



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240



**OCIO DIRECTIVE 2009-003**

DEC 31 2008

To: Heads of Bureaus and Offices

From: Sanjeev (Sonny) Bhagowalia  
Chief Information Officer  
Chief FOIA Officer

Subject: OPEN Government Act Provisions Taking Effect on December 31, 2008

**Purpose:** This directive updates the policy and procedures for administering and implementing the Freedom of Information Act (FOIA) in the Department of the Interior (DOI) to incorporate the provisions of the *Openness Promotes Effectiveness in our National Government Act of 2007* (also called the *OPEN Government Act of 2007*) that become effective on December 31, 2008. The Department's FOIA regulations (43 CFR Part 2, Subpart C) and the FOIA Handbook (383 DM 15) will be revised accordingly.

**Background:** On December 31, 2007, President Bush signed the *Open Government Act of 2007*, P.L. No. 110-175, amending the FOIA for the first time since 1996. The amendments address several procedural areas dealing with agency FOIA administration and codify some provisions of Executive Order (E.O.) 13392 ("Improving Agency Disclosure of Information"). Some amendments went into effect immediately; others (discussed below) become effective on December 31, 2008. (For a copy of the FOIA containing the *OPEN Government Act Amendments*, go to <http://www.usdoj.gov/oip/amended-foia-redlined.pdf>.)

**Scope:** The provisions discussed in this directive will be used by all DOI bureaus and offices in processing requests under the FOIA.

**Time Frame:** These provisions take effect on December 31, 2008, and affect FOIA requests perfected on or after that date.

**Policy:** Bureaus and offices are expected to comply fully with the *OPEN Government Act of 2007* and DOJ guidance for implementing the Act (see DOJ's guidance in the *FOIA Post* at <http://www.usdoj.gov/oip/foiapost/mainpage.htm>).

**NOTE: In this directive, statutory response times expressed in days always mean "workdays."**

1. Requirement to forward misdirected requests to proper agency FOIA office/Start date for 20-day response. This provision only applies to perfected requests that are received by a bureau or office ("bureau") designated by DOI regulation to receive FOIA requests and that are being forwarded to one or more other DOI FOIA offices for processing. (It does not apply to situations

in which a request is sent to the wrong agency.) When a request is misdirected to the “wrong” FOIA office within an agency, the 20-day time period for agency response will begin on the date the request is first received by the proper FOIA office, but not later than ten days after the “wrong” FOIA office received it. Thus, if a request is addressed to the wrong DOI FOIA office, that office must now, by law, promptly forward the request to the correct DOI FOIA office(s) for response. The start date for the 20-day response period is as follows:

- If the proper FOIA office receives the request within ten days of the date the request was received by the wrong FOIA office, the 20-day response time period begins on the date the request was received in the proper FOIA office.
- If the proper FOIA office receives the request after ten days, the 20-day response time period will begin on the tenth day from the date the request was received by the wrong office whether or not the proper FOIA office has received it yet.
- If the proper FOIA office subsequently determines a forwarded request is not perfected, the date the request was received by the wrong FOIA office has no effect on the start of the 20-day time period; the 20-day time period will start on the day the request is perfected.

Attached are examples of situations that bureaus/offices may encounter that illustrate how this provision should be interpreted in practice.

To ensure the proper DOI FOIA office gets its full 20 days to respond to requests, all bureaus designated by DOI regulation to receive FOIA requests must now promptly review all requests as soon as they are received to determine if they are the proper FOIA office to process the request. If not, they must get the request to the proper FOIA office within ten days.

Bureaus should track the receipt and forwarding of misdirected requests to appropriate office(s) in case a requester calls to inquire about his/her request. The office forwarding the request should attach a cover sheet to it notifying the receiving office that the request is being forwarded for action. The office forwarding the request should notify the requester of the referral. The office that receives and processes the forwarded request should inform the requester in its acknowledgment letter of the date it received the request.

Since the initiation of the 20-day response period depends on the date a request is received by any DOI FOIA office, bureaus receiving misdirected requests must either date stamp or note the date of receipt directly on the request. Likewise, the proper FOIA office must also note the date it received the forwarded request. The proper FOIA office must enter the actual date it received the request in the electronic FOIA tracking system (EFTS) under “date received” consistent with the procedures in Section 1 of this Directive. (DOJ guidance at <http://www.usdoj.gov/oip/foiapost/2008foiapost31.htm>.)

2. Limitation on stopping the clock on statutory response time. This provision only applies to requests that have been perfected and for which the 20-day response period has already begun. There are two scenarios in which a DOI FOIA office can stop the clock once a (perfected) request has been received. First, the FOIA office can go back to a requester once, stopping the

clock, to obtain non-fee related information it needs to process the request. If the FOIA office needs to go back again to the requester for clarification, the clock cannot be stopped to negotiate with the requester the second time. Second, a FOIA office may stop the clock as many times as it needs to when it is necessary to resolve fee issues. (DOJ guidance is at <http://www.usdoj.gov/oip/foiapost/2008foiapost29.htm>.)

3. Limitation on assessing search (or duplication, if applicable) fees in certain situations. DOI FOIA offices may no longer assess search fees (or duplication fees for requesters in the “educational institution,” “non-commercial scientific institution,” or “representative of the news media” fee categories) if they fail to comply with the 20-day time limit for responding to initial requests or appeals unless “unusual circumstances” or “exceptional circumstances” apply to the requests:

“Unusual circumstances” apply whenever there is a need: a) to search for and collect records from offices or establishments outside of the office processing the request; b) to search for, collect, and examine a voluminous amount of records; or c) for consultations with another agency or more than two Departmental components. In this case, a statutory time extension must be taken (see Chapter 3.3 of the DOI FOIA Handbook).

“Exceptional circumstances” generally apply when the FOIA office processing the request has a backlog of pending requests and that office is making reasonable progress in reducing its backlog.

If the processing of a request involves “unusual” or “exceptional circumstances” as described above, the exception to the rule against charging fees is met and the FOIA office may assess fees as it normally would. (NOTE: The Predisclosure Notification Procedures for Confidential Commercial Information under E.O. 12600 does not meet either of these exceptions.) This applies even if the bureau exceeds the 30-day time limit (20 days plus a 10-day extension).

If no “unusual” or “exceptional circumstances” are involved in the processing of a request and the bureau or office responds after the 20 days have expired, it must not:

- charge search fees to requesters in the “other” or “commercial” fee category
- charge duplication fees to requesters in the “educational institution,” “non-commercial scientific institution” or “representative of the news media” categories

(DOJ guidance is at <http://www.usdoj.gov/oip/foiapost/2008foiapost28.htm>.)

4. Requirement to assign tracking numbers to requests. As a matter of DOI policy, bureaus are required to assign tracking numbers to all FOIA requests and provide the tracking numbers to requesters. To meet this obligation, the bureau will include the tracking number in the acknowledgment letter sent to the requester. (The EFTS assigns tracking numbers for the requests that are in the system and will generate an acknowledgment letter that includes the tracking number.) DOI FOIA offices will continue to track all requests they receive in order to

manage their requests effectively and produce the required annual FOIA report. (DOJ guidance is at <http://www.usdoj.gov/oip/foiapost/2008foiapost30.htm>.)

5. Requirement to provide telephone line or Internet service for status inquiries. FOIA offices must establish either a phone line or Internet site for requesters to obtain information about the status of their requests using assigned tracking numbers by December 31, 2008. Bureaus must be able to provide the date a particular request was received by the FOIA office and an estimated completion date for the request. This estimate should be based on the request's processing track, its place in the processing queue, past experience with similar requests and the work that is left to be done at the time of the inquiry. Estimates do not have to be exact, e.g., three weeks, two months, etc. (DOJ guidance is at <http://www.usdoj.gov/oip/foiapost/2008foiapost30.htm>.)

Under E.O. 13392 all agencies had to establish FOIA Requester Service Centers to provide status information to requesters. These Centers, now codified in the *OPEN Government Act*, can be used to meet this requirement. DOI's existing FOIA Service Center phone lines fulfill this requirement as well as DOI's toll-free FOIA number (1-888-603-7119). The FOIA Liaisons also have been codified in the *OPEN Government Act*. (DOJ guidance is at <http://www.usdoj.gov/oip/foiapost/2008foiapost30.htm>.)

6. Other OPEN Government Act provisions that became effective on December 31, 2007.

**Revised "record" definition:** The definition of the term "record" is amended to include any information "maintained for an agency by an entity under Government contract, for the purposes of records management."

**Litigation considerations:** As a reminder, on April 28, 2008, the Department's Chief FOIA Officer issued a memorandum (attached) discussing two important *OPEN Government Act* provisions. Specifically, the memorandum addressed provisions in the Act making it easier for FOIA litigants to qualify to receive attorney fees, and requiring that such fees be paid out of the agency's annual appropriations. The memorandum emphasized the need for bureaus to consider the financial consequences that could result from inadequate, incorrect, or delayed FOIA processing. Bureaus should carefully consider the ramifications of their withholdings and ensure that they can be defended under the law. Individuals making disclosure determinations will consult their policy-makers and FOIA attorneys as appropriate.

**Note exemption(s) taken next to deletion(s):** Also, in October 2008, DOJ issued guidance on the new requirement to indicate directly on the released portion of the record not only the amount of information deleted, but also the exemption(s) used to withhold the information. This is consistent with guidance contained in the Department's FOIA Handbook (383 DM 15, Chapter 3.12) (DOJ guidance is at <http://www.usdoj.gov/oip/foiapost/2008foiapost26.htm>.)

**Contacts:** Questions concerning this directive may be directed to Alexandra Mallus, the Departmental FOIA Officer, by telephone at (202) 208-5342 or by email at [alexandra\\_mallus@ios.doi.gov](mailto:alexandra_mallus@ios.doi.gov), or Rosemary Melendy, Senior FOIA Program Officer, by telephone at (202) 208-5412 or by email at [rosemary\\_melendy@ios.doi.gov](mailto:rosemary_melendy@ios.doi.gov).

Please ensure that this directive is disseminated promptly to all employees within your bureau involved with processing FOIA requests to ensure Departmentwide compliance. We appreciate your assistance and cooperation in this regard.

Attachments - Examples, Determining Start of 20-Day Time Period for Misdirected Requests  
Freedom of Information Act Amendments

cc: Bureau and Office FOIA Officers  
Designated FOIA Attorneys  
Bureau/Office Chief Information Officers

# ATTACHMENT

## EXAMPLES

### Determining Start of 20-Day Time Period for Misdirected Requests

In all of the examples below:

- “Days” means “working days,” not “calendar days;”
- All of the offices are part of the Department of Interior (the provision does not apply to misdirected requests routed to a different agency);
- “DOI FOIA office” means an office or bureau that is designated by DOI regulation to receive FOIA requests; and
- Unless otherwise stated, all of the requests are “perfected” when first received.

#### Example 1:

The receiving DOI FOIA office (“Office A”) determines that a request was misdirected. Office A then routes the request to the proper DOI FOIA office (“Office B”). Office B receives the request on the seventh day from the date Office A received it. Then Office B will have the full 20 days to respond starting on the date it receives the request.

#### Example 2:

The receiving DOI FOIA office (“Office A”) determines that a request has been misdirected. Office A then routes the request to the proper DOI FOIA office (“Office B”). Office B receives the request on the 12<sup>th</sup> day after it was first received by Office A. Then Office B has only 18 days left in which to respond to the request. The 20-day time period for response began to run on the tenth day from the date the request was received by Office A, even if Office B (the proper FOIA office) had not yet received the request.

#### Example 3:

The receiving DOI FOIA office (“Office A”) determines that a request was misdirected. Office A then routes the request to the proper DOI FOIA Office (“Office B”). Office B receives the request on the 35<sup>th</sup> day after Office A received it. Office B’s 20 days to respond to the request have already expired before it even received the request.

#### **Example 4:**

A FOIA request is addressed to, and received by, a DOI program office (“Office A”) that is **not** designated by regulation to receive FOIA requests. Fifteen days later, the program office forwards the FOIA request to a designated FOIA office (“Office B”). Office B reviews the FOIA request and determines that the request should have been addressed to another DOI FOIA office (“Office C”). Office B is now obligated by law to forward the FOIA request to Office C. The significant dates in this example are the date the request was first received by Office B and then by Office C. If Office C receives the request on the fifth day after Office B received it, then Office C has the full 20 days to respond to the request. If, on the other hand, Office C receives the request on the 18<sup>th</sup> day after Office B received it, Office C has only 12 days left in which to respond. The date the request was received by Office A is immaterial to determining when the 20-day time period begins, because FOIA requests must be received by a FOIA office that has been designated by Departmental regulation to receive requests for this provision to apply.

#### **Example 5:**

The receiving DOI FOIA office (“Office A”) determines that a request is misdirected and then routes the request to the proper DOI FOIA office (“Office B”). Office B receives the request on the 12<sup>th</sup> day after the date Office A received it. **Office B then determines the request is not perfected, the 20-day time period to respond does not start until the request is perfected.** In this example, the date the request was received by Office A is immaterial to determining when the 20-day time period begins. The 20-day clock does not begin to run until the request is perfected.



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APR 28 2008



## Memorandum

To: Assistant Secretaries  
Heads of Bureaus and Offices

From: Michael J. Howell  
Chief FOIA Officer

*Edward J. Meagher*

Subject: Freedom of Information Act Amendments

This memorandum highlights several significant amendments to the Freedom of Information Act (FOIA) contained in the "OPEN Government Act of 2007" (the "Act"), which became law on December 31, 2007.<sup>1</sup> The Act resulted from Congress' belief that the FOIA has not lived up to its strong presumption in favor of disclosure. Through the Act, Congress sought to strengthen the FOIA and promote accessibility, accountability, and openness in Government.

The Act mandates a number of substantial procedural requirements, including designation of Chief FOIA Officers and FOIA Public Liaisons, improvements to tracking of FOIA requests, and increased reporting requirements. The Act also limits the agency's ability to assess certain FOIA fees for requests not responded to within the statutory timeframes. It does not, however, change the FOIA exemptions that enable withholding of certain types of records.

You should be aware of two particularly important changes that involve payment of attorney fees and costs for FOIA litigation. First, the Act expands the circumstances in which a plaintiff may be awarded attorney fees to include when the plaintiff obtained relief in the litigation due to a voluntary or unilateral change in the agency's position. Second, the Act provides that attorney fees and costs from FOIA litigation may no longer be paid from the Judgment Fund in the Treasury, but rather **shall be paid from annual appropriations of the agency.**

The full effect of these changes will not be known until they have been addressed in litigation. It is, however, clearly possible that, where an agency fails to properly process a FOIA request by either not responding in time, improperly asserting exemptions, or failing to search adequately, a plaintiff may be entitled to attorney fees and costs when the agency releases documents or otherwise attempts to resolve the matter after a case is filed. It is also clear that each bureau's budget may be adversely affected by awards of attorney fees resulting from inadequate FOIA responses. Bureau personnel should therefore be made aware that their FOIA decisions and activities now carry much greater significance. FOIA decisions or actions should be made in consideration of the financial consequences that may result from inadequate or incorrect FOIA processing.

<sup>1</sup> The statute is entitled the "Openness Promotes Effectiveness in our National Government Act of 2007."



Additional guidance will be forthcoming as the Act is implemented. You may contact Alex Mallus, DOI FOIA Officer, (202) 208-5342 or [Alexandra\\_Mallus@ios.doi.gov](mailto:Alexandra_Mallus@ios.doi.gov), if you have questions regarding the Act.

cc: Bureau/Office CIOs  
Bureau/Office FOIA Officers  
Designated FOIA Attorneys