




UNITED STATES GOVERNMENT
MEMORANDUM

FORM G-115f (1-92)
RAILROAD RETIREMENT BOARD

January 31, 2017

L-2017-6

TO : The Board

FROM : Rachel L. Simmons 
Acting General Counsel

SUBJECT : Public Law 114-185 FOIA Improvement Act of 2016

On June 30, 2016, the FOIA Improvement Act of 2016 (FOIA 2016) was signed into law.¹ It modifies the original Freedom of Information Act and its most recent Amendment, the OPEN FOIA Act of 2009.² The original Freedom of Information Act was enacted in 1966 and is meant to provide the public with access to federal government information.³ The right to access is limited when the requested information falls within the scope of nine exemptions established by the law.

This memorandum addresses the openness of government initiative, electronic accessibility of records, and other key changes incorporated into the amendment.

The concept of openness is embodied in a Memorandum by former Attorney General Eric Holder which instructed agencies to preemptively disclose information prior to a public request, partially disclose those portions of a record which do not fit an exemption, and not to withhold information because it falls within the strict legal parameters of an exemption.⁴ The memorandum further stated that "the Department of Justice will defend the denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions or (2) the disclosure is prohibited by law. The edicts expressed in the Attorney General's memorandum are now codified in FOIA 2016.

¹ Pub. L. 114-185.

² Pub. L. 111-83.

³ 5 U.S.C. 522.

⁴ Department of Justice, *Office of the Attorney General, Memorandum for Heads of Executive Departments and Agencies: The Freedom of Information Act (FOIA)*, (Mar. 19, 2009).

I. Presumption of Openness

Disclosure requirements

FOIA 2016 establishes standards by which the Board makes determinations on the withholding or disclosure of information. Many of these standards have already been implemented in our FOIA decision-making process. However, since they have now been codified into law it is necessary that we reexamine FOIA 2016 language to ensure full compliance.

FOIA 2016 provides that agencies “shall withhold information” under the FOIA “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.” This provision requires the Board to release requested information unless an exemption applies, there is a legal prohibition, or we can realistically anticipate harm in making the disclosure.

Additionally, agencies shall “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible.” Also, agencies shall “take reasonable steps necessary to segregate and release nonexempt information.” These provisions discourage the blanket denial of a request when only a portion of the record is subject to exemption or other legal protection. However, it also does not require disclosure of information “that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under Exemption 3.” Exemption 3 relates to matters specifically excepted from disclosure by statutes other than FOIA.

The Board is now required to “make available for public inspection in an electronic format,” records “that have been requested 3 or more times.” These provisions would result in preemptive disclosure of non-exempt records and ensures that information released to one party is equally available to all requesting parties. The requirement also serves to increase proactive disclosure of frequently requested records.

FOIA 2016 has applied the concept of openness to the deliberative process privilege. FOIA Exemption 5 no longer applies to “records created 25 years or more before the date on which the records were requested.” As such the Board must release any inter or intra-agency memoranda or letters subject to the deliberative process privilege which were created 25 years or earlier from the date of the FOIA inquiry.

II. FOIA Administration

Electronic Access to Records

The Board is required to make RRB Annual FOIA Reports “available for public inspection in an electronic format” and “make the raw statistical data used in each report available in a timely manner for public inspection in an electronic format.” This provision also imposes the requirement RRB FOIA electronic reports be in searchable format.

FOIA 2016 directs the Office of Management and Budget (OMB) to establish an online request portal for FOIA requests across the federal government. This portal would be in addition to any already established within Agencies. It provides requesters with additional avenues for filing and monitoring FOIA requests. OMB will be responsible for setting interoperability standards between the consolidated portal and agency case management systems.

Response letters

When a determination is made on a FOIA request, we must include the following information in our notification to the requester:

- “the right of such person to seek assistance from the FOIA Public Liaison of the agency,” and in the case of an adverse determination:
- the right to appeal within a period of “not less than 90 days from the date of the adverse termination,” and
- “the right of such person to seek dispute resolution services from the FOIA Public Liaison or OGIS” (Office of Government Information Services).

Fees

Agency administration of FOIA-related fees has been a subject of considerable debate in recent years. The issue has received attention from the FOIA Advisory Committee, which established a Fees Subcommittee to address the matter. FOIA 2016 retained the fee structure applicable to FOIA requests but codified several recommendations of this committee.

In the event that the Board misses a deadline for complying with a FOIA request, we are prohibited from charging a fee for providing records unless “unusual” circumstances apply and timely written notice has been provided to the requester.

“Unusual circumstances” are defined as: (1) “the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request,” (2) “the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request,” and (3) “the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.” 5 U.S.C. § 552(a)(6)(B)(iii).

III. New Roles and Responsibilities

FOIA Officers

There are now additional duties and responsibilities assigned to an agency Chief FOIA Officer, who is now required to “offer training to agency staff regarding their [FOIA] responsibilities,” and “serve as the primary liaison with OGIS and the Office of Information Policy.” The Chief FOIA Officer is also required to “review, not less frequently than annually, all aspects” of the RRB’s administration of FOIA “to ensure compliance” with its requirements.

The following topics are to be included in the review:

- Agency regulations;
- Disclosure of records under the proactive disclosure provision and the foreseeable harm standard;
- Assessment of fees and fee waivers;
- Timely processing of requests;
- Use of exemptions; and
- Dispute resolution services with the Office of Government Information Services or the FOIA Public Liaison.

Chief FOIA Officer Council

FOIA 2016 creates a new Chief FOIA Officer Council which will serve as a forum for collaboration across agencies and with the requester community. The Chief

FOIA officer for each agency will be a member of the Council. The Council's duties include developing recommendations for increasing compliance and efficiency under FOIA, disseminating agency experiences and best practices related to FOIA, and developing initiatives to increase transparency.

IV. Oversight and Reporting

In the agency's Annual FOIA reports to the Attorney General and OGIS, two additional elements must be included: (1) the number of times the RRB has denied a request for records under subsection (c) of FOIA and (2) the number of records made available for public inspection in an electronic format.

I have attached a copy of the FOIA Improvement Act of 2016 for your reference.

Attachment