How To Respond To An Initial FOIA Request

What is the Freedom of Information Act (FOIA)?

The FOIA was passed by Congress in 1966. It permits any person, whether a citizen or not, to request records in possession and control of a Federal agency, and the agency must provide access to those records unless they are exempted from disclosure by one of the nine exemption categories in the Act. You should follow the steps listed below as you process a FOIA request. Each step is explained following the list.

_____ Step 1: Make sure you clearly understand what records the requester is seeking.

_____ Step 2: Determine if you are likely to have records subject to the request.

_____ Step 3: Provide an estimate of search and review time and an estimate of pages if required.

_____ Step 4: What to do if expedited processing is required.

_____ Step 5: Search for records responsive to the request.

_____ Step 6: Determine if records are to be released or withheld from the requester.

_____ Step 7: Bracket information that should be withheld.

_____ Step 8: Organize the records responsive to the request and submit them to you office FOIA coordinator.

_____ Step 9: Submit your response package to the FOIA/PA caseworker.

Step 1: **Make sure you clearly understand what records the requester is seeking.**

The FOIA/PA caseworker will make every effort to clarify the scope of the request before forwarding the request to the office FOIA coordinators. However, if you have questions about the request you should contact your office FOIA coordinator. If you believe you need additional clarification on the scope of the request, you should ask your office FOIA coordinator to request that the agency FOIA/PA caseworker responsible for overseeing processing of the request contact the requester for clarification or alternatively arrange a conference call with the requester at which time you may ask questions or offer suggestions to further define the scope of the request. Note that no contact should be made with the requester unless approved by the agency FOIA/PA caseworker so that all contacts with the requester meet the needs of all others who have a role in processing the request.

Step 2: **Determine if you are likely to have records subject to the request.**

Based on your knowledge of the subject matter of the request, you should determine if you will have records responsive to the request. You are only required to look for records where you believe it is reasonable to expect you will locate paper or electronic records covered by the subject matter of the request.

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Only agency records that are in existence on the date NRC received the request are subject to a FOIA request. Agency records are records created or obtained by the agency and under the agency control at the time of request. This includes records created by the NRC staff, records submitted to the NRC by applicants, licensees, contractors, Federal and state agencies, international organizations and members of the public.

No records that are potentially responsive to the FOIA request may be destroyed after receipt of the FOIA request. However, there is no need to reconstruct a record that was destroyed prior to receipt of a request nor does NRC have to inform the requester that a record does not exist since it was destroyed prior to receipt of the request. As a matter of discretion, you may include records that can be released that were created after the date a request was received if you believe it would provide a clearer picture of agency actions regarding the subject of the request.

The agency is not obligated to create a record to respond to a request. Neither does the FOIA require an agency to answer questions that are asked in a request.

Some records may be determined to be **personal records** in that they may relate to the subject of the request but have not been circulated to anyone else in the agency, are not filed with any other agency records, and you were not required to create or retain them. These records still have to be identified and retained, but the agency does not have to invoke an exemption to withhold them. The agency does have to inform the requester that there are records that have been deemed to be personal records and the number of pages. Management Directive 3.1, Freedom of Information Act, contains a Personal Record Consideration Checklist that should be filled out by the owner of the personal records and submitted to the office FOIA coordinator. Contact your office FOIA coordinator for retention requirements.

Also, if you believe responsive records may be located in other offices, or with persons who may have been previously involved in the subject matter as staff in your organization or a member of a team or project, provide that information promptly to your office FOIA coordinator. The FOIA/PA caseworker will then contact the additional office(s) to begin searching for subject records.

Step 3: Provide an estimate of search and review time and pages if required

Within **four** (4) working days of your office's receipt of the request, your office may be required to provide to the FOIA/PA caseworker an estimate of the amount of time expected to be required to search for, and review records, and an estimate of the number of pages (or inches) you expect will be released to the requester. This includes pages that may be released in part. Whether your office will need to provide an estimate will depend upon whether or not the requester has been granted a fee waiver. The instructions on the FOIA E-Mail Assignment Form sent to your office FOIA coordinator will inform you if a fee waiver has been granted. If granted, fee estimates are not required. Proceed to Step 5. Otherwise if fees are required, your estimates must be given to your office FOIA coordinator within the time frame specified by your office.

Fee estimate for **search time** should include all time required to locate records responsive to the FOIA request. This includes time spent locating folders in file cabinets, looking for relevant records within file folders, and searching ADAMS and other databases, and consulting with others regarding the location of responsive records. **Review time** includes the actual time each person who will be involved in the review of the records will spend determining

if the records can be released in their entirety or in part and the process of bracketing any information that will be proposed to be withheld. Duplication estimate is based of the number of pages likely to be released to the requester and **does not** include the staff-hours used to copy the records.

Step 4: **What to do if expedited processing is required.**

Your office FOIA coordinator will inform you if a request has been granted expedited processing. If a request has been granted expedited processing, you should process the expedited FOIA request before processing any previous FOIA requests. Contact your office FOIA coordinator for more specific directions if needed.

Step 5: **Search for records responsive to the request**

a. Begin your search when instructed by the office FOIA coordinator.

Your office FOIA coordinator will tell you when to begin your search. If you had to provide a search, review or page estimate, you can expect that there may be a delay before you are instructed to begin your search. A search can begin only when a request is "perfected," which means when all fee related or other issues are resolved. If no estimates are required, your office FOIA coordinator will advise you to immediately begin your search for records.

b. Inform your office FOIA coordinator if you believe other offices or persons have responsive records.

If you believe responsive records may be located in other offices, or with persons who may have been previously involved in the subject matter as staff in your organization or a member of a team or project, provide that information promptly to your office FOIA coordinator. Notify your office FOIA coordinator when you are aware the Commissioners or the EDO, or a Deputy EDO has been involved in the subject matter and may have responsive records or the records may be the subject of an ongoing investigation. This information is valuable because it will ensure that the agency as a whole does an adequate search for responsive records. If you know others who are processing the same request or who should be, it may be useful to work closely with them, even if they are in other offices to both ensure an adequate search and to make the search more efficient.

c. Search all relevant files.

You must conduct, based on your knowledge of the subject matter, an adequate search of those paper and electronic files where you believe it is reasonable to expect to locate records covered by the subject matter of the request. You must include in your search the following:

(1) paper records under your personal control including working papers you have retained in your possession
(2) paper records maintained in your office
(3) paper records in the NRC File Center

(4) e-mails including property sheets in the Received, Sent, Archives, and Trash files. Note that since trash files are still within your control, e-mails responsive to a FOIA request in the trash folder must be identified, retrieved, printed out, and processed. You should also move the e-mail out of the trash folder to eliminate the possibility that an automatic deletion of e-mail will destroy the only copy.
(5) electronic records in ADAMS Main Library and Legacy Library including all versions.
(6) other electronic files, including but not limited to WordPerfect, Microsoft Word, spreadsheets, presentation files including those files stored on disks
(7) databases including those files stored on disks
(8) audio or video files or tapes.

d. Record computer search criteria

When a computer database such as ADAMS is searched to locate records responsive to a request, the search criteria used for conducting the search must be provided with the office response. The Department of Justice has advised agencies in order to justify that they have done an adequate search they must maintain computer search criteria. The search criteria must be provided even if no records are identified as a result of the computer search.

e. Download or print information from computer spreadsheets or databases.

If the requested information is in a database or spreadsheet and is retrievable by using an existing computer program or by minor program modifications or simple computer instructions, the subject information should be provided. If a program would have to be written, inform your office FOIA coordinator.

f. If a record is already publicly available you only have to identify the ADAMS accession number and a description of the record and page count. No copy is required to be made. Otherwise you will have to provide a copy of all responsive records.

Step 6: Determine if records are to be released or withheld from the requester.

After you have searched and located records, you should review the records to determine if any information in the records should be withheld under any of the FOIA exemptions. In particular you should be on alert for personal privacy information, allegation information, investigative related records, proprietary information, classified, or safeguards information. When you have questions you should refer to the applicable management directive or contact your office FOIA coordinator.

Sometimes while reviewing records you will find that they contain not only information that is subject to the request but also information that is outside the scope of the request. If an entire page of a record is outside of the scope of the request, you should mark the page at the top to indicate it is "Outside-of-Scope." This page will not be provided to the requester. If outside-of-scope information is on a page containing information that is subject to the request, the outside-of-scope information must be marked "Outside-of-Scope." The requester will be provided a redacted copy of the record that does not reveal the information that is outside-of-scope. It is not necessary to apply any FOIA exemptions to the outside-of-scope information.

Brief descriptions of the FOIA Exemptions are noted below. Descriptions are also found in NRC Management Directive 3.1, Freedom of Information Act, and 10 CFR 9.17. Your office FOIA coordinator can also provide additional information.

Exemption 1: Information properly classified pursuant to an Executive Order. This includes information classified as Confidential National Security Information (C/NSI); Secret National Security Information (S/NSI) or Top Secret National Security Information (TS/NSI). **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

Exemption 2: Information relating solely to internal personnel rules and procedures.

Low 2: This exemption has historically applied to internal information of a trivial nature, such as NRC parking lists or room numbers for NRC office buildings. Public release of such information would typically cause no harm, so the agency should generally authorize discretionary release of Exemption 2(low) records.

High 2: More substantial internal matters the disclosure of which would risk circumvention of a legal requirement where the information is predominantly internal and disclosure significantly risks circumvention of statutes or agency regulations. Some examples are: critical infrastructure systems and assets, and vulnerability assessments. Other information properly withheld under this exemption includes general guidelines for conducting investigations, computer programs and source codes, bridge passcodes, agency credit card numbers, and crediting plans for future vacancies. **A FORESEEABLE HARM STATEMENT MUST BE PROVIDED FOR EXEMPTION 2(HIGH)**

Exemption 3: Information specifically exempted from public disclosure by statute. This includes (1) safeguards information (*Section 147 of Atomic Energy Act (AEA)*); (2) Restricted Data (RD) including Restricted Data classified at the CONFIDENTIAL (C/RD), SECRET (S/RD), and TOP SECRET (TS/RD) levels (*Sections 141-145 of the AEA*), (3) voluntary submitted critical infrastructure information (6 U.S.C. 133(a)(1)(A). and (4) contractor proposals not incorporated into the contract (*41 U.S.C., Section 253b(m)(1)*. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

Exemption 4: Trade Secrets or commercial or financial information. This includes (1) confidential business (proprietary) information; (2) licensee's physical protection or material control and accounting program information for special nuclear material (see 10 CFR2.390(d)(1)); and (3) information submitted by a foreign source and received in confidence pursuant to 2.390(d)(2).

For confidential business (proprietary) information submitted by a company, provide a copy of the company's affidavit providing a statement of the reasons supporting the company's request that the information should be protected from public disclosure and the NRC's determination letter sent to the company. If your office determines that the information continues to be proprietary, the FOIA/PA staff, with OGC concurrence, will inform the requester in the NRC's response to the request. If you believe the record or portions are no longer proprietary, indicate those portions in your response. The FOIA/PA Officer will send a letter to the submitting company when an initial determination is made that information the

company claims as proprietary should be disclosed. The letter gives the company the opportunity to object to disclosure and if the company has any objection it must provide the agency a statement specifying the grounds why the information continues to be proprietary. The FOIA staff in consultation with OGC and the originating office will review the statement and reach a final agency decision and inform the company and the requester of that decision. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

Exemption 5: Interagency or intraagency records that are not available through discovery during litigation. This is normally referred to as predecisional information and includes information that would reveal (1) a deliberative process but only those portions which reveal advice, opinions, and recommendations, (2) attorney work-products and (3) records covered by the attorney-client privilege. This exemption=s goal is to encourage the open, frank, and candid exchange of opinions needed for good decision making, protect against premature disclosure of public policies, and protect against public confusion by disclosure of reasons and rationale that are not in fact actual reasons for agency decisions. Note that final agency decisions and interpretations can not be withheld under this exemption. **A FORESEEABLE HARM STATEMENT MUST BE PROVIDED FOR EXEMPTION 5, DELIBERATIVE PROCESS ONLY. ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY-WORK PRODUCT DO NOT REQUIRE A FORESEEABLE HARM STATEMENT**

Exemption 6: Information if released would result in a clearly unwarranted invasion of personal privacy. For example, this includes social security numbers, home addresses, home or personal telephone, cell and pager numbers, personal non-government e-mail addresses, date of birth, marital status, number of children, and non-job related interests, personal medical, financial, performance and disciplinary information. For application packages, candidate evaluations, personnel forms SF 50 and SF 52, and appraisal-related records, guidance can be obtained from your office FOIA coordinator. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

Exemption 7: Records compiled for law enforcement purposes. Sections A, C, and D are the most frequently used parts of this exemption.

7A: Disclosure could reasonably be expected to interfere with an enforcement proceeding. This exemption is used for records involved in an open allegation file, an ongoing investigation by the Office of Investigation (OI) or Office of the Inspector General (OIG), or in an ongoing enforcement action. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

7B: Would deprive a person of a fair trial or an impartial adjudication. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

7C: Disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. (See examples under Exemption 6.) Note the threshold for invoking Exemption 7C is less than that for Exemption 6 because Exemption 6 requires that the invasion of personal privacy be clearly unwarranted. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

7D: Information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal the identities of confidential sources. Confidential sources generally must have a written confidentiality agreement with the NRC. However that is not required by the OIG. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

7E: Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

7F: Disclosure could reasonably be expected to endanger the life or physical safety of an individual. **PROVIDE A FORESEEABLE HARM STATEMENT ONLY IF NOT OBVIOUS**

If you have questions regarding the application of exemptions you should consult with your own management or office FOIA coordinator

Step 7: Bracket information that should be withheld.

If the entire record is to be withheld write at the top of the first page: "Withhold All" and note the applicable FOIA exemption(s). If only a part of a record is to be withheld, whether it be part of a page, paragraph, or sentence, the information should be enclosed in brackets preferably using a red pencil and the applicable FOIA exemption noted in the margin next to the brackets. The FOIA requires that information that can be released be segregated from that which is withheld, thus it is important that you carefully consider what information can be released and what must be withheld. In particular, facts in predecisional records must be segregated from any advise, opinions or recommendations or other deliberative process information that is to be withheld. Also, make sure that information you are proposing to be withheld has not already been released to the public. Finally, remember you are only to bracket information to be withheld. The FOIA /PA Specialist is responsible for actually deleting withheld information in records prior to their release to the requester.

Step 8: Organize the records responsive to the request and submit them to your office FOIA coordinator.

Organize the responsive records into the following categories and list on separate pages as follows. Remember that all responsive records must be provided to the office FOIA coordinator regardless of whether they will be released or withheld in whole or in part. (Note the suggested format for compiling a list of records is as follows: Record Date, Originator, Originator Organization, Brief Subject and Page Count.)

(1) **Records Already Publicly Available** - if in ADAMS (main and legacy libraries) include the ADAMS Accession Number or include a printout if the records were identified via an ADAMS search along with the criteria used to perform the search.

(2) **Records Being Released in Their Entirety** - if the record is already in the ADAMS but not publicly available include the record's ADAMS Accession Number.

(3) **Records Containing Security-Related Information** - these records will be released only to the requester and not made publicly available in ADAMS until a third FOIA request is received for the same record. When a third request is received, the record will be made publicly available in ADAMS.

(4) **Records Being Released in Part** with the exemption(s) noted ***(a foreseeable harm statement must be provided for exemptions 2(high) and 5(Deliberative Process).***

(5) **Records Being Withheld in Their Entirety** with the exemption(s) noted ***(a foreseeable harm statement must be provided for exemptions 2(high) and 5(Deliberative Process).***

(6) **Records to be Referred to the Originating Office, Agency, or Company**.

(a) Identify any records submitted to the Commission or a Commissioner and provide a recommendation whether the record should be released or withheld because NRC policy requires Commission approval of the recommendation.

(b) Identify if any responsive record(s) involve(s) a subject for which litigation is either ongoing or is probable. This will ensure coordination with the Office of General Counsel, the NRC Solicitor, and when necessary the Department of Justice.

(c) Where an email contains the exchange between two or more offices, the submitting office is responsible for making a disclosure determination on the portions of the email originated by its staff and indicating the originating office(s) for the remaining portions.

(d) If a record contains proprietary information, remember to provide a copy of any affidavit provided by the submitted and any NRC decision letter. If the decision is still pending on submitted request for proprietary treatment of the record please note that in the response. Also since a letter will be sent to the submitted by the FOIA/PA Officer, please provide an address if it is not apparent on the record.

Step 9: **Submit your response package to the FOIA/PA caseworker.**

Within **ten** (10) working days, your office is required to submit records to the FOIA/PA caseworker handling the processing of the request. You should provide your office FOIA coordinator your response package within the time frame specified by your office. If you can not respond within your office's time frame, you should obtain your management approval and inform your office FOIA coordinator as soon as possible and explain why a delay will occur and when you expect to provide the complete response.

Your transmittal memo to the FOIA/PA caseworker must indicate whether the response does or does not contain security-related information. Your memo must also provide foreseeable harm statements for exemptions 2(high) and 5*(Deliberative Process)*. You only need to provide a foreseeable harm statement for exemptions 1, 3, 4, 6, 7A and 7C if the reason

is not obvious. While each document or portion of a document protected by exemptions 2(high) and 5*(Deliberative Process)* must be addressed in a foreseeable harm statement, a single statement may cover multiple documents or multiple portions of documents, provided that the harm foreseen, and the reasons why the harm is foreseen, are the same for each. While foreseeable harm statements do not need to be lengthy, they should be reasonably specific.

You should include in your response the actual search time and review time you spent on processing the request.

Do not put your office FOIA response in ADAMS. The FOIA/PA caseworker will place the FOIA request, NRC's response(s) to the requester (including the appendices and records) in ADAMS should the determination be made that the FOIA can be made publicly available.