

"Dedicated to the Advancement of Animal Rights"



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SPECIAL REPORT



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THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA) can serve as a valuable resource to help activists expose and end animal abuse. Through FOIA, activists may obtain reports on USDA-licensed dealer and exhibitor facility inspections, licensing information, and due process memoranda (such as legal complaints brought against the licensees). Concerning researchers, activists may gain information on facility inspections, annual reports on the numbers of animals used, correspondence with the USDA and the National Institute of Health (NIH), approved experimental protocols (detailing the procedure, use of anesthesia, species of animals used and justification for the experiment) and grant applications and awards.

The USDA, the NIH, and the facility itself are responsible for providing various aspects of this information. CRISP (Computer Retrieval of Information on Scientific Projects) documents are available from the NIH and offer an overview of federally funded experiments for each facility. Information is included on money allocated, years funded, and an abstract of the experiments. CRISP documents are often a good place to begin an investigation, with a request for "all animal based awards" for a facility for specific years (not available for years prior to 1972).

Activists are encouraged to utilize FOIA to its fullest extent.

Compiling and exposing the available information could ultimately lead to the revocation of dealers' and exhibitors' licenses and the termination of research projects. This brochure describes precisely how to make a request for the information and how to prepare an appeal if the request is denied.

A Users Guide

The Freedom of Information Act was enacted by Congress in 1966 to give the public access to information held by the federal government. The Act gives any person the right to request and receive any document, file or other record in the possession of any agency of the federal government, subject to exemptions. The Act does not require the government to create documents in response to your request, but simply to provide documents that already exist. While the federal Act does not apply to state governments, each state has its own laws governing disclosure of records held by state and local government bodies.

The federal government is a vast storehouse of untapped information. The availability of this information is important for several reasons. First, such information is necessary to inform the public about what the government is or is not doing with regard to matters of public concern:

Access to such information is the lifeblood of democracy. Second, government records often contain facts that can be helpful to organizations, businesses, and individual citizens. Regulatory agencies, for instance, have a large amount of data such as inspection reports, individual files, tests on a broad spectrum of goods and services and data submitted by industry on such subjects as pollution or nuclear safety.

This brochure provides a general description of the federal Freedom of Information Act (FOIA) and specific guidelines on how to use it effectively.

HOW TO MAKE A REQUEST

(1) The first step is to determine which agency has the records you want. There is no central government FOIA office, and each agency has its own office or public information staff. There is no special way of determining which agency has the information other than common sense and contacting various agencies. If you have trouble determining which federal agencies may have the records you seek, you may consult the United States Government Manual, which is available in most public libraries and online through the internet. The Government manual contains a list of federal agencies and a brief description of their functions. The Manual also contains the addresses and telephone numbers for each agency.

(2) The next step is to determine whether a FOIA request is necessary. In 1996, Congress amended FOIA to make it possible to obtain information that is frequently requested by the public, without a FOIA request. Agencies must make these materials, and indexes for finding them, available in their reading rooms. FOIA further requires agencies to make their Reading Room materials available on-line, or on CDROM or disk, if they were created after November 1, 1996. Check online services to see if the agency has posted records that provide the information that you want, or indexes that will help you to identify the information systems that are likely to contain the information that you want. If the agency has not posted its indexes on-line (or you do not have on-line access), check to see if the agency Reading Room has a list of information and record locator systems. Check these indexes to see if the records you seek, or related records, have been requested previously and are available at the agency's Reading Room. You

may want to call the agency's public information staff for their assistance, especially if you do not have access to its Reading Room materials. The public information staff should be able to provide you with a guide and reference materials on how to obtain information from the agency.

(3) If your preliminary exploration does not yield the information you seek, you may then decide to formulate a FOIA request. Determine the address of the office which processes Freedom of Information Act requests for the agency that has the information. Send your request to all agencies or agency field offices that may have the information you seek. You may want to check the Code of Federal Regulations, which contains the FOIA procedures for each agency, and can be found in many public libraries and online over the internet. In your request letter, you must specify what you want, since the law requires your request to "reasonably describe" the records you seek.

This means that you may not simply ask questions but must request records describing or pertaining to a particular subject. You do not need to specify a document by name or title, but you must provide a reasonable enough description to allow government employees who are familiar with the agencies' files to locate the records you seek. For example, if you want information on nursing homes in your area and know that the government requires some sort of annual surveys to be conducted on nursing homes, it is sufficient to ask that you want to see the surveys and all records pertaining to the surveys for particular years and/or regions. Agencies are not obligated to create a record to respond to your request, but only to provide existing records. A record is information in any format, including maps, photographs, computer disks, and electronic formats.

(4) Your request should state that it is being made pursuant to the Freedom of Information Act (5 U.S.C. Sec. 552) and, if you are requesting records about yourself, pursuant to the Privacy Act (5 U.S.C. Sec. 552a) as well. To request records about yourself you may ask for "all records pertaining to me." For requests to the FBI you must include your full name, address, date and place of birth, and social security number and have your signature notarized by a notary public, or instead of having your signature notarized, add to the letter the following: "Pursuant to 28 U.S.C. (a) 1746, I declare under penalty of perjury that the foregoing is true and correct." For all requests, you should write "Freedom Of Information Request" (or Appeal) on the envelope and on the letter and you should retain a copy for your files. You do not have to explain the reasons for your request, and government employees generally do not have any right to ask unless you are seeking a waiver of costs (see below).

(5) If the agency maintains the records you seek in electronic form, you can request that the information be provided in that form. Also, the agency is required to undertake a "reasonable" electronic search for records it maintains in electronic-format. If the agency maintains the records in one format but you want them in another, the agency must provide the information in the format you desire, if it is "readily reproducible" in that format. You should be aware that each agency's ability to reproduce information in specified electronic formats varies.

COSTS

The Act provides that agencies may charge different fees depending on who is requesting the information. Commercial users pay reasonable standard charges for document search, review and duplication. Educational or non-commercial scientific institutions and representatives of the news media may only be charged for reasonable duplication costs. \$.10-\$.25 per page is reasonable. All other users may be charged for document search and duplication; however, except for commercial users, the first two hours of search time and the first hundred pages of copying are free.

Regardless of the above categories, you may be entitled to a waiver or reduction of fees if, according to the Act, "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." In requesting a fee waiver, you should explain why you are seeking the information and how your access to it will further public understanding or awareness of government activities.

If you are denied a fee waiver or if an agency grants an unsatisfactory reduction of fees, ask the agency to justify its actions. Fee issues may be appealed and are also subject to judicial review.

THE AGENCY RESPONSE

Under the FOIA, an agency may deny your request if you have failed to reasonably describe the documents; the agency has conducted reasonable search and determined that the requested documents do not exist or are not in the possession or control of the agency; or the documents are specifically covered by one of the Act's nine exemptions (see below). If the agency claims you have inadequately described the documents you seek, you should rewrite your request more precisely and resubmit it and/or contact the official processing your request to describe it more fully, especially if you are reasonably certain the documents do exist.

The law sets specific deadlines for replying to Freedom of Information requests: 20 working days on the initial request and 20 working days on the administrative appeal. The FOIA also requires agencies to expedite requests that are particularly time-urgent: if there is a threat to an individual's life or safety, or the party requesting the information demonstrates an urgent need to inform the public. In spite of these rules, delay is common. Even though the law says that an agency may receive a time extension only in exceptional circumstances, agencies regularly extend the twenty working day deadline. At some agencies, the delays may last many months or even years.

In an effort to speed up the process, Congress amended FOIA in 1996 to encourage agencies to set up a multi track system so that requests for smaller amounts of material can be responded to more quickly. Check agency regulations to see if your request can qualify for faster processing under a multi track system or, in unusual circumstances, under the provision for expedited processing. In your request letter, include any information supporting your request for faster processing. If you are seeking expedited processing, you must provide the information in a statement certified to be true and correct to the best of your knowledge and belief.

If the agency does not respond in the time required, seems to be taking too long, or has denied your request or given you information you consider incomplete, you should consider the reasons for denial, and the options you have for contesting them, discussed below: appealing within the agency, and/or going to court.

THE NINE EXEMPTIONS

If the agency withholds some or all of the records you seek it must do so under one or more of the nine exemptions listed below. You may challenge an agency's decision to withhold the records by appealing any denial. In some cases, you may also ask the agency to use its discretion to release the records even if the records are covered by an exemption.

(1) National Security

The documents exempt under this section are those that are properly classified pursuant to a Presidential Executive Order. If you are requesting a document which the agency tells you is classified, you may want to ask that the reasons for classification be re-examined, as the agency may determine there is no longer a need for secrecy, at least as to some parts of the records in question.

(2) Internal Agency Rules

This exemption protects rules and practices of agency personnel that are "predominantly internal" in nature and, where disclosure serves no substantial public interest and significantly risks circumvention of agency regulations or statutes. Thus, minor employee matters such as employee parking and cafeteria regulations are exempt.

(3) Information Exempted by Another Federal Statute

This exemption honors mandatory nondisclosure provisions in other laws.

(4) Trade Secrets

Agencies withhold trade secret or confidential commercial or financial information. This exemption is often invoked by the EPA, FDA and other regulatory agencies which receive information from companies. Information which can be proven to be a trade secret is absolutely protected. For commercial or financial information, the government must prove that the information is not customarily disclosed to the public by the company and that its disclosure would be likely either to impair the agency's ability to obtain information in the future or to cause substantial competitive injury to the submitter. Confidential or financial information that companies give voluntarily to the government may be exempt, whether or not the government could compel submission of the information.

(5) Internal Agency Memoranda

This exemption protects information about an agency's decision-making process. Thus, advice and recommendations involving a "deliberative process" on legal and policy matters may be withheld, but the segregable, factual portions of documents should be disclosed. Preliminary drafts and unfinished reports may be withheld, but final decisions and memos on which they are based must generally be disclosed. Thus, a memo from a staff person to a supervisor recommending that a particular policy be established would be exempt from disclosure. But the factual portions of this memo would not be exempt unless they reveal the deliberative decision-making process of the agency.

(6) Personal Privacy

This exemption involves a balancing of the public's interest in disclosure against the degree of invasion of privacy which would result from disclosure. If your request involves this exemption, you should provide a brief explanation of the public benefits from disclosure, particularly how disclosure sheds light on government activities, so that it can be determined whether any invasion of privacy resulting from disclosure would be "clearly unwarranted."

(7) Investigatory Records

This exemption protects information compiled for law enforcement purposes which could reasonably be expected to interfere with enforcement proceedings, to identify a confidential source, to disclose techniques and procedures for law enforcement investigations or to invade personal privacy.

(8) & (9) Other Exemptions

These are two special-interest exemptions relating to banking and oil well information and they are not relevant to most FOIA requests.

Note: If an agency withholds records based on one of these nine exemptions, it must (1) release portions of the records that are not exempt and that can be separated from the exempt portions; (2) indicate where the withheld portions appear on the records; and (3) if records are withheld in their entirety, provide a reasonable estimate of the amount of information that is being withheld, unless giving an estimate would harm an interest protected by the exemption invoked. Under certain circumstances an agency may state that it has no records subject to your request, even though it does in fact have some relevant records. For example, under exemption 1 (national security), the government can refuse to acknowledge the existence of classified records if the mere existence of records is classified. Under exemption 7 (investigatory records) where a subject is not aware of a criminal investigation and disclosure could interfere with law enforcement proceedings, the government can refuse to state whether such records exist.

HOW TO MAKE AN APPEAL

If your request is partially or entirely denied, you may appeal within the agency or department. The agency's denial letter should inform you of appeal procedures and the proper address to send your appeal letter. Your appeal letter should attach and describe copies of the request and the denial, state that an appeal is being made of the agency's initial denial, and if you can, explain why the denial was unwarranted, either because the exemption does not apply or because the agency should use its discretion to release the records anyway.

Many agencies require that appeals be filed within 30 days. Unless you are aware of a different time limit, you should file your appeal letter within 30 days. You must file an appeal within the agency before proceeding to court, except when an agency fails to respond substantively to your request within 20 working days. In those situations, you are legally entitled to go to court without filing an appeal. However, most courts view this as unreasonable. If your request has been excessively delayed, it is generally better to send a letter demanding a prompt response before going to court; if the request has been denied in part or in full then you must appeal before a lawsuit can be filed. A lawsuit may take a year or more, and thus coaxing the information out of the agency is preferable to going to court. Following up written requests with phone calls can speed up your request. If agencies are aware that you know your rights, they will sometimes move more quickly. For your files, keep a written record of all phone contacts with the agency processing your request.

GOING TO COURT

The Act is designed to make litigation as simple as possible. In some instances, taking a FOIA case to court is not overly complicated and requesters can do it themselves without a lawyer. However, it is more helpful to have a lawyer if you litigate in court. After your appeal is denied, or after 20 working days have elapsed from the time the agency received your appeal, you may sue in the United States District Court where you live, where the documents are located, or in the District of Columbia. If the government cannot prove that the requested documents fall within one of nine exemptions from the Acts mandatory disclosure requirement, then the Court will order the agency to give the documents to you. Even if you lose, the agency may release more documents along the way. If you win, the Court may require the government to pay your attorney's fees if you incur any.

THE PRIVACY ACT

In 1974 Congress enacted the federal Privacy Act, 5 U.S.C. Sec. 552a, which, on the one hand, requires the government to protect personal

information from misuses and unauthorized disclosure, and, on the other hand, establishes a right of access for individuals to their own files, and a right to seek correction of those files. The limitations to an individual's right of access under the Privacy Act are fewer than those in the Freedom of Information Act. However, law enforcement agencies and the CIA are completely exempt from the individual access provisions, there is no specific time limit for an agency's initial response to a request, and only U.S. citizens or permanent resident aliens may obtain access to records. Requests for your own file should invoke both the Freedom of Information Act and the Privacy Act. Neither the Privacy Act nor the FOIA can be used to deny access under the other statute.

THE SUNSHINE AND ADVISORY COMMITTEE ACTS

There are two other important federal open meetings laws. The Sunshine Act, 5 U.S.C. Sec. 552b, requires agencies such as the Nuclear Regulatory Commission and the Equal Employment Opportunity Commission to announce their meetings ahead of time and to open them to the public unless one of ten specific exemptions applies to particular discussions. Similarly, the Federal Advisory Committee Act, 5 U.S.C. App. II, contains the same requirements regarding meetings of outside groups advising Federal agencies and subjects advisory committee records to the FOIA.

¹ By The Freedom of Information Clearinghouse, a project of Ralph Nader (Revised -10/97). The Clearinghouse is a project of Ralph Nader's Center for Study of Responsive Law. We provide technical and legal assistance to individuals, public interest groups, and the media who seek access to information held by government agencies. We are available to consult by phone or mail. The Clearinghouse also litigates a select number of cases each year to protect the public's right to access government information. The Clearinghouse is a nonprofit organization and welcomes your tax deductible contributions.

FREEDOM OF INFORMATION CLEARINGHOUSE P.O. BOX 19367 WASHINGTON, DC 20036 202-588-7790

You may use the following address to request documents from the USDA: *USDNAPHIS/REAC*; FOIA Office; Legislative and Public Affairs; 4700 River Road #50; Riverdale, MD 20737.

To request documents from the National Institutes of Health, you may write to: National Institutes of Health; Research Documentation Section; Division of Research Grants; Westward Building, Room 148; Bethesda, MD 20892

SAMPLE REQUEST LETTER

Date

Freedom of Information Unit

(Name and Address of Government Agency)

Pursuant to the Freedom of Information Act, 5 U.S.C 552, [and/or the Privacy Act, 5 U.S.C 552a,] I hereby request access to or a copy of all records pertaining to (describe the subject or document containing the information that you want).

I am requesting these records (as a representative of the news media, for non commercial personal use, for an educational institution, etc.)

[If any expenses in excess of \$ _____ are incurred in connection with this request, please obtain my approval before any such charges are incurred.] or

[I request a waiver of fees because my interest in the records is not primarily commercial and disclosure of the information will contribute significantly to public understanding of the operations or activities of the government because _____.]

I will expect a response within 10 working days as provided by law. If my request is denied in whole or in part, I expect a detailed justification for withholding the records. I also request any segregable portions that are not exempt to be disclosed.

SAMPLE APPEAL LETTER

Date

(Name and Address of Head of Government Agency)

By letter dated (month day, year), I requested access to (use same description as in request letter). By letter dated (month day, year), Mr./Mrs. of the Freedom of Information Unit (usually) of your agency denied my request. Pursuant to the Freedom of Information Act, 5 U.S.C 552, I hereby appeal that denial. I have enclosed a copy of my request letter and the denial that I have received.

The denial of my request was improper because ... (describe why the denial was improper, e.g. why the exemption should not apply in your circumstances).

I expect a response within 20 working days, as the law provides.

Very truly yours,

