



# Freedom of Information Act Policy

Issued by the EPA Acting Chief Freedom of Information Act Officer

# Freedom of Information Act Policy

## 1. Purpose

The Freedom of Information Act Policy (Policy) sets forth the U.S. Environmental Protection Agency's (EPA's or Agency's) approach for complying with the Freedom of Information Act, 5 U.S.C. § 552, as amended, (FOIA) and EPA's FOIA Regulations, 40 CFR Part 2, Subpart A. The Policy supports EPA's commitment to operating in an open and transparent manner.

## 2. Scope and Applicability

The Policy serves as the framework for the associated EPA Freedom of Information Act Procedures (Procedures), which promote accountability, encourage timeliness, and ensure the quality of EPA FOIA responses. The Policy implements the provisions of FOIA for Headquarters and Regional FOIA Programs (FOIA Programs).

## 3. Audience

The audience for this policy includes: all EPA organizations, officials, and employees; those who oversee contractors and grantees; and others operating on behalf of the EPA in accordance with their contract or grant.

## 4. Overview

### A. EPA FOIA Administration

The Policy is intended to ensure that the Agency responds to FOIA requests in accordance with statutory requirements, the EPA's FOIA Regulations, 40 CFR Part 2, Subpart A (FOIA Regulations), and applicable open government and transparency policies.

### B. The Freedom of Information Act

Congress enacted the FOIA in 1966. The statute gives any person the right to obtain access to federal agency records unless one or more of the nine exemptions or three law enforcement exclusions contained in the statute protect such records, or portions of such records, from public disclosure. *See* 5 U.S.C. § 552(b)–(c). The FOIA applies only to administrative agencies within the federal Executive Branch.

Congress has passed several amendments to the FOIA, including:

- *The Electronic Freedom of Information Act Amendments of 1996*. This amendment clarified how electronic records should be handled under the FOIA and extended the statutory time to respond from ten working days to twenty working days.
- *OPEN Government Act of 2007*. This amendment addressed several procedural issues concerning FOIA administration, including a requirement that each agency make a FOIA Public Liaison available to resolve any disputes between the requester and the

agency. The Act also established the Office of Government Information Services within the National Archives and Records Administration to provide mediation services for resolution of disputes between FOIA requesters and administrative agencies.

- *OPEN FOIA Act of 2009*. This amendment revised the requirements of FOIA Exemption 3 regarding records exempt from disclosure by other statutes.
- *FOIA Improvement Act of 2016*. This amendment addressed a range of procedural and substantive issues and directed all agencies to amend their FOIA regulations to incorporate the required changes.

### **C. FOIAonline**

FOIAonline is an internet tool where requesters may submit FOIA requests. FOIAonline is also EPA's management and tracking system for FOIA responses. *See* EPA Records Schedule 0263, FOIAonline System (Jan. 31, 2016).

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## **5. Authority**

Freedom of Information Act, 5 U.S.C. § 552.

EPA FOIA Regulations, Title 40, C.F.R. Part 2, Subpart A.

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## **6. Policy**

EPA's policy is to manage FOIA requests as follows:

- A. A FOIA request submitted to the Agency will be processed in accordance with the FOIA, applicable Presidential Orders and memoranda, EPA's FOIA regulations, the Agency's FOIA Procedures, and EPA FOIA guidance. The Agency will also consider guidance issued by the Department of Justice and the National Archives and Records Administration.
- B. A FOIA request submitted to the Agency will be processed throughout its lifecycle using FOIAonline, which is the FOIA management and tracking system approved by the Chief FOIA Officer.
- C. In response to a properly submitted FOIA request, EPA organizations will conduct a search that is reasonably calculated to uncover all relevant documents. EPA organizations should submit search requests to collect electronic documents from the identified electronic record source locations covered by the eDiscovery Division's centralized search, unless a more targeted collection is more likely to locate all responsive documents, such as where all responsive records are located in a specific folder within an email account.
- D. A responsive record may be withheld pursuant to one of the nine exemptions of the FOIA. *See* 5 U.S.C. § 552(b). Records found to be responsive to a request will be released unless a mandatory exemption applies or, for discretionary exemptions, the Agency determines that disclosure would harm an interest protected by one of the exemptions or the disclosure is prohibited by law. EPA organizations may make

discretionary disclosures of exempt information, as a matter of administrative discretion, where they are not otherwise prohibited by law from doing so.

- E. EPA organizations may not redact non-responsive information within a responsive FOIA record. Where a FOIA requester has narrowed their request to exclude non-responsive information within a responsive record, such narrowing should be memorialized in writing to ensure clarity.
- F. All records released or withheld in response to a FOIA request must be reviewed by at least two knowledgeable individuals, including one manager or supervisor, to ensure openness, transparency, consistency, and the appropriate application of FOIA exemptions. One of the reviews may be performed by the individual who processes the request.
- G. Only Authorized Officials may issue final determinations under 40 C.F.R. § 2.103(b).
- H. Responsive records will be uploaded to FOIAonline pursuant to the FOIA Procedures. *See* FOIA Procedures, 6.A. Step 15.

Additionally, while it is a best practice and strongly encouraged that both the original unredacted versions of records and the records being withheld in full be maintained in FOIAonline, such records may be maintained in a manner pursuant to EPA's FOIA records retention schedule, Schedule 1049, provided that a notation is added to FOIAonline identifying where such records are being maintained.

- I. EPA organizations will ensure that resources are sufficiently allocated to enable compliance with EPA's FOIA requirements.
- J. EPA organizations will develop, submit to the Chief FOIA Officer for approval, and maintain local FOIA procedures to identify how the Agency's FOIA Policy and Procedures will be applied within their organization. The local FOIA procedures may add more detail, including detail on matters not covered or not fully covered by the Agency's FOIA Policy and Procedures. The Chief FOIA Officer will approve each FOIA Program's local FOIA procedures to ensure consistency with the Policy and the Agency's FOIA Procedures. The OIG is exempt from the Chief FOIA Officer approval requirement.
- K. FOIA Programs (EPA Regions and Headquarters Program Offices) will identify the name and position of the individuals who serve as FOIA Officers, FOIA Coordinators, and FOIA Managers. This information will be maintained by the National FOIA Office (NFO) and posted in a location that is accessible to all FOIA Programs.
- L. FOIA Professionals will have the knowledge, skills, and abilities to perform their duties.
- M. Supervisors will ensure that FOIA duties are critical elements in the performance agreements of FOIA Officers and Coordinators, FOIA Managers, and FOIA Professionals.
- N. EPA employees will take the mandatory annual FOIA training.
- O. FOIA Managers will have a critical job element in their performance agreement that

establishes they are accountable for ensuring that their FOIA Professionals have the knowledge, skills, and abilities and time to perform their duties in a timely manner, and in accordance with the FOIA.

- P. The Agency's FOIA Public Liaisons, along with the FOIA Requester Service Center, will work to resolve FOIA issues with requesters, and foster openness and transparency in the Agency's administration of the FOIA and its interactions with the public.
- Q. EPA organizations will comply with this Policy and the Agency's FOIA Procedures when processing FOIA requests, along with the guidance and direction issued by the Chief FOIA Officer or NFO. The OIG will comply with this Policy and the Agency's FOIA Procedures to the extent it does not conflict with the Inspector General Act, as amended.

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## 7. Related Documents

### Statutes, Regulations, and Policy

- EPA FOIA Regulations, 40 CFR Part 2, Subpart A.
- U.S. Department of Justice Mark-up of the FOIA to highlight all amendments, <https://www.justice.gov/oip/freedom-information-act-5-usc-552> (last accessed October 2, 2019).

### Procedures, Directives and Guidance

- EPA Freedom of Information Act Procedures.
- Delegation 1-19, *Directives*, Directives Manual (updated January 23, 2020)
- Delegation 1-30, *Freedom of Information*, Directives Manual (updated Nov. 8, 2019).
- Delegation 1-31, *Freedom of Information: Appeal Determinations and Confidentiality Determinations*, Directives Manual (updated July 10, 2020).
- Delegation 1-131, *Chief Freedom of Information Act Officer*, Directives Manual (Sept. 11, 2018).

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## 8. Roles and Responsibilities

**Authorized Officials** – The Administrator, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, Deputy Regional Administrators, General Counsel, Deputy General Counsels, Regional Counsels, Deputy Regional Counsels, and Inspector General, or those individuals' delegates, are authorized to make final determinations required by 5 U.S.C. § 552(a)(6)(A). *See* 40 C.F.R § 2.103(b).

**Chief FOIA Officer** – At the EPA, the General Counsel is the Chief FOIA Officer. *See* Delegations Manual, Delegation 1-131, *Chief Freedom of Information Act Officer* (Sept. 11, 2018). The Chief FOIA Officer is responsible for ensuring the efficiency and effectiveness of the Agency's FOIA administration, including compliance, accountability, and reporting to the Administrator, the Department of Justice and the Office of Management and Budget on the status of the Agency's FOIA Program.

**Contributing FOIA Program** – Another Regional or Headquarters Program office that

may possess records which are responsive to a request assigned to the Lead FOIA Program. A Contributing FOIA Program is responsible for the following core functions:

- Complete and close all assigned search, collection, and review tasks in a timely manner, including local electronic and hardcopy searches;
- Coordinate with the Lead FOIA Program to identify subject matter experts, custodians, record source locations, including electronically stored information, search terms, date range and other search criteria for centralized searches performed by the eDiscovery Division;
- Assist the Lead FOIA Program with document reviews, as appropriate; and
- Enter administrative costs into FOIAonline, as necessary.

The Contributing FOIA Program's FOIA Officer or Coordinator may assign tasks to the appropriate division or branch within the Contributing FOIA Program for completion. The Contributing FOIA Program will identify the staff who will assist in conducting the search and review tasks.

**eDiscovery Division** – The eDiscovery Division provides an electronic centralized search service to support the Agency's Program and Regional Offices in responding to litigation, FOIA requests, congressional inquiries and other formal requests for Agency information.

**FOIA Coordinator or FOIA Officer** – Each FOIA Program (i.e., EPA Region or Headquarters Program Office) shall have a FOIA Coordinator or FOIA Officer who serves as the primary contact for the NFO and other FOIA Programs. The primary function of the FOIA Coordinator or FOIA Officer is to ensure:

- The proper assignment of a request within their FOIA Program;
- That proper staff are assigned to process the FOIA request;
- The timely processing of a FOIA request in accordance with the FOIA, the FOIA Regulations, this Policy, and the Agency's FOIA Procedures; and
- That reports are properly and timely submitted to the NFO.

Additional duties to be performed by the FOIA Coordinator or FOIA Officer may be detailed in the FOIA Program's local procedures.

**FOIA Manager** – A FOIA Manager is a GS-14 level or higher manager who is specifically assigned to oversee prompt processing of FOIA requests by a FOIA Program. A FOIA Manager is also responsible for the duties listed in the Managers and Supervisors role.

**FOIA Professionals** – All FOIA Managers, FOIA Officers, FOIA Coordinators, other EPA employees, contractors, or grantees who interact with FOIA requesters or perform FOIA processing activities as part of their regularly assigned duties or in accordance with their contract or grant.

**FOIA Programs** – See “Headquarters or Regional FOIA Programs.”

**FOIA Public Liaisons** – EPA “supervisory officials to whom a requester under [the FOIA] can raise concerns about the service the requester has received from the FOIA Requester Service Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and

understanding of the status of requests, and assisting in the resolution of disputes.” 5 U.S.C. § 552(l). At the EPA, the FOIA Public Liaisons are the Associate General Counsel for the National FOIA Office and any supervisor designated as a FOIA Public Liaison by the Chief FOIA Officer or the Associate General Counsel for the National FOIA Office.

**FOIA Requester Service Center** – The FOIA Requester Service Center (FOIA Hotline) provides members of the public with information on the status of their request, how and where to submit a FOIA request, and the types of information available on EPA’s websites. The FOIA Public Liaisons and the National FOIA Office’s staff members make up the FOIA Requester Service Center.

**General Law Office** – The General Law Office (GLO) within the EPA’s Office of General Counsel is responsible for the following FOIA functions:

- Provide FOIA legal counseling, including on the applicability of FOIA exemptions;
- Concur on the use of 5 U.S.C. § 552(c);
- Adjudicate FOIA appeal determinations;
- Provide legal counsel to support the Agency’s defense in FOIA litigation proceedings;
- Provide and support FOIA training; and
- Review CBI substantiations, and issue determinations for TSCA and FIFRA CBI claims, and CBI claims originating in Headquarters.

**Headquarters and Regional FOIA Programs (FOIA Programs)** – The Office of the Administrator, each EPA assistant administrator-level Headquarters office, and each EPA Region. Each FOIA Program shall have a FOIA Coordinator or FOIA Officer who serves as the primary contact for the NFO and other FOIA Programs. Any further assignment of FOIA processing responsibilities and tasks within a FOIA Program should be addressed in the FOIA Program’s local procedures.

**Lead FOIA Program** – The FOIA Program assigned the FOIA request by the NFO. The Lead FOIA Program is responsible for the following core functions:

- Serve as the primary contact for FOIA requesters;
- Assign review tasks, and search tasks for hardcopies and records that are not collected through the eDiscovery Division centralized search, to staff within the Lead FOIA Program and to the FOIA Officer or Coordinator in any Contributing FOIA Program;
- Submit all necessary centralized searches to the eDiscovery Division and ensure that all necessary search and review tasks are completed;
- Coordinate referrals, consultations, equity reviews, and awareness notifications; and
- Release records that are responsive and properly reviewed in FOIAonline, as appropriate, prepare and issue interim response and final determination letters, send invoices, and close out FOIA requests.

The Lead FOIA Program’s FOIA Officer or Coordinator may assign the request to the appropriate division or branch within the Lead FOIA Program for processing. The Lead FOIA Program will identify the staff who will assist in conducting the search and review tasks. The Lead FOIA Program will contact each Contributing Programs’ FOIA Officer or Coordinator to coordinate Contributing FOIA Program search and review tasks.

**Managers and Supervisors** – EPA managers and supervisors are accountable for ensuring that staff responding to FOIA requests have the knowledge, skills, abilities, resources, and time to perform their duties, which includes responding in a thorough and timely manner to requests, and ensuring both the protection of confidential and privileged information and the Agency’s compliance with all applicable laws, regulations, policies and Executive Orders. Additionally, EPA managers and supervisors are responsible for the following functions:

- Conducting a second-level review of the documents to ensure compliance with the FOIA, including application of exemptions, prior to releasing records;
- Ensuring the issuance of timely and well-reasoned interim responses and final determinations responding to the request; and
- Actively assisting with related appeals and litigation.

**National FOIA Office** – The National FOIA Office (NFO) is designated by the Chief FOIA Officer. *See* 40 C.F.R. § 2.100(c). The Associate General Counsel for the NFO is delegated the authority to perform and oversee the functions assigned to the NFO. The NFO coordinates and administers the Agency’s FOIA implementation, including but not limited to: assigning requests to a Lead FOIA Program; issuing expedited processing and fee waiver determinations; developing EPA’s FOIA Policy and Procedures; reviewing FOIA Programs’ local procedures; counseling on processing and responding to FOIA requests, including the applicability FOIA exemptions; preparing quarterly and annual reports to the Department of Justice; coordinating with the Office of Government Information Services and DOJ’s Office of Information Policy; and providing FOIA training, support and assistance to Agency employees, FOIA Professionals, and Managers and Supervisors.

**Office of General Counsel** – The Office of General Counsel (OGC) is responsible for exercising the authorities assigned to the Chief FOIA Officer, the NFO, and the General Law Office. Under the direction of the General Counsel, the OGC provides direction, oversight, and support for FOIA processing throughout the Agency.

**Office of Inspector General** – On FOIA matters pertaining to the Office of Inspector General (OIG), including the collection and review of records in the custody and control of the OIG, OIG and the Counsel to OIG perform the following functions: issue determinations on FOIA appeals, and confidentiality determinations, except when a conflict of interest arises as described in the EPA FOIA Regulations; provide counsel on FOIA exemptions; and assist the DOJ attorneys in FOIA litigation. The OIG will comply with this Policy and the FOIA Procedures to the extent it does not conflict with the Inspector General Act, as amended.

**Office of Regional Counsel Attorneys** – Regional attorneys provide legal counsel to regional staff who have been assigned to assist and review records with respect to a FOIA response and perform at least the following functions:

- Review documents for consistent and correct application of exemptions, as appropriate;
- Assist in communications with the requester, as necessary and appropriate on a case-by-case basis, to clarify a request, determine appropriate search terms, and negotiate deadlines for response, among other things;
- Assist in preparation of FOIA response letters that assert one or more FOIA

- exemptions;
- Review CBI substantiations and coordinate with the Regional Counsel to issue CBI determinations;
- Coordinate with attorneys in OGC to ensure nationwide consistency of legal interpretations, as necessary; and
- Actively assist with FOIA appeals and litigation.

**Subject Matter Experts** – Subject matter experts are staff who have knowledge regarding the scope of a FOIA request and responsive documents. Subject matter experts will assist in identifying, locating, and reviewing records potentially responsive to a FOIA request.

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## 9. Definitions

**Agency Records** – An agency record subject to FOIA includes records, in any format including electronic, that are either created or obtained by an agency, and under agency control at the time of the FOIA request regardless of whether they are considered Federal Records under the Federal Records Act.

**FOIA Exemptions** – Pursuant to 5 U.S.C. § 552(b), the nine enumerated exemptions to the statutory requirement that agencies make records available in response to a FOIA request. *See* 5 U.S. C. § 552(b)(1)–(9).

**Requester** – Any individual (including non-U.S. citizens), corporation or association, public interest group, or state, local, tribal, or foreign government making a FOIA request. Requests from federal agencies, the Government Accountability Office, or Congress (e.g., the Speaker of the House, the President of the Senate, or the chair of a committee or subcommittee when acting on behalf of their committee or subcommittee) are not covered under the FOIA.

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## 10. Material Superseded

CIO 2157.0, Interim Freedom of Information Act Policy.

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## 11. Additional Information

For further information, please contact the Office of General Counsel, National FOIA Office.

**DAVID FOTOUHI** Digitally signed by DAVID  
FOTOUHI  
Date: 2020.11.06 14:38:03 -05'00'

David Fotouhi  
Acting General Counsel and Chief Freedom of Information Act Officer  
U. S. Environmental Protection Agency