

NIH and FOIA

Susan R. Cornell, J.D., FOIA Officer
National Institutes of Health





FOIA Requirements

The FOIA Requires Agencies to Make Records Available to the Public:

- Affirmatively
 - In a Reading Room
 - On the Web
- Upon receipt of a written request reasonably describing the records sought



FOIA Requirements

➤ **Who is Subject to the Federal FOIA**

- All Federal Agencies - YES
- Personal staff of the President; Congress; Federal Courts – NO
- State Agencies or Entities - NO



FOIA Requirements

➤ Who May File a FOIA Request

- Any Person
 - Does not have to be a US Citizen
- State Agencies



Responsive Records

- **All Records in the Possession or Control of NIH**
 - Created or obtained by NIH
 - Under NIH control – contractor records

- **Includes ALL Records Responsive to the Request – NOT just those that can be Released**



Definition of Record

- **Any handwritten, typed or printed documents and documentary material in other forms**
- **Information in Electronic Format**
- **Includes Email**



Response Options

- **No Records Responsive to the Request**
- **Responsive Records Exist and may be Released in Full**
- **Responsive Records Exist but We Don't Want to Release**



Response Options

The FOIA is a Disclosure Statute

- Presumption is that all responsive records/information will be released unless 1 of 9 exemptions applies
- We may not consider the identity of the requester or the use the requester intends to make of the records when deciding whether to release or withhold records



Exemption 1

- **Protects National Security Information**
- **The information must be properly classified**



Exemptions 2 and 3

Exemption 2

Protects matters internal to an agency if disclosure will risk the circumvention of a statute or agency regulation

Exemption 3

Another federal statute prohibits disclosure



Exemption 4

- **Protects trade secrets and commercial or financial information obtained from others**
- **The submitter of the information will have an opportunity to identify such information and has the burden of showing that it falls with the exemption**



Exemption 5

- **Protects inter-agency or intra-agency memoranda or letters unavailable to another party in litigation**
- **Incorporates Certain Privileges**
 - Deliberative Process
 - Attorney-Client Communication
 - Attorney Work Product



Exemption 6

- **Protects records that if released would result in a clearly unwarranted invasion of privacy**
 - We must balance the privacy interest of the individual with the public interest served by disclosure



Exemptions 7, 8 and 9

Exemption 7

Protects certain information in law enforcement files

Exemption 8

Protects information of financial regulators (FDIC)

Exemption 9

Protects geological and geophysical information and data concerning wells



FOIA Processing at NIH

- **One FOIA Officer for all of NIH**
- **NIH FOIA Office – Part of the Office of Communications and Public Liaison, Office of the Director**
- **33 Components with FOIA Responsibility – Each with its own FOIA Coordinator**



NIH FOIA Office

- Establishes and communicates NIH FOIA Policy
- Interprets the FOIA and DHHS FOIA Regulations
- Processes FOIA requests for complicated and/or sensitive records
- Issues all FOIA denials
- Processes all administrative appeals
- Coordinates all NIH FOIA litigation with the Office of General Counsel



NIH FOIA Coordinators

- Prepare and send all correspondence with requesters
- Conduct searches for responsive records
- Conduct submitter notice if necessary
- Consult with program officials regarding appropriateness of withholdings proposed by submitters
- Release responsive records to requesters



FOIA Processing at NIH

- **Requests may be sent to the NIH FOIA Office or to the appropriate IC/OD Component**
- **Upon receipt of a request we search all agency files “reasonably likely” to have responsive records**



FOIA Processing at NIH – Submitter Notice

- If the request is for records submitted to us and we have reason to believe that the records contain proprietary information (Ex. 4 info), we will notify the submitter and ask the submitter to identify any proprietary information within the requested records
- Submitters have 5 business days to respond and responses must be specific
- The submitter notification procedures apply only to records that we believe may contain proprietary information



FOIA Processing at NIH – Submitter Notice

- An NIH Program Official will review the submitter notice and either agree or disagree with the proposed redactions
- If the Program Official disagrees, we will attempt to negotiate a release
- In most cases any initial disagreement can be resolved



Non-Compliance

- **Administrative Appeal**
- **Federal Lawsuit**
 - Time consuming
 - Results are out of our control
 - Results may be binding on future cases
 - May be required to pay the requester's legal fees – from appropriated funds