

*Note: Text has been edited for clarity*

## **Freedom of Information Act Policies**

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Slide 1 (Title Slide)

Good morning or good afternoon depending on your local time zone.

Welcome to the second in the series of [OLAW IACUC Staff Outreach Online Seminars](#). My name is Jerry Collins and I will be the moderator for this session. Please look at the top left box at the top of your screen entitled 'Submit a Question, Q&A'. If you would like to submit a question for today's speaker please type it in the text field at the bottom of that box and click on the arrow to submit and you may submit questions at anytime during the presentation and at the end of the presentation as well. Once submitted, your questions will appear at the upper portion of that screen but will only be seen by you and the staff here in the office. As a reminder, this session will be recorded and will be available to all interested parties. It will be posted within a week in the Education section of the [OLAW website](#).

With those housekeeping items out of the way, let me introduce today's speaker. We are both pleased and fortunate to have with us today Ms. Susan Cornell who will speak to us on the topic of Freedom of Information Act Policies. Ms. Cornell is a graduate of Washington and Jefferson College in Washington, Pennsylvania and she obtained her law degree from Syracuse University College of Law. Ms Cornell is the NIH Freedom of Information Officer and a Director of the [NIH Freedom of Information](#)

[Office](#). In those capacities Ms. Cornell is responsible for providing FOIA guidance and advice to the entire NIH community, developing FOIA policy for the Agency and serving as the Agency's Denial Authority. It is my pleasure to introduce Ms. Susan Cornell. Susan?

Jerry, this is Susan Cornell, as Jerry said and I'm going to talk to you about the FOIA, which stands for F-O-I-A, or [Freedom of Information Act](#). What I'm going to, hopefully, do is give you some sort of framework so you can understand what the federal FOIA stands for and how we implement it here at NIH.

Slide 2 (FOIA Requirements)

What the FOIA does is it requires federal agencies to make documents, or records available to the public, either affirmatively, which means we put it in a reading room, either a physical reading room or on the web in an electronic reading room or just merely on our website. If we don't make it affirmatively available, then the FOIA requires us to make those records available if we receive a written request that describes the records that the requester wants to receive.

Slide 3 (FOIA Requirements)

Not everyone is subject to the Freedom of Information Act. The federal law applies to all federal agencies. Personal staff of the President, Congress and the Federal Court, although federal entities, are not subject to the FOIA. State agencies and state entities are not subject to the federal Freedom of Information Act. Most states, and it may even be all states, have an open government act or a FOIA of their own that might apply to your institution. But state entities, again, are not subject to the

federal Freedom of Information Act and are not required to respond to requests that are submitted citing the federal law.

#### Slide 4 (FOIA Requirements)

Any person may file a FOIA request, that's what the law says, any person. It does not have to be a United States Citizen, it does not even have to be someone in say, good standing. We actually have a quite active requester base in my office of individuals who reside in state and local prisons. State agencies if they are interested in receiving documents that we have in the federal government, they also would use the FOIA to obtain copies of those records.

#### Slide 5 (Responsive Records)

For which does the FOIA apply to when we talk about records or documents. The FOIA applies to all records in the possession or control of NIH, which means that they were either created by us, or obtained by us, or they are under our control. When I say contractor records, many times, we hire a contractor to do work for us, and those records are really agency records - if they are acting as our agents, then their records become our records. Agency records also includes all records that are responsive to the request, not just those that can be released. What does that mean? That means that if we get a request, we have to admit to everything that we have, even if we ultimately don't turn them over. The other thing that I'd like to mention here is that the FOIA applies, like I said, to things that we have created or we have obtained, things within our possession or control. When we get a FOIA request, if we do not have the records, we won't go outside the agency and ask someone to submit records to us in order for us to respond to a FOIA request. We only deal with what we own and what we control.

## Slide 6 (Definition of Record)

So what is a record? The department's - that's the Department of Health and Human Services, FOIA regulations and the statute define a record as any handwritten, typed or printed document and documentary material in other forms, such as video tapes. It also covers the information in electronic format, databases, database information is subject to the Freedom of Information Act. It also includes email, so all emails that are sent or received by an NIH employee are subject to the Freedom of Information Act.

## Slide 7 (Response Options)

When we get a FOIA request, we have essentially three response options. We search for the records that have been asked for and if we don't find them we can give the requester what's called a no records response, we have no records responsive to that particular request. If we search through our files and we do find responsive records and we do want to release them in full, we can do that. Look for, we have the records, the requester may have them, we send them out the door. The third option we have in responding to requests is that we have records, but either part, or some of those records we don't want to release. So three options and the statute gives us twenty working days to use one of those options in response to a FOIA request.

## Slide 8 (Response Options)

One important thing to remember is that the federal Freedom of Information Act is a disclosure statute. The presumption is, that if we have the records they will be release unless one of the nine exemptions that Congress wrote into the statute applies. When we're making that releasability determination, in other words when were looking at the records that had been requested and we're trying to decide whether one of the exemptions applies that will

allow us to withhold those records, we are not allowed to consider the identity of the requester, or the motive of the requester when we're deciding whether we're going to release them, or whether we're going to withhold them. One of the Golden rules of FOIA is release to one, is release to all.

#### Slide 9 (Exemption 1)

So, there are nine ways, or reasons, that Congress has given us that we can say no to something in our possession or control if someone has asked for it. Exemption One allows agencies to protect national security information. There is an executive, or presidential executive order, that sets out the rules that agencies have to use to classify information. You can only use Exemption One if that information has been properly classified.

#### Slide 10 (Exemptions 2 and 3)

Exemption Two protects internal matters of an agency, if disclosure will allow someone to circumvent a statute or a regulation. A really good example of that, to give you some context, is every agency conducts computer vulnerability assessments, they will do some type of investigation to see, you know, where are we vulnerable, where can someone hack into our systems. Obviously, we wouldn't release the results of such an assessment, because it would allow someone to hack into them.

Exemption Three, another federal statute prohibits disclosure. Sometimes Congress will actually pass a law that says, the information that they are talking about in that particular law will not be available to the public, in response to a Freedom of Information Act request. That then gives the agencies no discretion, if a request comes in for that type of information, we have to automatically withhold it.

#### Slide 11 (Exemption 4)

Exemption Four protects trade secrets and commercial or financial information obtained from others. Exemption Four allows us to protect information that comes to NIH from the outside. For instance, grantee institutions submit grant applications, PIs submit grant applications - contract proposals that come in - anything that comes to us from the outside has potential to be protected by Exemption Four. Trade secrets, commercial and financial information, what are we talking about? We're talking about commercial interests; we're talking about commercial information. The type of information that a competitor would love to have because it would allow them to know the inside workings of that business. It's a lot easier to apply Exemption Four in contractor stand point because those are actually commercial entities. What we do apply commercial for, or Exemption Four, for commercial information that is contained in grant applications. In order for exemption four to work, the submitter of the information, the entity that sent us that information originally, has to have an opportunity to identify that information and they also have the burden of explaining to us why the information is commercial, why that entity would be harmed commercially if the information is released, so that we can know whether we can assert that Exemption in denying the information. Now I'll talk a little bit later about this submitter notice process that we go through with this type of information.

#### Slide 12 (Exemption 5)

Exemption Five, protects interagency or intra-agency memos and letters that are unavailable to another party in litigation. What that really means, in practical application, is that it protects the information; the documents that we create within NIH that if we were in a law suit, our lawyers would be able to claim are privileged in some way. Exemption Five essentially incorporates certain privileges that we assert. The first one, one of the prime examples, of those kinds of privileges is the deliberative process privilege, that's our

inter-thinkings, our recommendations, our opinions of our staff. The attorney-client communications privilege; the Office of General Counsel at the Department of Health and Human Services is responsible for providing legal advice to NIH. So those communications are privileged. An attorney work product, which, of course, is the material that is prepared or produced by our attorney if we are in a litigation situation.

#### Slide 13 (Exemption 6)

Exemption Six protects records that, if released, would result in a clearly unwarranted invasion of personal privacy. How this exemption works is, if we think the Exemption has been triggered, we will look to the material to see: is there a privacy interest in this material? That's the first, sort of, step; identifying any privacy interest. If there is a privacy interest, then we'll look to see if there's any public interest that would be served by disclosing the information, and we balance the two. If the privacy interest is greater, then the information is not released. If the public interest is greater, then the information is released, even if there is some small privacy interest involved. Information that is already in the public domain, even if you would consider it private information, we consider that in the public domain and therefore we won't protect it. What do I mean by that? A PI's name, every grant - funded grant application appears in our CRISP database. So that information is already out there for the public to see, we can't now protect it, since it's already out there.

#### Slide 14 (Exemptions 7, 8 and 9)

Exemption Seven protects certain law enforcement files, it primarily applies to agencies, and federal agencies that have law enforcement authority. NIH is not a regulatory agency, as you know. We do have certain, a few files,

where we do some civil investigative activities and we can use Exemption Seven to protect some of that information.

Exemption Eight protects information that is found within the files of financial regulators such as FDIC.

And Exemption Nine, which is the last exemption, protects geological and geophysical information and data concerning wells.

Slide 15 (FOIA Processing at NIH)

So, how does the FOIA work here at NIH? It's a pretty big place and it can be confusing to people. There is one FOIA Officer for all of the National Institutes of Health. That is set by the Department's Regulations, the department and each of the Department's sub agencies have a FOIA Officer. There is a FOIA Office at NIH, and is that is part of the Office of Communications and Public Liaison, which falls within the Office of the Director of NIH. So, I'm the FOIA Officer, I report to the Director of the Office of Communications and Public Liaison and my boss reports to Dr. Zerhouni, the director of NIH.

We're also decentralized here, and there are 33 components that have FOIA responsibilities - 27 institutes and centers, and then there are certain offices within the Office of the Director, such as the Office of Extramural Research, that has its own FOIA coordinator.

Slide 16 (NIH FOIA Office)

A FOIA Coordinator is different from a FOIA Officer. In my office, the FOIA office, we're responsible for establishing and communicating NIH FOIA policy, such as I'm hoping to do today. We interpret the FOIA and the Department's FOIA regulations, both for the requester community and for



our own staff. We process FOIA requests for complicated or sensitive records that may cross all of NIH. We issue all of the FOIA denials, only the FOIA Officer, that's me, has the authority to say "no" to a requester, to tell a requester that they cannot have information. We process all administrative appeals, and I'll talk about the appeal process in a little bit. But if an IC takes an action on a FOIA request and the requester is unhappy, then that request gets transferred to my office and we handle the administrative appeal. We also coordinate all of the FOIA litigation with the Office of General Counsel. Occasionally, we do get sued by a requester because they are unhappy with the way their FOIA request has been handled.

#### Slide 17 (NIH FOIA Coordinators)

FOIA Coordinators, on the other hand, have release authority; they prepare and send all correspondence with requesters. They conduct searches for responsive records when they get a request. They conduct submitter notice, that submitter notice that I talked about regarding Exemption Four, they will conduct that submitter notice if it's necessary. They'll consult with their program officials regarding any type of information that the submitter has said "I want to have this withheld because it's commercial, it's proprietary, it'll harm me if you release it." The FOIA Coordinator will consult with their program officials to see if it's appropriate to go ahead and withhold that information, and then they will go ahead and release records to requesters. They will say yes to the requesters, here are your records. One thing to keep in mind if you are involved in the FOIA process, in any way, if your records have been requested and we've conducted the submitter notice, everyone in my office works full time on FOIA, that's all we do. In the Institutes, many of the FOIA Coordinators are doing that as a collateral duty, they have other primary responsibilities, and they're doing FOIA only part of the time. So

that's just something to keep in mind if you're ever working with a FOIA coordinator.

#### Slide 18 (FOIA Processing at NIH)

FOIA Processing at NIH, we are decentralized, requests can be sent either to my office, the main NIH FOIA Office, or if the requester knows which IC is likely to have the records, they can send the request directly to the FOIA Coordinator for that Institute. We have a website that's dedicated to FOIA here at NIH, the easiest way to find it is on the NIH homepage, at the very bottom of that page, there's a little button for FOIA, if you click on that it takes you right to the FOIA website. And a listing of all the FOIA Coordinators can be found there, you can see who the FOIA Coordinator might be for a particular institute, if you're funded by a specific institute and you're curious. For example, if a requester is looking for a National Cancer Institute funded grant, they would send that FOIA request to the FOIA Coordinator for NCI and that person would go ahead and process the request. When we receive a request, the first thing we do, are some administrative things, we log them in, every FOIA request gets its own tracking number so we can keep track of it. And then, we start searching for records, and our obligation under the law is to search all files that are reasonably likely to have responsive records. So if we think something is routinely misfiled, we look in the main file where it should be but it's not unlikely that something gets misfiled, we are responsible for looking in that other file where it might be. We are not responsible for looking; we don't have to look in every single file, every single time. We just have to look in the files where we think the document might be filed.

#### Slide 19 (FOIA Processing at NIH – Submitter Notice)

Now I'll talk about this submitter notice process a little bit. As I said earlier, if the documents, if we think the documents have commercial information in them, what we will do is notify the submitter that a FOIA request has come in, the submitter will know who the FOIA requester is and we will ask the submitter to identify any proprietary information within those requested records that they would like for us to withhold. The Department's Regulations state that the submitter has five business days to respond to us and the response has to be specific, it can't just be 'Please withhold pages 34 through 38, those are commercial'. It has to be specific, that submitter notice, has to say this is why this information is commercial, this is how it would harm the submitter commercially if you release it for the requester. And again, in making that determination, the identity of the requester is irrelevant. The assumption is that if it's going to go to one person, it can go to anyone. So you can't really say, I don't want this requester to get it, but I wouldn't mind if that requester got it. All requesters are treated the same. These submitter notification procedures apply only to records that we believe contain propriety information. So if something comes in to us and we don't think it contains proprietary information, we are not going to conduct, or go through, the submitter notice procedures.

#### Slide 20 (FOIA Processing at NIH – Submitter Notice)

Once we get that feedback back from the submitter, a program official will review the information and either agree or disagree with the proposed redactions. If we disagree with what the submitter wants to withhold, we'll engage in some limited negotiations, try to negotiate a release of the information. In most cases we're able to come to some agreement that what can be released and what can't be released. I've been here for nearly 11 years and there are only six times that I've actually had to write a letter back to a submitter saying 'you want this, we can't support that, we're going

to release the records the way we think they should be released' and what the Regulations say is then the submitter, we give them ten days to go to Federal Court to get an injunction to keep us from releasing the record. Like I said, that's happened probably fewer than six times in the last eleven years. So we are generally able to come to some agreement with submitters over what we are going release from their records.

#### Slide 21 (Non-Compliance)

So what happens if a requester is unhappy? The first step is to file what's called an administrative appeal, which means that they write to the Department of Health and Human Services, our parent agency, and they complain. They say either, you know, 'Susan Cornell should have given me that information, and she didn't' or 'You should have that 40-year-old grant application, I can't believe you don't still have that'. And we get a lot of requests for really old stuff; people seem to think that we keep everything forever. We do keep a lot of stuff, but we don't keep everything forever. Or they think that we should have every patient record for everybody who's every participated in one of our clinical trials, we have to explain to them. So if they're unhappy, they have to file an administrative appeal, they get a chance to make their argument to the Department, I get a chance to make the Agency's argument to the Department, and then the Department decides whether they're going to grant the appeal or not. If the requester is still unhappy, they can go to Federal District Court and file a lawsuit, they would have to follow that law suit in federal court, not state court. We're not crazy about litigating, primarily because it's extremely time consuming. Our negotiations are generally over with the party because now there are lawyers involved; we can't control the results because the judge is now going to make a decision. Judges, although you'd like to think that they know everything, sometimes they make mistakes and if they make a

mistake, we might have to live with that mistake for a long time and the real thing that hurts is that sometimes we have to pay the requester legal fees if they're successful in litigation.

Slide 22 (Questions)

So that's sort of a skeleton view of the federal Freedom of Information Act and how we process requests here at NIH. I know some questions have come in and I'll try to answer those to the best that I can.

Thank you Susan, You're right, there are some questions here. The first one is - **Can an institution ever deny a FOIA request?** Well, an institution would never be responsible for responding to a federal Freedom of Information Act request. So an institution wouldn't in the position of granting or denying a request. I'm not sure if that's the intent of the question, if that's, really, the question that's being asked. Now, I can't speak to what an institution can do if it's a public institution with response to a request that's sent in under the state law. I'm going to put a little twist on this, if you're talking about submitter notice, can the institution refuse to respond to that submitter notice? They can refuse, but the process will continue then. What we will do then is redact that document the best way we see fit and send it out the door. We'll make every attempt to notify you that we're getting ready to do that but an institution couldn't hold up one of our responses under the federal FOIA simply by failing to respond to the submitter notice.

The next question is the following - **Because of concerns with animal rights activists, getting addresses to harass a PI or lab personnel at home, how ought that be handled? Is this public domain or private information?** Well, generally, we're dealing only with the records under our possession and control. I have never seen a grant application that has a home address or any personal information. I will say that we are taking a

very good look at the concerns that are being raised. We have, in some situations, where the circumstances warrant it, we have redacted the locations of animals, if they're in the grant application. We have redacted specific office locations where they appear in the grant application. It's generally our policy that anyone who receiving federal funds, that the public has a right to know that and so everyone who is listed on the budget page of a grant application, we generally release those names. We have, however, in certain circumstances, we have redacted some of those names especially post graduate students, graduate students who are working in the labs. The PI's name is one that we would never withhold because that information is already in the public domain, in databases.

Susan, the next question is actually similar, from different individuals, and that is - **How does the submitter receive notice after the release of the request or is the institution informed if someone requests information under FOIA?** The only time someone is informed that we have received a request is if we think there is Exemption Four material and we engage in the submitter notification process. We do not notify other than that circumstance. Once we've reached agreement on the redactions, we release the material. We do not send any further notification to the submitters. I hope that answered the question, if not feel free to resubmit.

Okay, okay, I've seem to have lost Jerry. So I'm just going to pick one of these questions that I'm seeing here, one of the questions is - **Are floor plans of an animal facility released by NIH?** It's our practice, especially if it's a detailed floor plan; no, we will not release that. We don't release that from our own records, and wouldn't release them if they would appear in a grant application. Generally, though, we don't have that type of information in a grant application. Although I understand that OLAW might occasionally

have that type of information in their files. But our policy, is that no, we don't release that information.

Susan, I think the system is up and working again, and that was a failure on my part. The next question is - **If an entity sends a FOIA to a state institution and indicates that the request is being performed under federal law, is the state institution liable for responding under federal law while there still may be obligation under state law?** No, there is no obligation for a state entity to respond to a request that comes in citing the federal law. The federal law applies only to federal agencies.

Okay, the next question. **Is proprietary information only interpreted as relating to money and commerce or can it include information that could be used by a competing researcher, or by a competing lab?** It's very difficult for us to apply Exemption Four to that type of information. The submitter can always make the argument and we'll always take a look at it. Generally, the Exemption Four case law and interpretation applies to purely commercial type things, or ideas that might lead to a patent. We can't protect something simply because a researcher hasn't published yet. The courts ruled against us in a case several years ago that there is really no recognized first to publish exemption or privilege or recognition under Exemption Four. So we do the best we can to protect what we can under Exemption Four, but it's not an automatic thing simply because a competitor is asking for your grant application they're not going to get it.

Susan, the next question. **Are there guidelines as to what information is generally redacted before sending to a requester?** Absolutely, we provide guidelines and guidance to our coordinators as to what our routine redactions are to a grant application. For those of you who may have been around for a really long time, grant applications, each grant application used

to have the PI's social security number on every single page. So, obviously, that would be something we would redact. That doesn't happen anymore, from the face page of a grant our routine redactions are just the EIN number of the institution. Trying to think if there's anything else that comes off of that, then we do have - we don't release any of the information that would reveal institutional based salary. We're not going to tell the requester what someone gets paid in their job. What is a public interest is how much money the taxpayer is paying for that project. So we do have some routine redactions and the coordinators are well aware of those when they're preparing a grant application.

Okay, I seemed to have lost Jerry again, so I'm just going to move ahead. **I saw a question up there about the USDA, whether USDA site visits?** Those requests would go to the USDA and I can't speak to their releasability practices, so I hate to punt on that but it would really be inappropriate for me to give an opinion on what the USDA does with records within their possession and control because each agency applies the FOIA within their agency.

Susan, the next question is - **Is it accurate - is it an accurate assumption that if an institution receives notice from the NIH FOIA office, then there was some question about whether the materials were or were not releasable, which then seems to give the institution an opportunity to identify?** Okay, I'm not sure I totally understand the question. The submitter notice process works, in that the coordinator receives the request, they will automatically institute submitter notice if it's a grant application or a contract or some other document that indicates that it has proprietary information in it. The negotiations that occur once that submitter notice is returned to us, sometimes are done by email, sometimes done by telephone call. The letters that go out from my office,



under my signature, are called intent to release letters and those are pretty formal statements from the agency that, you've asserted this, I've consulted with the program official, we cannot agree, our negotiations are concluded and we're going to be releasing the material and I will give a specific date at which that material is going to be released. The ball is then in the institution's court as to how they want to proceed at that point. I hope I answered the question appropriately.

Susan, another question. **Are IACUC PIs considered to be NIH contractors, thus making their protocol subject to NIH FOIA requests?** I'm going to have to show my ignorance here, because I'm not sure what an IACUC PI is. I know, generally, what we consider a PI. I can tell you from the IACUC, we release only the chairman's name and the name of the institutional vet. Now, I'm not sure if I'm answering the question.

Susan, our next question. **G20 and C06 applications typically contain extensive information regarding our animal programs including floor plans, census information, etc. Do these mechanisms receive any special considerations by NCRP prior to releasing info via FOIA?** They would receive the same attention that we give to any document that's subject to a FOIA request. We don't really give them special consideration, but we'll be looking at those documents to see if there's anything in there that would cause a safety risk, we'd be looking for that type of information. If that answers the question, I'm not sure.

Susan the next question. **How does the copyright law interact with FOIA? For example, can material be withheld because it is copyrighted?** That's one of those typical lawyer answers, it depends. If we have material in our possession or control that the submitter normally offers for sale because it's copyrighted, they have a class, they teach a course,

whatever they are just selling this material, we will not release that under FOIA and allow someone to circumvent the process that way. Generally information that we release under FOIA, if it's been copyrighted, it's already in the public domain so there's not going to be any intellectual property issues surrounding our release.

Susan, the next question. **Recognizing the PI name, that the PI's name is releasable, are the names of research associates, lab assistants, or others considered releasable material as well?** At a starting point, yes they are. As I explained earlier, it's always been our policy here, there is a strong public policy interest in knowing who is receiving taxpayer funds. So it has always been our policy to release the names of everyone who is listed on the budget page or listed within a grant application as receiving federal or public funds. That being said, that doesn't mean that there aren't specific instances where we have, because there have been documented and specific threats made against that PI and the people working in that lab, that we wouldn't protect that information on a case by case basis. The general rule is yes it's releasable. There's an exception to every rule and as long as we have documentation and it's specific and the threat is real, we would consider withholding that information.

Susan, the next question. **How many FOIA requests does NIH receive in a year?** We average approximately 1,200 FOIA requests a year. That's not an extraordinary number, when you look at say the Food and Drug Administration they get about 13,000 and 15,000 requests a year. But I always say, it's not really the number of requests it's what's requested. One request can paralyze an agency because if the requester asks for a tremendous amount of material, it may only be only one request and it's only going to count as one in our tally but it could shut you down, you know,

it could take one person to respond to that, working maybe a year or more. So, but we get about 1,200 a year.

Susan, one of the participants asked the following - **Are floor plans of an animal facility released by NIH?** Generally not, if we have floor plans of a facility we will not release that information, we won't release the specific locations of animals. If for some reason, and I don't see this too often, but if for some reason specific room numbers are listed within the text of material, we'll withhold that information from the material before we release it.

Our next question. **How long do you keep records?** Well, I have record retention schedules that apply to my FOIA files. Now the FOIA files, if we make a release we keep a record of that FOIA request for two years. If I have issued a denial and I've invoked an exemption, and denied access to someone, we keep those records for six years. But I can't speak to how long the underlying program files are kept. So we might get a FOIA request today, and I respond to that request tomorrow - and two years from tomorrow, that file in my office will be destroyed. But the underlying program office might still have the documents in their possession. So if we've got a FOIA request two and a half years from now, we would still have to process it if we still had those records.

Another question relating to records. **If a contractor maintains animal records funded by NIH are they FOIAble?** It depends, we'd have to probably talk about what do we mean by a contractor? If it's an NIH facility and we own the facility and we own the animals and the contractor is working for us, acting as our agent, and caring for those animals, yes they would be subject to the Freedom of Information Act. Some of you may be familiar with that very situation, we litigated that and we lost. So, but if we have - if a contractor is maintaining animal records and all we do is fund the

institution through a grant mechanism, I would argue that those are not agency records, federal agency records subject to a federal FOIA. But that's going to come down to a case by case determination.

Susan, I'll combine the next two questions into one. **First of all, how often have animal rights .... Do you charge for a FOIA request?** Jerry, I lost you a little bit there, but I'm reading along, so I think I know the question. I don't know how often they [animal rights groups] file requests, we track requesters by fee category which leads right into the second part of that. Yes, we can charge requesters. The statute sets out three categories of requesters, commercial use requesters, those are people who are looking for this information because they're going to use it in their commercial interest, to make money, so to speak. Mostly those are companies that are either unsuccessful contractors or they are bidding on a contract and they want to see what the current contract looks at, like law firms, that kind of thing. Second category of requesters are educational institutions and members of the media. Now, I'm getting ahead of myself, commercial use requesters, we can certainly charge them for the time it takes us to look for the records and for the time it takes us to look at the records to decide what we're going to release. For educational institutions and members of the media, they do not pay for what is called that search time, which is when we're looking for the records, or for review time, which is when we're looking at the records, they only pay for duplication. The Department has set an incredibly low figure for duplication, we charge ten cents a page when we release documents. Every educational use requester and media requester get 100 pages for free. The third category of requester is everybody else, most of the animal rights groups fall into that category. Those people get charged for search time only after the first two hours. What we're seeing more and more of is there's a mechanism under the statute where you can come in and say I'd like to

have a waiver of those fees because it's in the public interest for you to give me these records. And more and more advocacy groups, on many different subject matter advocacy groups, not just animal rights groups are arguing we have a website, we disseminate this information, we have an educational campaign, we're going to inform the public about what NIH is doing and therefore you should give us this material for free. So we're seeing more and more asking for a fee waiver. So the short answer is we can charge, but frequently the charges are not enough that we do charge.

Susan, our next question. **Is your office obligated to send hard copies of documents to requesters, or just make them available, for example, in a reading room?** We are not obligated to send hard copies; the problem is that most of the documents that are requested from this agency have to be redacted of something. My policy is once we've redacted it, the requester has bought it. It doesn't do me any good to go through all the efforts to search for it, review it, redact it, to put it in the reading room for one person to come in and look at it. If we have records that are of common interest, we have lots of requesters who want to come in and look at it, we will go through that process and prepare them and put them in our reading room. Sometimes we'll post them on our website so that the people can get them that way, sometimes they're just in a physical reading room if they're way too many of them. But for the most part, we search for them, we prepare them for release and we send a hard copy. We will send them electronically if the requester asks for them that way.

**One of our participants is asking if you can confirm that a researcher will not receive a notice if his grant is FOIAed.** The only time a PI would not receive that submitter notice is if we've already, what we refer to, is cleared that grant application. So if we've already gone through the submitter notice process, then we won't go through it again. We also don't

do submitter notice on some training grants because they don't contain proprietary or commercial information. All other funded applications, we will do the submitter notice. Now we do not do submitter notice for unsuccessful applicants, it's out policy just to routinely deny those. So we don't engage in the submitter notice because we're going to deny it anyway.

Our next question. **Does the process of FOIA change if the requested... is different than that process at the NIH?** Jerry, I lost you midway through that, so I didn't hear the whole question.

I'll repeat it. **Does the process of FOIA change if the requested material is for work at a VA medical center? And, is there a FOIA process at VA medical centers that is different than the process at the NIH?** Well the VA is a federal agency, so they are subject to the FOIA. I can't speak to what their process is, I mean they have the same general rules that we do. They have to search for the records and they have to release anything that subject to the FOIA, that would be my assumption. It doesn't - if someone comes in - if the relationship that we have with those records is more of a regulator to the VA, opposed to a sister agency, then the process is different. Agency to agency you wouldn't - I'm trying to explain this in a way that would make sense to people who don't do this everyday. If we search our records, for example, and we find records that belong to the Food and Drug Administration, we will send those records to the Food and Drug Administration, and I will ask that FOIA office to make a releasability determination to respond to the requester for their records. We'll only deal with the NIH records. If we have the VA's records because there's been some sort of compliance action on part of OLAW, that's not a sister agency to sister agency relationship and the process won't be the same.

The next question. **What parts if any of an animal study protocol, and I assume by that they mean the document, the Institutional Animal Care and Use Committee is reviewing, what parts if any of the animal study protocol are FOIAble?** Again, I have to give one of those lawyer answers which is it depends. For the most part, we don't have those in our files because they're not required to be submitted with the application. If OLAW would happen to have a copy in their files, we're going to first look to see, was that study funded by the NIH? We're going to look at the age of the document. We're going to look at a lot of factors. They're definitely FOIAble, I want to make that clear. FOIAble means are they subject to the Freedom of Information Act. If we have those records in our files, they're FOIAble. Whether they're releasable or not is the determination that we will have to make if we get a request and when we look at the specific document.

Our next question. **What can OLAW release regarding contract research organizations, or site inspections?** Well, we are going to release anything, and this is going to sound like a cop-out answer, we're going to release anything that doesn't fall within one of the nine exemptions. We have to, again, look at the records that have been requested and we have to determine, go through the exemptions, is there any Exemption Four material? Is there any Exemption Six material? Those are going to be two big exemptions that we're looking at. When you're talking about site visits, we're going to look to who conducted the site visit. If it was an internal NIH team, or a team acting on our behalf as our experts, that report might fall under Exemption Five. A lot of these are going to be document by document determinations by our staff here if we do get a FOIA request. I don't mean to be hedging on this, but I don't want people to go away thinking we're

automatically going to do something when I haven't specifically addressed - I don't know that we're all talking about the same thing.

The next question. **Can an institution receive a copy of the material that is provided to the requester, so they know what has been released in part to assist with any possible fall-out in the future?** It is not our policy to provide copies, primarily because we're releasing too much information and we can't do that. Anyone is free to come in and ask under FOIA what has been released to other FOIA requesters. Just as anyone is free to come in under FOIA and ask for a copy of our FOIA log to see who we hear from in terms of FOIA requesters.

Thank you Susan, it looks as if that's the end of the questions that we've received. Once again, I really want to thank you for the time and effort that you have shared with us and certainly for the expertise you have shared with the participants in the seminar series and I also want to thank the participants themselves, we recognize that you have taken time from a very busy schedule in order to obtain additional information that we hope will be helpful to you in your daily jobs. We remind you again that we will be looking forward to hearing from you and any of your comments or suggestions about this or any future presentation. Please send them to the [OLAW email box](#) which can be found at the bottom of the OLAW webpage. Thank you again for your participation. Goodbye