



THE FREEDOM OF INFORMATION ACT A MANAGER'S GUIDE TO A COMPLEX LAW

November 30, 2016

Office of the General Counsel

Introduction

The Freedom of Information Act (FOIA) generally provides that any person has a right of access, enforceable in court, to Federal records except to the extent that such records (or part of those records) are protected from disclosure by one of nine exemptions.

The FOIA applies to the Executive Branch of the Government, including the Executive Office of the President.

DCAA policy is to make the maximum amount of information available to the public thereby providing more open Government.

We may not deny a record unless it falls within one of nine exemptions provided by the law. Even if an exemption applies, we release the record unless such release would harm Governmental interests.

Applicable Statute and Regulations

- United States Code, Title 5, Section 552
- Implemented by Department of Defense Directive 5400.7, DoD Freedom of Information Act Program
- Implemented by DCAA Instruction 5410.8, DCAA Freedom of Information Act Program

Responsibilities

The DCAA Chief FOIA Officer is responsible for the processing of a FOIA request. This includes:

- Preparing the tasking letter to the Office of Primary Responsibility (OPR) for the requested records.
- Assessing appropriate fees.
- Reviewing the requested record or records to determine releasability as the Agency's Initial Denial Authority (IDA).
- Determining the appropriate exemption(s) and providing rationale when recommending denial or partial denial.
- Maintaining the case file and preparing the Annual FOIA Report.

The OPR for the records requested is responsible for:

- Providing a copy of the requested record(s) to the DCAA Chief FOIA Officer for FOIA processing.

The OPRs should seek advice/guidance on questions regarding the search for responsive records from the DCAA Chief FOIA Officer. The DCAA Chief FOIA Officer will coordinate with the General Counsel, as appropriate. The General Counsel is responsible for serving as the agency's FOIA appellate authority.

Records Subject To Disclosure

All records in the possession of the Agency when a response is submitted to the requester are subject to disclosure, unless they fall within one or more of the following exemptions from Title 5 U.S.C. § 552(b):

(b)(1) – Classified in the interest of national defense or foreign policy (the classifying authority must review to determine if classification is current).

(b)(2) – Internal practices not directly affecting the general public.

(b)(3) – Records specifically exempted from disclosure by statute other than Title 5 U.S.C § 552(b).

(b)(4) – Trade secrets and commercial or financial information obtained from a person outside the Agency and which are privileged or confidential.

(b)(5) – Inter-agency or intra-agency memorandums or letters, not available on a routine basis under the laws of civil court discovery. This normally applies to DCAA if release would reveal the deliberative process of the Agency.

(b)(6) – Personnel or other files, release of which would result in a clearly unwarranted invasion of personal privacy.

(b)(7) – Records compiled for law enforcement purposes.

(b)(8) – Records concerning the regulation or supervision of financial institutions.

(b)(9) – Geological and geophysical information and data concerning wells.

Because the Act applies only to records, in whatever form they are maintained, the Agency is not required to create a record to respond to a FOIA request.

Recognizing a FOIA Request

A written request from a member of the public which:

- States the request is made under the provisions of the FOIA.
- Clearly implies the request is made under the FOIA by referencing the “law,” the “statute,” or the “regulation.”
- Is addressed to the “FOIA Office” or Director, DCAA.

Upon receipt of this type of request, it should be immediately provided to the DCAA Chief FOIA Officer for processing.

A request, which does not invoke the FOIA, is handled by the receiving office as a public request. Public requests may only be denied or partially denied if the information meets a FOIA exemption. The OPR for the requested record uses the rationale of the FOIA exemptions, without specific reference to the FOIA, 5 U.S.C. § 522, or DCAAI 5410.8. Appeal procedures are not provided on such denials. This authority must not be used to withhold records that would otherwise be released under the FOIA. Consult your servicing legal office prior to denying a public request.

If the requester cites another statutory or regulatory authority, process the request under that statute or regulation, for example, Title VII of the Civil Service Reform Act of 1978.

Time Constraints

Requests must be answered within 20 working days of the receipt by the appropriate office. In “unusual circumstances,” an administrative extension of an additional 20 working days may apply. These “unusual circumstances” are defined as:

- The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
- The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request.
- The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having a substantial subject-matter interest therein.

A report of administrative extensions taken is included in the annual DCAA FOIA Report to Congress.

Assessment of Fees

The DCAA Chief FOIA Officer assesses the fees or determines whether the fees can be waived. Requesters are categorized for purposes of fee assessment as follows:

- Commercial use requesters are assessed fees which recover full direct costs of searching for, initially reviewing for release, and duplicating records sought.
- Representatives of the news media or an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research, are assessed fees for *reproduction only*, excluding the first 100 pages. *Note*: Fees are waived or reduced if disclosure of the information is in the public interest and is not primarily in the commercial interest of the requester.
- All other requesters are assessed fees only for direct costs of search and reproduction and are furnished the first two hours of search and the first 100 pages of reproduction without charge.

The fee is waived if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee.

We may not require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion or the fee will exceed \$250.

Appeals of Denials

The Denial Authority must tell the requester the rationale for denial, the exemption claimed, and advise the requester of procedures for appealing denials or partial denials.

If the requester disagrees with a denial or partial denial, the requester has a right to appeal the initial decision.

Appeals of denials are processed immediately through the Office of the General Counsel, the DCAA appellate authority, for review and processing.

That office then has 20 working days in which to make a final determination.

If the appeal is granted, the General Counsel notifies the requester and releases the record or directs its release.

If the denial is upheld, the requester is told of his or her right to judicial review of that determination.

The requester has exhausted all administrative remedies within DCAA when an appeal has been filed and a decision made on that appeal. That decision is the final DCAA action on the request.

A Word to the Wise

A requester may file suit if they believe that DCAA failed to comply with the FOIA. This includes failure to respond within the 20 working days established by the law.

Requesters must be notified within 20 working days even when an administrative extension of processing time is required to satisfy the request. The key here is to keep the requester informed.

While the Government is normally allowed to answer complaints or suits in 60 days, this is accelerated to 30 days when the FOIA is involved.

The court may assess against the Agency attorney fees and other litigation costs reasonably incurred in any case in which the FOIA complainant has substantially prevailed. DCAA General Counsel and the Department of Justice will defend a DCAA official named in a suit providing the action taken by the official was neither arbitrary nor capricious.

If the court finds that information has been withheld arbitrarily, the matter is referred to the Office of the Special Counsel for the Merit Systems Protection Board for the possible initiation of an adverse personnel action against the individual responsible for making the arbitrary decision.

Remember to consult with the DCAA Chief FOIA Officer if you receive a request or have questions concerning the FOIA.