertise or knowledge concerning, a particular type of information.

## **Referrals to other agencies or agency components**

If an agency or component locates entire records originating from another agency or component, it should refer those records to their originator for its direct response to the requester. The referring agency or component ordinarily should advise the requester of the referral and the name of the agency FOIA office to which it was made.



## FEES

An agency should require a requester to pay any fees owed prior to releasing the processed records, because the agency has no assurance of payment after the requester receives the documents.

CATEGORY	NO CHARGE	FEES CHARGED
Commercial	N/A	Search, review, duplication
Educational Institution	Search, review, 100 pages	Duplication over 100 pages
Non-commercial Scientific Institution	Search, review, 100 pages	Duplication over 100 pages
News Media	Search, review, 100 pages	Duplication over 100 pages
Any Other Requester	2 hours search, all review, 100 pages	Search, duplication over 100 pages

### Waiver of fees

A requester may ask for a fee waiver. Fee waivers are granted on the basis that the information is not in the commercial interest of the requester, and is likely to contribute to the public's understanding of government activities.



## TIMELINES

### **Time limits for processing a request**

Requests must be filed in accordance with published regulations. Once an agency properly receives a FOIA request, it has twenty working days in which to make a determination on the request.

### **Delays in responding to a request**

In “unusual circumstances,” an agency can extend the twenty-day working time limit for processing a FOIA request. However, the agency must notify the requester in writing of the reason an extension is necessary, and provide a date for a determination on the request.

### **The FOIA defines an “unusual circumstance” as:**

- The need to search for and collect records from separate offices;
- The need to examine a voluminous amount of records required by the request; and
- The need to consult with another agency.

## Discretion & time limits for expedited processing

An agency may, at its own discretion, expedite the FOIA process under special circumstances. In addition, an agency must determine whether to grant a request for expedited access within ten calendar days of its receipt by the proper FOIA office.

## Request for expedited processing

An agency is required to expedite the processing of a request if the requester demonstrates a “compelling need.” A requester can show a “compelling need:”

- By establishing that his or her failure to obtain the records quickly “could reasonably be expected to pose an imminent threat to the life or physical safety of an individual”; or
- The requester is a person primarily engaged in disseminating information, “by demonstrating that an “urgency to inform the public concerning actual or alleged Federal Government Activity” exists.

## **Temporal Scope and “cut-off” dates**

The temporal scope or “cut-off” date of a FOIA request is the date the record search begins. Courts have favored this definition because it “results in a much fuller search and disclosure” than the use of a less inclusive cut-off date, for example, one based on the date of request or of receipt by an agency.

## **The problem of “FOIA backlogs” and “tracks”**

An agency usually follows the court-sanctioned practice of “first-in, first-out” in the processing of backlogged FOIA requests. Furthermore, the Electronic FOIA amendments expressly authorized an agency to promulgate regulations providing for “multi-track processing” of their FOIA requests. An Agency is now required to process requests on a first-in, first-out basis within each track; and is also permitted to respond to relatively simple requests more quickly than requests involving complex and/or voluminous records.



## FOIA READING ROOMS

### **Purpose of the reading rooms**

Reading rooms provide the public with convenient access and also provide an agency with the opportunity to demonstrate transparency in government. An agency may withhold certain records if those records fall within a FOIA exemption, just as they can with an outlet in a written response to a FOIA request.

### **Public inspection and copying**

The FOIA requires that records be made available for public inspection, unless they are publicly offered for sale; and that material will not be maintained in a reading room, unless the material has been the subject of multiple requests.



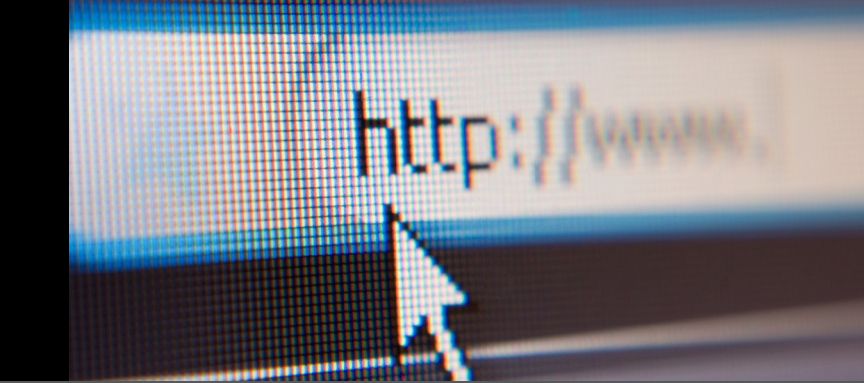
## What records are required in a reading room?

- Final opinions and orders in administrative cases;
- Agency policy statements;
- Administrative staff manuals that affect a member of the public;
- Records that have become, or are likely to become, the subject of subsequent requests.

Furthermore, the Obama administration has emphasized the need to anticipate records that may be requested, and to disclose them in the reading rooms.

## Electronic reading rooms

A reading room provides the public with instant electronic access to records. An agency is only required to post reading room category records created after November 1996.



http://www.

## USEFUL WEBSITES

### **CMS FOIA site:**

[http://www.cms.gov/AboutWebsite/04\\_FOIA.asp](http://www.cms.gov/AboutWebsite/04_FOIA.asp)

[http://www.cms.gov/FOIA/01\\_Overview.asp](http://www.cms.gov/FOIA/01_Overview.asp)

### **DOJ FOIA guide:**

[www.justice.gov/oip/foia\\_guide09.htm](http://www.justice.gov/oip/foia_guide09.htm)

### **Office of Information Policy:**

[www.justice.gov/oip/oip.html](http://www.justice.gov/oip/oip.html)

### **Office of Legal Education FOIA Course Calendar:**

[www.justice.gov/usao/eousa/ole/ole\\_course\\_calendar/calendar.html](http://www.justice.gov/usao/eousa/ole/ole_course_calendar/calendar.html)

*(recommended course: FOIA for Attorneys and Access Professionals)*

### **Public's Guide to FOIA:**

[www.pueblo.gsa.gov/cic\\_text/fed\\_prog/foia/foia.htm](http://www.pueblo.gsa.gov/cic_text/fed_prog/foia/foia.htm)

### **Open Government Act:**

[www.justice.gov/oip/amendment-s2488.pdf](http://www.justice.gov/oip/amendment-s2488.pdf)



My FOIA Contact is: \_\_\_\_\_

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

Notes: \_\_\_\_\_

\_\_\_\_\_

*Adapted from The United States Department of Justice  
Office of Information Privacy*

