



ADVOCATES for the **West**

**USING FOIA TO SHINE LIGHT
ON FEDERAL AGENCIES IN
THE TRUMP ERA**

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The Freedom of Information Act Overview

WHY:

“The basic purpose of FOIA is to ensure an informed citizenry, **vital to the functioning of a democratic society**, needed to **check against corruption** and to hold the governors accountable to the governed.”

N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242
(1978) (Justice Marshall)

The Freedom of Information Act Overview

- **WHO:** 100 + federal agencies, executive departments
- **WHAT:** Public right to access records of any form in an agency's possession – no requirement to create new documents or answer questions
- **WHEN:** Agencies subject to short deadlines and must make records promptly available. 5 U.S.C. § 552(a)(3)(a).

Deadlines

- **Determination of whether and how the agency will comply due in 20 days – 5 U.S.C. § 552(a)(6)(A)(i)**
- **Agency can extend the deadline by 10 days if unusual or exception circumstances apply**
- **Deadlines only apply once proper request received:**
 - Request includes reasonable description of records
 - Need for agency to clarify request can stall deadlines

Essential Elements of FOIA Requests

- **Include a reasonable description** of records sought: sufficient detail for employees familiar with subject to locate records with reasonable efforts
- **Make request in writing and state it is under FOIA**
- **Include contact information:** include where the records should be sought, and in what form (e.g., electronic)
- **Request a fee waiver**
- Check specific agency regulations for other details: E.g., BLM: 43 C.F.R. Part 2

What to Ask for in FOIA Requests

- **Specific documents**
- **Communications:**
 - Emails important, but can slow down process
 - Discussions with industry, politicians, or other agencies can be revealing
- **Shortest possible timeframe**
- **Define “records” broadly**
- **BLM/Public lands examples:**
 - Management planning or permitting efforts, such as NEPA documents, meeting notes, specialist reports, public comments
 - Reports of ecological monitoring, ORV/trespass issues, recreation conflicts, archaeological data, relevant science studies, permit compliance, etc.

Where and How to Send FOIA Requests

- **Office where you believe the records are located**
- **Alternative** – FOIA officer or head of office/agency
- **Email acceptable** for many agencies
- **Some online portals available**
 - **FOIA Online** for some agencies (e.g., EPA,) foiaonline.regulations.gov/foia/action/public/home
 - **Dept. of the Interior portal:** www.doi.gov/foia/foia-request-form

Fee Waivers for Public Interest

- **Documents produced without charge if:**
 - (1) “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government ...”
 - (2) “and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii) (emphasis added)
- Provide **detailed description** to meet both prongs
 - Include details about your organization’s interests, # supporters, and ability to disseminate information learned to the public via website, press, newsletters, word of mouth, etc.
 - ID gov’t operations and activities at issue, especially if not apparent
 - Non-commercial interest easy, but detail anyway

Best Practices

- **Research and coordinate ahead of time:**
 - Do homework - agency need not answer ?s, analyze, or create records
 - Confirm records are not available through web or other groups
- **Submit multiple smaller requests:**
 - Agency may claim longer time required for complex or large requests
 - Submit most time-sensitive and narrow requests first
- **Track and communicate often:**
 - Calendar deadlines and follow-up with reminders to agency
 - Document communications to support challenges if needed
- **Be professional & prompt**

Reacting to Agency Responses

- **Agency may withhold or redact documents under 9 exemptions**
 - Trade secrets, confidential/privileged commercial or financial info
 - Inter-agency or intra-agency memos or letters. 5 U.S.C. § 552(b)(5)
- **Take recourse if agency ignores deadline or improperly withhold documents**
 - Agency letters will explain how to appeal adverse decision
 - Lawsuits available if agency ignores request or appeal, or if it denies your appeal

Conclusions

- Use **targeted** FOIA requests to get records needed to assess agency land management, threats to public lands, and consider challenging agency decisions
- Research and **craft responses carefully** to balance need for information with resources of agency
- **Track and follow-up** in writing to agency repeatedly to set stage for appeal or lawsuit if necessary
- Follow through on important records with appeal and lawsuits where prudent

Resources

- BLM FOIA Reading Room:
<https://www.blm.gov/about/foia/foia-reading-room>
- FOIA.gov
 - <https://www.foia.gov/search.html> (check for records already produced/available)
- Department of Justice Guide to FOIA:
 - <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>

Recap and Brainstorming

- **Hypothetical Part One:** BLM is considering a utility-scale solar project in the heart of your favorite piece of public land. What do you do?
 - Identify the project and timeline
 - Activate your networks to pay attention
 - Gather information
 - Submit appropriate comments on DEIS

Recap and Brainstorming

- **Hypothetical Part Two:** BLM is about to ask for public comments on a draft EIS for a transmission line running through Mojave Trails National Monument. What do you do?
 - Determine logistics
 - Obtain supporting and relevant documents that are available
 - Ask other groups if they obtained info through FOIA
 - Gather evidence