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## ***What is the FOIA?***

*Title 5, United States Code, Section 552*

- (U) The Freedom of Information Act (FOIA) is a law that establishes the public's right to request records from federal government agencies.
- (U) It provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that they are protected from disclosure by law.
- (U) The FOIA promotes public trust by encouraging that the maximum amount of information be made available to the public regarding the operation and activities of the government.

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## ***Who is subject to the FOIA?***

- (U) The FOIA applies to federal executive branch departments, agencies, and offices. DoD is an executive branch department of the federal government and is thus subject to the FOIA.
- (U) Congress, federal courts, and parts of the executive office of the President are not subject to the FOIA. State and local governments are also not subject to the FOIA, but some states have their own equivalent access laws for state records.

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## ***What should I know about DoD FOIA?***

- (U) DoD Directive 5400.07 establishes policy and assigns responsibilities for the DoD FOIA Program in accordance with the FOIA.
- (U) DoD Manual 5400.07 implements the DoD FOIA Program pursuant to this directive, supplements 32 C.F.R. 286, and incorporates the provisions of the OPEN Government Act of 2007 (P.L. 110-175) and the FOIA Improvement Act of 2016 (P.L. 114-185).
- (U) Due to its size and complexity, the DoD FOIA Program is decentralized, and DoD Components operate their own FOIA offices. CYBERCOM stood up its FOIA requester service center in July 2018. CYBERCOM FOIA Program is codified at USCCI 5000-06.

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## ***DoD FOIA applicability and policy***

- (U) DoD Directive 5400.07 applies to OSD, the Military Departments, the Joint Staff, Combatant Commands, DoD Office of the Inspector General, the Defense Agencies, DoD Field Activities, and all other organizational entities within DoD.
- (U) While remaining consistent with DoD's responsibility to protect national security and other sensitive information, the DoD FOIA Program promotes transparency and accountability by:
  1. Adopting a presumption in favor of disclosure in all release decisions involving the FOIA
  2. Responding promptly to FOIA requests in a spirit of cooperation

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## ***Who can make a FOIA request?***

- (U) Any “person” can file a FOIA request, including U.S. citizens, foreign nationals, organizations, universities, businesses, and state and local governments.
- (U) Requesters can make a request for any reason and they do not have to justify or explain why they are making the request.
- (U) The FOIA does not require federal agencies to answer questions, render opinions, or provide subjective evaluations. Requesters must ask for existing records.

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## ***What records are subject to the FOIA?***

- (U) The FOIA applies to all “agency records.” Agency records are any records created or obtained by an agency that are under the control of the agency at the time of a request.
- (U) Most records located in agency files are considered agency records subject to the FOIA. The definition of an agency record under the FOIA is more expansive than the definition of a federal record.
  - 1. See [https://www.justice.gov/oip/oip-guidance/defining\\_a\\_record\\_under\\_the\\_foia](https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia)
- (U) Agency records are, however, distinct from personal records of an employee or congressional records that are not under the control of the agency.
  - 1. See definition of “personal file” in DoDM 5400.07

## ***Time limits for responding to requests***

(U) The FOIA requires agencies to respond to a FOIA request within 20 working days from the date the request was received.

(U) Agencies may extend the basic time limit under certain circumstances:

1. Search/collect records from separate offices and facilities
2. Voluminous amount of records must be examined
3. Consultation with other agencies required

## ***Expedited processing***

- (U) The FOIA allows requesters to ask that their request be expedited. Agencies have 10 calendar days to make this determination.
- (U) DoD FOIA regulation provides for expedited processing of requests for requesters who demonstrate a compelling need or who satisfy other specific standards:
  1. Imminent threat to the life or physical safety of an individual
  2. Urgent need to inform the public of actual or alleged activity
  3. Imminent loss of substantial due process rights



## ***Processing requests***

(U) After a FOIA request has been “perfected,” we:

1. Conduct a search for records responsive to the request
2. Review those records to determine whether any portions should be protected from public disclosure

(U) We may ask you to:

1. Identify likely custodians/locations of such records
2. Identify any sensitive information in records deemed responsive

## ***Conducting searches***

(U) The FOIA defines the term “search” as “to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.”

(U) When conducting a search, you must:

1. Have a clear understanding of the scope of the request
2. Conduct a search that is “reasonably calculated to uncover all relevant documents”
3. Document how the search was conducted
4. Provide the records that are located so that they may be reviewed

## ***Proper document review***

(U) After a reasonable search has been conducted, we will begin the document review. This review involves:

1. Identifying any exempt information
2. Segregating non-exempt information
3. Applying the foreseeable harm standard

(U) Attorney General Memorandum for Heads of Executive Departments and Agencies regarding FOIA states that an agency should not withhold information simply because it may do so legally.

(U) An agency should not withhold information merely because it can demonstrate, as a technical matter, that information falls within the scope of a FOIA exemption. Discretionary disclosures are strongly encouraged.

*Currently and properly classified material is not a matter of discretion.*

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## ***Segregating non-exempt information***

- (U) When processing records for disclosure, we must carefully review the *content* of the records line by line to both identify any exempt information that needs protection and to segregate any non-exempt information that should be released to the requester.
- (U) When reviewing records for disclosure, we may ask that you identify whether there is any sensitive information in the documents or whether otherwise exempt information can be released as a matter of discretion because its disclosure will not cause foreseeable harm.

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## ***Applying FOIA exemptions***

- (U) Per DoDM 5400.07 section 5.1.b., information responsive to a FOIA request will be withheld only if the DoD Component reasonably foresees that disclosure would harm an interest protected by one or more of the FOIA exemptions, or disclosure is prohibited by law.
- (U) Under this standard, the content of a particular record should be reviewed and a determination made as to whether the DoD Component reasonably foresees that disclosing it, given its age, content, and character, would harm an interest protected by the applicable exemption.
- (U) Mere speculative or abstract fears, or fear of embarrassment, are an insufficient basis for withholding information.



## ***FOIA exemptions***

(U) The nine FOIA exemptions cited as 5 U.S.C. §552 (b)(1) – (b)(9):

(b)(1) – information currently and properly classified in the interest of national security

E.O. 13526 Sec. 1.4(a) – (h)

(b)(2) – information related solely to the internal *personnel* rules and practices of an agency

Milner v Dept. of the Navy (2011)

(b)(3) – information protected by another law that specifically exempts the information from public release

10 U.S.C. §130b – sensitive unit (2015)

10 U.S.C. §130e – defense critical infrastructure security information (2018)

## ***FOIA exemptions cont'd***

(U) (b)(4) – trade secrets and commercial or financial information obtained from a person and privileged or confidential  
Food Marketing Institute v Argus Leader Media (2019)

(b)(5) – inter- or intra-agency memoranda containing information considered privileged

1. Threshold requirement
2. Privileges
  - a. Deliberative process privilege
  - b. Attorney-client privilege
  - c. Attorney work product privilege
  - d. Government trade secret privilege
  - e. Safety investigation privilege
  - f. Presidential communications privilege

(b)(6) – information in personnel and medical files, the disclosure of which would constitute an unwarranted invasion of personal privacy

## ***FOIA exemptions cont'd***

(U) (b)(7) – records or information compiled for law enforcement purposes

Six conditions cited as (b)(7)(A) – (b)(7)(F)

e.g. (b)(7)(E) relates to non-obvious techniques and procedures for law enforcement investigations or prosecutions

(b)(8) – information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions

(b)(9) – geological and geophysical information and data, including maps, concerning wells

## ***Reasons for denying a request other than exemptions***

(U) Top reasons for CYBERCOM FOIA:

No records. A reasonable search of files failed to identify responsive records, or no search was undertaken.

Referral. All responsive records originate with other agencies and are transferred to those agencies for action.

Request withdrawn. The requester withdraws the request.

Records not reasonably described. A record has not been described sufficiently to be located by reasonable search.

Other. Directed requester to another agency; requester filed a complaint in federal court; unable to contact requester.



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## ***FOIA resources***

- (U) The FOIA office can answer any questions you have regarding the FOIA. We work closely with OSJA to ensure that the Command meets its statutory obligations under the FOIA. Contact us:

Email, [cybercom\\_foia@cybercom.mil](mailto:cybercom_foia@cybercom.mil)

Phone, (301) 688-3585

Visit, OPS2B RM6066B

- (U) Additional resources can be found on the Command's FOIA page at [www.cybercom.mil/foia/](http://www.cybercom.mil/foia/), the central government FOIA site [www.foia.gov](http://www.foia.gov), and DOJ site [www.justice.gov/oip/foia-resources](http://www.justice.gov/oip/foia-resources).

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