

Developments in FOIA in the Context of Animal Research



OLAW Online Seminar
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As part of a federal agency, OLAW is subject to FOIA.



Department of Health and Human Services



National Institutes of Health



Office of Laboratory Animal Welfare (OLAW)

National Institutes of Health
Office of Laboratory Animal Welfare

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FOIA:

- promotes transparency
- ensures accountability

of government officials and agencies



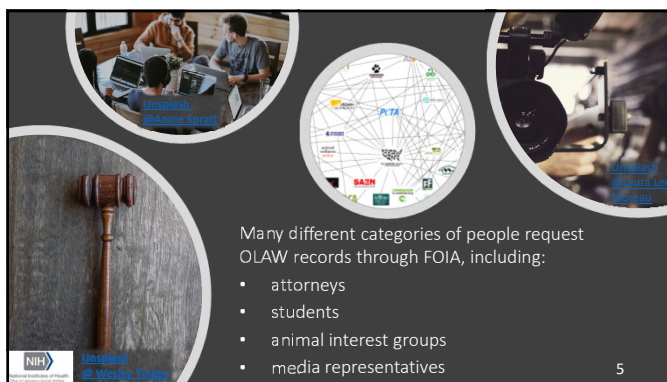
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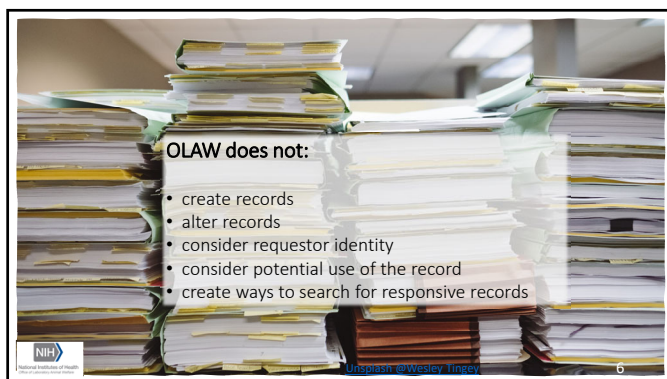
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Information released under FOIA may be used to:

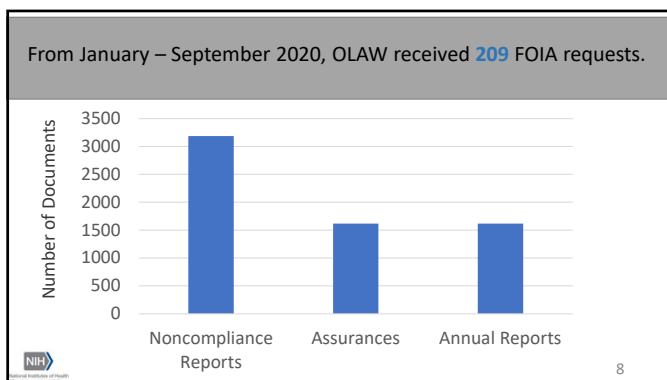
- issue misleading press releases
- request investigations
- ask for law enforcement actions related to animal welfare

NIH
National Institutes of Health

Unsplash @United Nations

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It is very likely that your institution's records will be released under a FOIA request to OLAW!

Broadly-worded FOIA requests can result in the release of:

- noncompliance reports
- Assurances
- Annual Reports
- correspondence
- photographs and other media



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When reporting to OLAW, think “minimal, but complete”:

Report complete and accurate information.


DO NOT report information not required:

- personal identifiers
- room numbers
- building plans
- photos, videos, graphic descriptions

<https://olaw.nih.gov/guidance/reporting-noncompliance.htm>

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OLAW cannot alert institutions about FOIA requests we have received.

Advice: Prepare documents like they will be requested and released.

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NIH National Institutes of Health
NIH...Turning Discovery Into Health®

The Freedom of Information Act

Gorka Garcia-Malene
FOIA Officer for the NIH

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Purpose of FOIA

- A mechanism for disseminating agency records
- Enables people know what their government is doing
- Exemptions permit the withholding of certain information

FOIA is a vital part of our democracy

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Who can file a FOIA request?

- Any person or entity
 - Does not need to be a US citizen
 - Including State agencies and courts
 - A representative can make a request on behalf of a 3rd party
- Except, e.g., a Federal agency or fugitives

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Who is subject to FOIA?

- Agencies in the Federal Executive Branch
- Independent regulatory agencies
- Some components in Executive Office of the President

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FOIA or Privacy Act?

- FOIA provides a right access to agency records
- The Privacy Act
 - Protects information about individuals from release to others
 - Allows individuals access to records about themselves

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What is an agency record?

- Records...
 - Any handwritten, typed or printed documents, and documentary material in other forms,
 - Information in electronic format, including email
- That are either created or obtained by an agency, and
- Under agency control at the time of the request

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Does FOIA cover records sent to an agency by institutions?

- Absolutely:
 - Any records obtained by an agency that are under the agency's control at the time of the request is subject to FOIA
 - This does not mean the records will be released. FOIA Exemptions protect certain categories of information
- Where the institution is a government agency, NIH may send the records to that agency for final processing and release

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How we process requests:

- Agencies typically have 20 working days to process a request
 - The clock begins to tick when the correct office receives the request.
- Requests must reasonably describe the records sought
 - Agency staff can reasonably ascertain exactly which records are being sought and locate them with a reasonable amount of effort
 - Agency staff are need not spend countless hours seeking difficult-to-find records

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How we process requests (continued)

- If the request is unclear or too general, agency FOIA staff will seek clarification from the requester. Otherwise, the agency will likely decline to process that request as not perfected.
- FOIA staff may reach out to the requester to tailor the scope of the request

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How we process requests (continued)

- Agency FOIA staff typically lack access to responsive records
 - Requests are usually sent to agency staff likely to have records
- If the records sought do not exist, the agency closes the request with a No Records letter to the requester
- There is no requirement that an agency create a record to respond to a request

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How we process requests (continued)

- Agency FOIA staff then review records to determine
 - Responsiveness (ensure the records match what the requester seeks)
 - Presence of information protected from disclosure by FOIA Exemptions
- Depending on complexity
 - Agency subject matter experts may be consulted
 - Additional layers of review are required (e.g., OD FOIA Officer)

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FOIA Exemptions

Generally, FOIA provides that any person has the right to request access to federal agency records, **except** to the extent the records are protected from disclosure by any of **nine exemptions contained in the law**.

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Exemption 1 and 2

- Exemption 1
 - Protects National Security Information
 - The information must be properly classified
- Exemption 2
 - Protects information related to internal personnel rules and practices

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Exemption 3

- Applies to information the US Congress has identified as protected through to legislation
- The legislation in question would be anything other than the Freedom of Information Act

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Exemption 4

Protects two distinct categories of information:

- Trade secrets and
- Information that is:
 - (a) commercial or financial,
 - (b) obtained from a person, and
 - (c) privileged or confidential

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Exemption 4 (continued)

This exemption is intended to protect the interests of both the government and submitters of information:

- Affords protection to those submitters who furnish commercial or financial information to the government by safeguarding them.
- Encourages submitters to furnish useful commercial or financial information to the government and it correspondingly provides the government with an assurance that such information will be reliable so it can conduct its business.

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Exemption 4 – Trade Secrets

Examples:

- Product formulations
- Chemical compositions
- Quality control procedures
- Sterilization and cleaning procedures
- Production procedures
- Blueprints
- Design specifications

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Exemption 4 – Confidential Commercial Information

Information that is:

- (a) commercial or financial,
- (b) obtained from a person, and
- (c) privileged or confidential

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Exemption 4 – Confidential Commercial Information

Information that is:

- (a) commercial or financial,
- Use "ordinary meaning". As a rule, if it relates to business or trade, it is commercial or financial information.
- Examples include: Information related to leases, prices, quantities and reserves, business decisions, names of key personnel, statements of work, financial situations, etc.

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Exemption 4 – Confidential Commercial Information

Information that is:

■ (b) obtained from a person, and

- Includes: Individuals, corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations, who provide information to the government (aka "submitters").
- The federal government's information is generally not protected by Exemption 4 – must be obtained from someone outside the government.

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Exemption 4 – Confidential Commercial Information

Information that is:

■ (c) privileged or confidential

- Information is both customarily and actually treated as private by its owner
- There were no express or implied indications at the time the information was submitted to the government that the government would publicly disclose the information

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Exemption 4 – Confidential Commercial Information

Examples of Commercial information:

- SOPs
- Sales data
- Unit pricing
- Future business plans
- Customer/Supplier relationships
- Consultants / Contractor relationships
- Clinical trial data gathered by a drug company
- Pending product approval records (could include Trade Secrets)

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Exemption 5

- Protects internal, pre-decisional government deliberations
- Also protects Attorney-Client communications and work-product

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Exemption 6

- Protects information that if released would result in a clearly unwarranted invasion of personal privacy
- Whistleblower identifying information is carefully guarded

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Exemptions 7, 8 and 9

- Exemption 7
 - Protects certain information in law enforcement files
- Exemption 8
 - Protects information held by financial regulators
- Exemption 9
 - Protects geological and geophysical information

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Exemptions most often applied to OLAW records, and examples

- Exemption 4
 - Private sources of funding
- Exemption 5
 - Information regarding a pending grant application
- Exemption 6
 - personal phone numbers and email addresses,
 - names of secondary individuals (IACUC Coordinators, grad students, clinical vets)
- Exemption 7
 - Records relating to pending investigations into non-compliance reports

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Practical Considerations

- **Most of the information submitted to OLAW by institutions is released upon request under FOIA**
- **All records are reviewed for redaction prior to release**
- Some institutions provide greater detail when submitting documentation to NIH
 - Secondary staff names, room numbers, floor plans, personal contact information or direct contact information of secondary individuals
 - The less this unnecessary information is included, the faster we can process FOIA requests and the less the risk protected information is accidentally released

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Recent Trends in FOIA

- The number of requests for OLAW records has more than doubled in the last 4 years
- Increasingly, requesters also seek any pictures submitted to the agency

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Recent Trends in FOIA (continued)

Before, requests for OLAW records:

- Were sporadic
- Focused on specific institutions
- Focused on a species

Perhaps to gather information narrow for direct action (lobbying, posting). More akin to an informal oversight function

Now, requesters tend to systematize requests:

- E.g., every few weeks: Annual Reports and Assurances for the next batch of assured institutions
- Eventually, information is provided to them for **all Assured institutions** on a rolling basis
- Requesters appear to be building libraries of materials for further dissemination

Perhaps to amass broad information to empower local grass-roots efforts

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Recent Trends in FOIA - Grants

Grant records are also sought from NIH Institutes and Centers with great frequency

- Requesters identify the grants sought using OLAW's online RePORTER tool
- Frequent requesters usually sought grants guided a species of interest
- Of late, frequent requesters are beginning to focus on animal use by field of research, e.g., sepsis, regardless of species
- Requesters appear to be building libraries of materials for further dissemination
- Importantly, the existence or information related to unawarded grants is never released

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NIH FOIA Program Contacts

FOIA Program

NIH FOIA Office

E-mail: niinfoia@mail.nih.gov

Phone: (301) 496-5633

URL: <https://www.nih.gov/institutes-nih/nih-office-director/office-communications-public-liaison/freedom-information-act-office>

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What information is redacted by OLAW?

OLAW: None

NIH FOIA Office: All redactions are carried out by the NIH FOIA staff.

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How can institutions limit the information provided to OLAW, but still satisfy reporting requirements?

OLAW:

Report:

- What occurred
- Corrective/preventive measures taken

DO NOT Report:

- Names, contact info, floor plans

NIH FOIA Office

- Complete, but minimal
- Increases efficiency for processing the request, and
- Reduces the risk of releasing protected information

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Are text messages subject to FOIA?

OLAW: OLAW does not conduct official business with text messages.

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Does OLAW release AAALAC Program Descriptions under FOIA, given it's a voluntary program and not a legal compliance requirement?



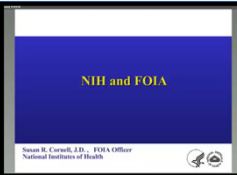
OLAW: OLAW does not keep AAALAC program descriptions. If elements used in Assurance, these would be releasable.

NIH FOIA Office: AAALAC elements incorporated into Assurance descriptions would probably not benefit from the protection of a FOIA exemption. However, this is evaluated on a case-by-case basis.

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Additional FOIA Resources Available from OLAW



OLAW Webinar
[Freedom of Information Act Policies](#)
– September 18, 2008

OLAW Podcast
[Understanding the Freedom of Information Act \(FOIA\)](#)
– May 24, 2016



<https://olaw.nih.gov/education/webinars-and-podcasts>

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Next OLAW Online Seminar:
21st Century Cures Act Progress Updates



OLAW Online Seminar
Spring 2021

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