



UNITED STATES DEPARTMENT *of* JUSTICE

FOIA Improvement Act of 2016



FOIA Improvement Act of 2016

- Signed into law on June 30, 2016.
- New provisions apply to any request made after the date of enactment.
- The Act contains several substantive and procedural changes.



Proactive Disclosures

The “Rule of 3” is Codified for Frequently Requested Records.

- Agencies are now required to “make available for public inspection in an electronic format,” records “that have been requested 3 or more times.”



Disclosure Requirements – Codification of DOJ’s Foreseeable Harm Standard

Agencies “shall withhold information” under the FOIA “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”



Codification of DOJ's Foreseeable Harm Standard

- Agencies shall “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible.”
- Agencies shall “take reasonable steps necessary to segregate and release nonexempt information.”



Codification of DOJ's Foreseeable Harm Standard

This provision does not require disclosure of information “that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under [Exemption] 3.”



Sunset Provision for the Deliberative Process Privilege

Exemption 5 of the FOIA is amended to provide that “the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.”



Changes in Procedures when Processing Requests – Extending Time Limits Due to Unusual Circumstances

When a request involves “unusual circumstances” agencies have long been required to provide written notice to the requester to extend the statutory response time.



Extending Time Limits Due to Unusual Circumstances

- When the extension is for more than ten working days, agencies have also been required to provide the requester an opportunity to limit the scope of the request so that it can be processed more quickly or to arrange an alternative time to respond.
- To aid the requester, agencies have also been required to make their FOIA Public Liaison available.



Extending Time Limits Due to Unusual Circumstances

The amendments add a new requirement that this written notice also notify the requester of their right to seek dispute resolution services from the Office of Government Information Services.



Unusual Circumstances & Further Limitation on Assessing Fees

When “unusual circumstances” apply, and the agency has provided “timely written notice to the requester,” the delay is “excused for an additional 10 days.”

“If the agency fails to comply with the extended time limit,” it may not charge search fees (or for requesters with preferred fee status, may not charge duplication fees), unless one of two exceptions are met.



Exceptions to the Fee Limitation

1. Agencies can still charge fees if:
 - Timely written notice of unusual circumstances is provided to the requester;
 - “more than 5,000 pages are necessary to respond to the request,” and
 - The agency discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request.



Exceptions to the Fee Limitation

2. Additionally, if a court determines that “exceptional circumstances exist,” the agency’s failure to comply with a time limit “shall be excused for the length of time provided by the court order.”



New Language for Response Letters

For determinations that are not adverse (i.e., full grants), agencies must include in their notification to the requester “the right of such person to seek assistance from the FOIA Public Liaison of the agency.”



New Language for Response Letters

For adverse determinations, agencies must include in their notification to the requester:

- The right to appeal within a period of time “that is not less than 90 days after the date of such adverse determination,” and
- “[T]he right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or [OGIS].”



New Duties for Chief FOIA Officers

Chief FOIA Officers are now required to:

- “offer training to agency staff regarding their [FOIA] responsibilities,” and
- “serve as the primary liaison with the Office of Government Information Services and the Office of Information Policy.”



New Duties for Chief FOIA Officers

Chief FOIA Officers are also now required to “review, not less frequently than annually, all aspects” of their agency’s FOIA administration, including:

- Agency regulations,
- Disclosure of records under paragraphs (a)(2) [proactive disclosure provision] and (a)(8) [foreseeable harm standard],
- Assessment of fees and fee waivers,
- Timely processing of requests,
- Use of exemptions, and
- Dispute resolution services with OGIS or the FOIA Public Liaison.



Chief FOIA Officer Council

The Act created a new Chief FOIA Officer Council, which will serve as a forum for collaboration across agencies and with the requester community to explore innovative ways to improve FOIA administration.



Chief FOIA Officer Council

The Council shall “consult on a regular basis” with requesters.

It shall “meet regularly and such meetings shall be open to the public” and at least annually the Council must have an open meeting that permits interested members of the public to appear and present statements.



Chief FOIA Officer Council Duties

- Develop recommendations for increasing compliance & efficiency.
- Disseminate agency experiences, ideas, best practices, and innovative approaches related to the FOIA.
- Identify, develop and coordinate initiatives to increase transparency and compliance with the FOIA.
- Promote development and use of “common performance measures for agency compliance.”²⁰



Chief FOIA Officer Council

First meeting of the new Council was held on July 22, 2016. Information related to the activities of the Council can be found on OIP's website.



Annual FOIA Report Additions

On or before February 1 of each year, agencies must submit their Annual FOIA Report to the Attorney General and to the Director of OGIS.



Annual FOIA Report Additions

The Annual FOIA Report must include two new elements:

- The number of times “the agency denied a request for records under subsection (c)” of the FOIA, and
- The “number of records that were made available for public inspection in an electronic format under subsection (a)(2).”²³



Annual Report Additions

The raw, statistical data used in the agency's Annual FOIA Report must be made available for public inspection without charge in an electronic, aggregated, searchable format, that may be downloadable in bulk.



Agency Reference Guides

Agency FOIA Reference Guides must be made available in electronic format.



OGIS

Not less than annually OGIS shall submit to Congress and the President, and make available to the public electronically:

- A report on its findings from its reviews of agency policies, procedures, and compliance,
- A summary of its mediation services, including any advisory opinions issued,
- The number of times each agency engaged in dispute resolution with OGIS or the FOIA Public Liaison, and
- Any recommendations to improve FOIA.



OGIS

- OGIS is not required to obtain prior approval before submitting to Congress reports, recommendations, testimony, or comments, if such submissions include a statement indicating that the views expressed are those of the OGIS Director and not necessarily the views of the President.
- Not less than annually, OGIS shall hold a public meeting on its activities and “allow interested persons to appear and present oral or written statements.”



Consolidated Online Request Portal

The Director of OMB, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that:

- Allows the public to submit a request to any agency from a single website, and
- May include additional tools that OMB finds will improve FOIA.



Consolidated Online Request Portal

- Agencies may still create or maintain independent online portals.
- OMB shall establish standards for interoperability between the consolidated portal and agency case management systems



Agency FOIA Regulations

- Agencies must, no later than 180 days after enactment “issue regulations on procedures for the disclosure of records under [the FOIA] in accordance with the amendments made by section 2 [of the Act].”
- Agency FOIA regulations shall include procedures for engaging in dispute resolution through the FOIA Public Liaison and OGIS.



Proactive Disclosures through Records Management

The FOIA Improvement Act of 2016 amends Section 3102 of the Federal Records Act, 44 U.S.C. § 3102, to include a requirement that agencies establish “procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format.”



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Questions?