

PERKINScoie

COUNSEL TO GREAT COMPANIES

FOIA: Offensive and Defensive Strategies

February 2014

Rick Oehler

Don Carney

Perkins Coie LLP

Offensive and Defensive FOIA

“Offensive” FOIA – Requesting and Obtaining Information from the Federal Government



“Defensive” or “Reverse” FOIA - Protecting Information from Release by the Federal Government

FOIA Agenda

- What is FOIA?
- Offensive Strategies
 - What can I request?
 - How to prepare a FOIA request
 - Submitting a FOIA request
 - Typical agency procedures
 - Judicial appeal
- Defensive Strategies / Reverse FOIA Matters
 - How to stop your trade secrets from being disclosed
 - The Reverse FOIA process

What is FOIA?

“In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government.”

- The White House, Memorandum for the Heads of Executive Departments and Agencies (emphasis added)



What is FOIA? (con't)

- Federal agencies shall make records promptly available to any person
- Upon any request for records which:
 - Reasonably describes such records, and
 - Is made in accordance with the published rules stating the time, place, fees (if any) and procedures to be followed
- Exception for information in Federal Register or otherwise made available
- Enumerated exceptions – i.e. trade secrets

What is FOIA? (con't)

“With the passage of FOIA, the burden of proof shifted from the individual to the government. Those seeking information are no longer required to show a need for information. Instead, the ‘need to know’ standard has been replaced by a ‘right to know’ doctrine.”

- Citizen’s Guide to FOIA, House Committee on Government Reform

OFFENSIVE STRATEGIES

What Can I Request?

- Contract Information
- Agency Information
- Information related to a claim
- Audit Information



What Can I Request? Contract Information

- Contracts are “records”
- Be specific what you are requesting:
 - Awarded contract only?
 - Subsequent change orders?
 - Task orders?
 - Proposals?



What Can I Request? Contract Information (con't)

- Generally, the less specific or timely the information, the less likely it will be withheld from release
 - Pricing – total price versus line-item or unit pricing
 - Labor Rates – older versus more recent
- Courts may not impose a per se rule that in all cases prohibits or requires the release of one particular type of information. *See Canadian Commercial Corp. v. Dep't of the Air Force*, 514 F.3d 37 at 41 (D.C. Cir. 2008)

What Can I Request? Agency Information

- Records reflecting agency conduct or decisionmaking
- Regulatory Files
 - Trace history and intent behind regulations
- Agency internal procedures



What Can I Request? Agency Information (con't)

- BUT, exceptions may apply, particularly Exception 5, for privileged inter- or intra- agency documents
 - Deliberative process
 - Attorney-client
 - Attorney work product
 - Presidential Communications

What Can I Request? Information Related to a Claim

- Records potentially relevant to claims under your contract
- Pre-dispute “Discovery”
- Subject to potential exceptions

What Can I Request? Audit Information

- Audit Information
- Working files
- Other supporting information
- Subject to potential exceptions



How to Prepare A FOIA Request

- Is the Information available elsewhere?
- Research the topic
- Target the correct agency and component and request directly
- Draft clear and specific, but not overly specific, request
- Identify desired format

Submitting a FOIA Request – Sample Agency FOIA Webpage

FOIA/Privacy Home

12/29/14 11:34 AM

The screenshot shows the Defense Logistics Agency (DLA) website's FOIA/Privacy Home page. At the top left is the DLA logo, featuring an eagle with wings spread, perched on a shield with stars and stripes, surrounded by the words "DEFENSE LOGISTICS AGENCY". To the right of the logo is the text "DEFENSE LOGISTICS AGENCY" and "AMERICA'S COMBAT LOGISTICS SUPPORT AGENCY". Below this is a navigation menu with links for Home, News, Team DLA, Customer Support, Business Operations, Careers, Directory, and FOIA-Privacy. A search bar is located to the right of the navigation menu. The main content area features a heading: "Welcome to the Defense Logistics Agency's Freedom of Information and Privacy Act Office Home Page". Below the heading is a paragraph of introductory text. To the left of the main content is a sidebar with a table of contents for FOIA/Privacy Home, including links to Freedom of Information, The Privacy Act of 1974, FOIA and Privacy Contacts, Privacy Training and Reminders, E-Government Act, and Links. Below the sidebar is a green box labeled "HQ DLA Operating Status" and a purple box labeled "DLA's 3 Areas of Focus" which lists "WARFIGHTER SUPPORT", "STEWARDSHIP EXCELLENCE", and "WORKFORCE DEVELOPMENT". At the bottom of the sidebar are social media icons for Facebook, YouTube, Twitter, Google+, LinkedIn, and a blue circular icon. The main content area also includes a section for "The Freedom of Information Act (FOIA)", "The Privacy Act (PA)", and a "NEW!" announcement about a FOIA Law Enforcement Support Office. A "FOGE 450 Filing Waiver" section is also present, along with a "Previously updated" section regarding a memorandum on Personal Identifiable Information (PII).

December 29, 2014

Home News Team DLA Customer Support Business Operations Careers Directory FOIA-Privacy

DLA Home > FOIA/Privacy Home

Welcome to the Defense Logistics Agency's Freedom of Information and Privacy Act Office Home Page

The Defense Logistics Agency (DLA) is DOD's largest combat support agency, providing worldwide logistics support in both peacetime and wartime to the military services as well as several civilian agencies and foreign countries. The DLA FOIA/Privacy Offices receive a multitude of requests for records on a wide-range of topics. Your search can be easier once you know how to comply with the regulations and procedures governing release of government documents.

The Freedom of Information Act (FOIA) generally provides that any person has a right, enforceable in court, of access to federal agency records, except to the extent that such records (or portions thereof) are protected from disclosure by one of nine exemptions.

The Privacy Act (PA) regulates the Executive Branch of the federal government's collection, maintenance, use, and dissemination of personal information about U.S. citizens and aliens lawfully admitted for permanent residence; permits access to records about oneself, subject to the Privacy Act exemptions; permits the amendment of a record if it is inaccurate, irrelevant, untimely, or incomplete; limits the use of social security numbers; and provides judicial remedies, both civil and criminal, for violations of the Privacy Act.

NEW! [FOIA: Law Enforcement Support Office Excess Department of Defense Property Transferred to Participating Agencies](#)

FOGE 450 Filing Waiver (CAC or .mil required to access)

Previously updated. [Defense Logistics Agency Users Guide to Personally Identifiable Information \(PII\)](#). Revised June 2013. DLA General Counsel [Memorandum](#) to DLA Executive Board, "Policies and Procedures when Personal Information is Lost, Stolen, or Compromised" (Feb. 28, 2013) -- (CAC or .mil required to access [attachment](#))

HQ DLA Operating Status

DLA's 3 Areas of Focus

- WARFIGHTER SUPPORT
- STEWARDSHIP EXCELLENCE
- WORKFORCE DEVELOPMENT

Facebook YouTube Twitter Google+ LinkedIn

Submitting A FOIA Request

- Written, typically electronic
- Agency will ordinarily acknowledge and assign a tracking number
- Example of adequate request:
 - 1. In writing
 - 2. Reasonably describes records
 - 3. Complies with Agency rules
- Agency may request additional info



Typical Agency Procedures

- Published in Code of Federal Regulations
- Identify FOIA point of contact / public liaisons
- “Multitracking”
- Critical to know agency rules for appeal rights
 - Time
 - Appeal Authority



Typical Agency Procedures (con't)

- Agency determination
 - Not find anything
 - Release documents in full or part
 - Withhold documents
- Vaughn Index
- Interim versus “Final” response

SPECIFIC AIMS

Our *long-term goal* is the characterization of [REDACTED] in [REDACTED]. We have devised [REDACTED]. These [REDACTED]. We propose to use [REDACTED] to explore the *hypothesis* that [REDACTED] function in the [REDACTED] between [REDACTED] as [REDACTED] that convey [REDACTED].

In *preliminary studies*, we have validated [REDACTED] as a valuable tool for [REDACTED] in the [REDACTED] of [REDACTED]. The [REDACTED] is an excellent model system because of [REDACTED] coupled with [REDACTED] is a key [REDACTED] and known to be essential for [REDACTED] and proper [REDACTED].

When [REDACTED] is [REDACTED] and proper [REDACTED], it [REDACTED] thereby inducing [REDACTED] identical to those induced by [REDACTED]. induces [REDACTED].

These results indicate that [REDACTED].

The following three *Specific Aims* are designed to explore the [REDACTED] in the [REDACTED] system:

Specific Aim #1: Identify [REDACTED] for [REDACTED] in [REDACTED]
[REDACTED] will be [REDACTED] using a [REDACTED] will be assayed. These studies will reveal the role of [REDACTED] in regulation of [REDACTED].

Specific Aim #2: Determine effects of [REDACTED] on [REDACTED] properties of [REDACTED]
We will use [REDACTED] to determine the effects of [REDACTED] on [REDACTED] and use [REDACTED] to determine [REDACTED] effects on [REDACTED]. These studies will provide important information about the [REDACTED] mechanisms by which [REDACTED] exerts its effects in the [REDACTED] system.

Specific Aim #3: Identify roles for [REDACTED] in the [REDACTED] system
Published studies demonstrate the existence of [REDACTED] other than [REDACTED] in the [REDACTED] including [REDACTED]. We have confirmed in preliminary studies that one of these [REDACTED] is functional in [REDACTED] and has effects on [REDACTED] when [REDACTED]. We will use the approaches outlined for Aims #1 and #2 to identify the [REDACTED] basis for [REDACTED] in the [REDACTED] and also determine their effects on [REDACTED] properties of the [REDACTED].

The proposed research will provide essential information concerning the [REDACTED] basis for [REDACTED] in the [REDACTED]. While a great deal is known about the mechanistic basis for [REDACTED], much less is known about the [REDACTED] that underly [REDACTED], both in [REDACTED] and [REDACTED]. From the broader perspective of [REDACTED], our studies will validate [REDACTED] as a technological platform that will be applicable to the [REDACTED] dissection of [REDACTED] systems in both [REDACTED] and [REDACTED] that control key [REDACTED] processes: [REDACTED], etc.

FOIA Does NOT Require Agencies:

- To do research for the requestor
- To analyze data
- To answer written questions
- To create records in response to a request

FOIA: Fee Provisions

- Agencies must promulgate fee regulations
- Commercial Requests - limited to reasonable standard charges for document search, duplication, and review
- Non-Commercial Requests – limited to duplication charges
 - Public interest exception
- No agency costs incurred to resolve issues of law or policy may be charged to requester

FOIA: Time for Agency Determinations

- Upon any FOIA request, agency must determine within 20 days whether it will comply and notify the requester
 - Exceptions may apply – agency requests for information, clarification of fee assessment, and “unusual circumstances”
- Agency must make a determination regarding any appeal within 20 days after receipt of appeal
- If on appeal the denial is upheld in whole or part, right to judicial appeal

FOIA: Other Agency Responsibilities

- Rules for expedited processing for compelling need or other cases determined by the agency
- Assign an individualized tracking number for each request taking longer than 10 days
- Establish a telephone line or Internet service that provides status information
- Agency reporting requirements
- GAO Audits

FOIA: Judicial Appeal

- Applicable U.S. District Court has jurisdiction to enjoin agency from withholding records and to order production of records improperly withheld
- *De Novo* review
- Burden is on agency to sustain its action
- Court shall accord substantial weight to affidavit of agency regarding technical feasibility
- Court may assess fees against US if requestor substantially prevails

DOJ Standard for Defending Agency FOIA Withholds

“... The Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exceptions, or (2) disclosure is prohibited by law.”

- Attorney General, FOIA Guidelines (March 19, 2009)

FOIA Requestor Lawsuits

- In 2014, 422 FOIA Suits were filed in federal district court
- Top Defendants:
 - DOJ - 121
 - DoD – 54
 - DHS - 49

Other Statutes Relevant to Agency FOIA Response

- Trade Secrets Act, 18 US Code § 1905
 - Officer or employee of the US
 - Disclose, divulge, make known
 - Trade secrets, processes, operations, styles of work, or apparatus
 - Fined or imprisoned not more than one year
- “Prohibition on Release of Contractor Proposals”
10 US Code § 2305(g)
 - Except for “any proposal that is set forth or incorporated by reference in a contract”
 - A “proposal in the possession or control of an agency may not be made available to any person” under FOIA



DEFENSIVE STRATEGIES / REVERSE FOIA MATTERS

The Agency's FOIA Letter

- An agency sends your company a letter that it has received a FOIA request and that the agency has determined that records that concern your company are responsive to that request
 - Examples: A winning proposal that your company submitted to the agency; information regarding your company contained in agency source selection documents
- The agency should identify the documents in its letter and, in certain circumstances, may enclose the documents at issue

The Agency's FOIA Letter (con't)

- The agency's letter typically will state that your company has 10 days to submit any objections with supporting justification to release of these records under FOIA
- The agency letter may provide additional information regarding the type of information or documentation that the company must submit in order to demonstrate that one or more records are exempt from disclosure under FOIA

Your Company's Response

- The response must be timely
 - 10 days is not a lot of time (particularly if the letter has taken several days to make it to the appropriate person)
 - A company typically will be granted a 10 day extension
 - Further extensions may be granted depending on the volume of records at issue

Your Company's Response (con't)

- The response must be thorough
 - You have to identify precisely the information at issue demonstrate that this information is a trade secret or confidential commercial or financial information
 - The Company's letter of explanation is frequently supported by the Declaration of a knowledgeable Company employee
 - Your response will have to show that the Company has protected the confidentiality of this information and that it has not been publicly disclosed

A Reverse FOIA Matter

- Refers to a challenge to the release of certain records/information on the grounds that the information is exempt from release under FOIA
- Most commonly, the information is alleged to be exempt under FOIA Exemption 4 (trade secrets or confidential or privileged commercial or financial information)
- Sometimes Exemption 6 (a clearly unwarranted invasion of personal privacy) may apply

Your Company's Response (con't)

- The agency typically will not accept a Company contention that an entire document is exempt under Exemption 4
- Instead, the agency typically expects that the Company will identify specific information that is exempt from disclosure and agree to release the remainder of the document
- This will require that your Company provide proposed redactions to the documents at issue

Your Company's Response (con't)

- Your Company will need to follow the rules established by the agency for submission of FOIA objections
- If your Company fails to do so, it may find that it cannot challenge the disclosure of these documents further because the Company did not exhaust this administrative remedy

Your Company's Response (con't)

- Sometimes, there is a statutory exemption to disclosure of the records at issue and the agency may not always be aware of these exemptions
- Examples
 - An unsuccessful proposal submitted to DOD is exempt from disclosure under FOIA
 - Certain infrastructure information submitted by companies to the Department of Homeland Security

Exemption 4 Requirements

- Commercial or financial information that the agency obtained from a person outside the government
- “Confidential Information” standard for information that is required to be submitted to the agency:
 - Commercial or financial information if disclosure is likely either to (1) impair the government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained
 - The Company maintains the confidentiality of the information

Exemption 4 Requirements (con't)

- Known as the National Parks standard
- Submission of proposals in response to a Government solicitation is governed by the National Parks standard
- Must show that actual competition exists and that likely competitive injury exists
- Must show that company maintains confidentiality of the confidential information
 - Company policies
 - Company Nondisclosure Agreements
 - Company IT or other restrictions on access to certain information (such as pricing information)

Exemption 4 Requirements (con't)

- Exemption 4 has an easier standard for information submitted voluntarily to the government:
 - Confidential information is information that is of a kind that the provider would not customarily release to the public
- Known as the Critical Mass standard
- Critical Mass standard is significantly easier to satisfy than the National Parks standard

Exemption 4 Requirements (con't)

- In a proposed rule, DOD guidance regarding information that may be protected by Exemption 4 is as follows:
 - Commercial or financial information received in connection with loans, bids, contracts, or proposals
 - Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures
 - Technical or scientific data developed by a contractor exclusively or in part at private expense

Exemption 6 (Privacy) Requirements

- Whether the records are personnel, medical or similar files
 - “Similar files” is interpreted broadly
 - A government record that contains information that applies to a particular individual satisfies this requirement
- Disclosure of information would compromise a substantial privacy interest
- The Privacy interest outweighs any public interest in release of the records

Exemption 6 (Privacy) Requirements (con't)

- No Privacy interest for corporations generally under FOIA
- Courts, however, have recognized substantial privacy interests in business-related commercial information for individually-owned or closely-held businesses where the information would reveal at least a portion of the owner's personal finances

Possible Agency Appeal

- Some agencies have a procedure pursuant to which it can appeal denial by the agency FOIA officer of the Company's FOIA objections to the agency headquarters
- If that procedure is provided, you generally have to follow that procedure to exhaust your administrative remedies, but that can differ by agency

Reverse FOIA Litigation

- Once you have exhausted the agency procedures, your Company can file a Reverse FOIA action in U.S. District Court with the agency as the defendant
- The Reverse FOIA action may be filed where the Company or the agency is located
- Many companies file these actions in the U.S. District Court for the District of Columbia which has favorable FOIA case law regarding Exemption 4

Reverse FOIA Litigation (con't)

- In a Reverse FOIA action, the Company will ask the Court to enjoin the agency from disclosing the records at issue
- The Company's position will be based on the records being exempt from disclosure under FOIA (e.g., Exemption 4)

Reverse FOIA Litigation (con't)

- If the release of the records is imminent, the Company should seek a Temporary Restraining Order (TRO) which is an immediate injunction that will stay in place until there is a hearing on a Motion for a Preliminary Injunction
- The next step is the filing and hearing on a Motion for a Preliminary Injunction

Reverse FOIA Litigation (con't)

- Reverse FOIA litigation conceivably can continue on to a hearing on a Permanent Injunction but
 - That hearing can be consolidated with the hearing on a Motion for a Preliminary Injunction
 - A court decision on a Preliminary Injunction can be immediately stayed and the trial court action may be stayed pending a decision by the federal court of appeals

Reverse FOIA Litigation (con't)

- It is rare that witnesses testify in person; instead, one or more Declarations are submitted
- The FOIA requester can intervene in the action if permitted by the Court generally grants this request
- It is always interesting to see if the Government will take a neutral position in the litigation or, instead, will argue that the records at issue are not exempt under FOIA and should be disclosed
- The Court frequently will review the documents and the proposed redactions *in camera*

Effective Reverse FOIA Tips

- Proposal team should consider whether any information in a proposal is confidential and proprietary information whose disclosure may be likely to result in competitive injury to the company
- Mark relevant information as confidential, proprietary information in accordance with any procedures stated in the RFP
- Generally avoid marking an entire proposal as confidential

Effective Reverse FOIA Tips (con't)

- Be prepared to defend relevant information as exempt under FOIA
 - Consider preparing a response in advance
- Once the Company has provided a Reverse FOIA response to an agency, ensure that relevant Company personnel are aware of the existence of the response
- Companies lose confidential proprietary information under FOIA when (1) they do not mark such information properly and (2) they do not provide an adequate and timely response to an agency FOIA letter

Questions? Please Contact:

Rick Oehler

ROehler@perkinscoie.com

(206) 359-8419

Don Carney

DCarney@perkinscoie.com

(202) 654-6336