

The Livestock Producer's Guide To FOIA: How to Get the Information You Need From Government Agencies

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You may find a time when you may want to see the documents available to the public about yourself or your livestock operation. Maybe you want to see the files on your Confined Animal Feeding Operation (“CAFO”) or on your recent Forest Service (“FS”) livestock trespass ticket. Or possibly you would like information from the U.S. Army Corps of Engineers on a nearby wetland or your farm’s hydropower supply. Perhaps you want to understand how the Bureau of Reclamation (“BOR”) is managing a local dam that might be flooding your pastureland. All of this information and more can be obtained from governmental agencies. There are two main statutes that guide the process of obtaining information from the federal government: (i) Freedom of Information Act (“FOIA”) and (ii) Privacy Act (“PA”). This article seeks to provide livestock producers with a simple guide to making a FOIA/PA request.

Background and Applicability

The Freedom of Information Act (“FOIA”) was enacted in 1966 by President Lyndon B. Johnson. President Johnson believed that a democracy works best with transparency in the system allowing the people to have “all the information that the security of the nation permits.” See GEORGE KENNEDY, *HOW AMERICANS GOT THEIR RIGHT TO KNOW* (1996). There is no longer a burden to show that you “need to know” the requested information. Instead, you have a “right to know.” The burden is now on the government to show its need for secrecy.

However, this “right to know” does not come without limitations. A FOIA request can only be made to federal government agencies, which broadly includes government corporations (*e.g.*, Federal Crop Insurance Corporation), government controlled organizations, and independent regulatory agencies (*e.g.*, Library of Congress, Government Accountability Office, Congressional Research Service). FOIA is *not* applicable to private companies or persons who receive Federal contracts or grants, or private organizations.

Additionally, the Privacy Act (“PA”) allows U.S. citizens seeking information about *themselves* to receive greater information than what would typically be released to the general public. The primary purpose of the PA is to provide individuals with more control over the gathering, dissemination, and accuracy of information about themselves contained in government files, and to promote greater privacy for citizens. The PA serves to protect farmers and ranchers from environmental groups or other citizens that may wish to obtain private information about your property or livestock operation.

Even though FOIA and PA only apply to *federal* government agencies, every state has enacted its own open public records act or right-to-know act that are applicable to state and local governmental agencies. For example, the Illinois Freedom of Information Act, broadly defines “public body” as any “legislative, executive, administrative, or advisory

bodies of the State, State universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State.” See 5 Ill. Comp. Stat. § 140/2(a). Additionally, the Texas Attorney General has ruled that government e-mail correspondence in *personal* e-mail accounts (*e.g.*, yahoo, hotmail, or gmail account) may be subject to disclosure under the Texas Public Information Act in certain circumstances. See Open Records Letter Nos. 2003-1890 (2003), 2003-0951 (2003). Most states do not allow for such open disclosure to personal e-mails from government employees. Also, the Montana Public Records Act only allows for public records to be disposed or destroyed by a “unanimous approval of the state records committee.” See Mont. Code § 2-6-212(1). Each state’s act varies somewhat on the breadth of government disclosure and the burden for maintenance and preservation of those public records.

If you are unsure whether your documents are regulated by the federal or state agency (such as the federal or state Environmental Protection Agency), it is best to make two separate FOIA requests— one to the federal agency citing FOIA/PA and another to your state’s agency citing your state law (*e.g.*, Wyoming Public Records Act, North Dakota Open Records Statute). If you do not know the name of the open records statute in your state, try to be as clear as possible on your intent to obtain public records under your state’s law.

Decide If It Is Necessary To File a FOIA Request

Not all agency records require a written FOIA request. In 1996, Congress passed the Electronic Freedom of Information Act (E-FOIA). E-FOIA requires government agencies to have electronic FOIA “reading rooms” available online. The information you seek may be available online such as regulations, agency decisions and statements of policies, staff manuals (*e.g.*, U.S. Department of Agriculture Rural Development Handbooks, Bureau of Land Management Grazing Administration Handbooks), forms, and agency publications such as pamphlets, brochures, and books created after November 1, 1996. See 5 U.S.C. § 552(a)(2). For example, the soil composition on your property is available from the Natural Resources Conservation Service (“NRCS”) online at <http://www.nrcs.usda.gov/> so there is no need to file a FOIA request for such information. All previous records before November 1, 1996 are not required to be in electronic format; however, upon request to the agency, even these can be made available to you in electronic form.

Choose The Government Agency or Agencies To Request Documents

Unfortunately, there is no one central office in the federal government that manages all FOIA requests so you must contact the department or agency itself. Even if you know that you need to obtain records from the U.S. Department of Agriculture (“USDA”) or U.S. Department of the Interior (“USDI”), it is helpful if you know the specific sub-agency, such as the Risk Management Agency for information on your livestock or crop insurance. If you are unclear as to the department or agency, you can call the Federal Citizen Information Center toll free at 1-800-FED-INFO to help you locate the right government agency. A list of general FOIA contacts is available with the Department of Justice at

www.usdoj.gov/oip/foiacontacts.htm.

Any records that are more than twenty-five years old are archived with the National Archives and Records Administration (“NARA”). For example, perhaps you would like to see the original patent on your property under the Homestead Act and would like to see if the federal government reserved mineral or water rights on your property. Such requests should be made with NARA.

Draft and Mail Your Written FOIA Request Letter

You cannot make a FOIA request over the telephone. All FOIA requests *must* be in writing (*i.e.*, postal mail, fax, or email). Most federal agencies do not have FOIA forms so you must draft a written letter. To make sure your letter is handled correctly, mark on both the letter and envelope “Freedom of Information Act Request.” The government is not required under FOIA to do any research, analyze data, or answer written questions; thus, if you include these types of requests in your FOIA letter, the federal agency is not obligated to answer them. You are encouraged to keep a copy for records and send your letter by certified mail so that you can have proof of the agency’s receipt.

Your FOIA request should include the following information:

- Contact information including your full name, address, phone number;
- Description of records requested (*e.g.*, aerial photographic reproductions from the Farm Service Agency or National Agriculture Library, all records pertaining to a piece of property), all materials pertaining to your grazing lease or permit;
- Identification of locations of files are located, such as a regional Bureau of Land Management (“BLM”) or Environmental Protection Agency (“EPA”) office if known;
- The maximum amount that you are willing to pay for documents;
- Written authorization signed by yourself or an official representative of your livestock operation; and,
- Ask that non-exempt material be segregated.

Though a FOIA request does not require a specific format, an example FOIA request letter is available at: <http://www.buddfalen.com/FOIARequestLtr.pdf>.

Wait Twenty Working Days for Government Response

Governmental agencies are required to *respond* to FOIA requests within twenty business days, excluding weekends and holidays, beginning from receipt of the request. However, the government is not required to *send you the requested documents* within

twenty days; instead, the government will likely send you *written confirmation* of its intent to comply with the request within a reasonable time.

In this letter, the government agency might also give you a figure of estimated costs where you are required to agree or cancel the request. If the files are urgent, then you can specifically request that your FOIA request be expedited. In this letter, you must include your reasons for the urgency.

Pay Fees

There is no initial fee to file a FOIA; however, agencies are allowed to request “reasonable standard charges for document search, duplication, and review. . . .” See 5 U.S.C. § 552(a)(4)(A)(ii)(I). Unless no relevant documents were found, the federal agency will send you a letter giving you an estimate of the charges. Next, you will either agree to the costs or cancel the request.

The fees do vary somewhat among agencies; however, for example, the USDA currently charges \$0.20 per page for photocopying and \$15 to \$40 per hour for search charges, depending on the complexity of the search. There may be additional fees for aerial photographs or negatives of pictures. Black and white or color enlargements, slides, microfilm, scans, and audio/videotape reproductions can also be ordered for an additional fee from most administrative agencies. If the total fee does not exceed \$25.00, the USDA will not charge you a fee at all.

At this time, you may also request a fee waiver. Your fees will only be waived if you can persuade the government that it is within the public interest to disclose the document. Waivers are not granted in cases where an individual livestock producer is not be able to pay the fee—public interest must be argued.

If you do not pay your fee, most administrative agencies will begin levying interest charges on an unpaid bill. If affordability is a deterrent for obtaining a FOIA request, as noted above, you should state a maximum fee that you are willing to pay in your original request (*e.g.*, \$100.00 or \$250.00 maximum).

Review FOIA Request

After the agency has received your fees, it will process your request. The agency may send you a written “initial determination” of documents available. FOIA allows for access to all federal agency records except for documents pertaining to sensitive law enforcement and national security matters. The nine exempted FOIA materials are as follows:

1. Classified national defense files;
2. Internal agency rules and practices;

3. Information prohibited under another federal law;
4. Trade secrets and confidential business information;
5. Inter-agency or intra-agency communications;
6. Information involving matters of personal privacy (but may be obtained under the PA);
7. Certain types of information compiled for law enforcement (*e.g.*, documents for an ongoing investigation);
8. Information relating to the supervision of financial institutions; and
9. Geological information on wells.

For example, a company that you are thinking about negotiating with may have a pending prosecution with the U.S. District Attorney's office. The government would not have to release its documentation on this company if a release may adversely affect the investigation. Additionally, the EPA would never have to disclose the intra-agency emails discussing whether your property has "hazardous materials" nor would the USDA need to disclose confidential internal memorandums discussing whether Animal and Plant Health Inspection Service ("APHIS") should seize cattle for evidence of tuberculosis or brucellosis. Furthermore, citizens groups cannot obtain information on your National Animal Identification System because this information on your premise ID is confidential and protected.

After receiving your FOIA request from the government, make sure that the government did not withhold something that it should not have or inadvertently omitted requested documentation. The government is required to use a "reasonable effort" when searching for your records. If you feel that you are missing some records, you can write a letter appealing to the agency. Be sure to check the maximum time period for preparing an appeal.

Finally, if you find incorrect information in public records about yourself or your livestock operation, you should write back to the agency explaining the changes that you are requesting. Should you request for such changes to be made, the agency is required by law to notify you of its receipt of such an amendment, typically within ten days. The federal agency may request further proof before it will make the correction in the public records on you or your livestock operation.