

Freedom of Information Act Overview

Catherine M. Papoi, J.D., CIPP/G
Deputy Chief FOIA Officer
Director, Disclosure & FOIA
Privacy Office



Homeland
Security

FOIA Overview

✦ History

- Enacted in 1966; amended several times since, including the 1996 “Electronic Amendments”.
- Statutory right of access to federal agency records.
- To ensure informed citizenry/prevent secret law – Government openness and accountability.
- Records must be disclosed unless exempt/excluded by the statute.
- Key Agency for FOIA guidance – Department of Justice.

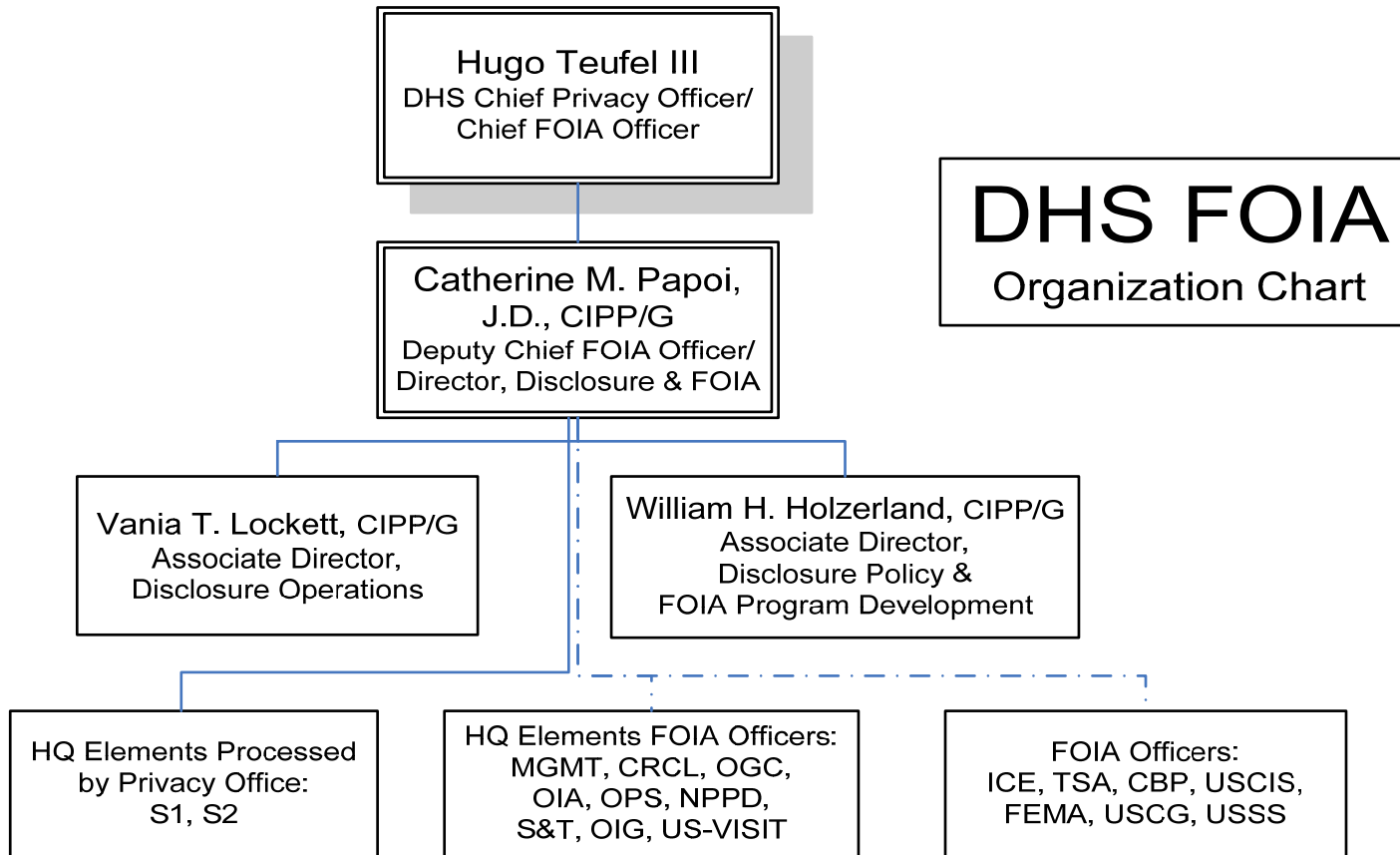


FOIA Overview

- ✦ "This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."
-LBJ, on signing of FOIA, 1966



DHS FOIA Organization



Lifecycle of a FOIA

- ✦ Request received by component's FOIA officer
 - Determine fee category
 - Resolve scope issues through communication with requestor
- ✦ Acknowledgement letter
 - Was expedition or fee waiver requested?
- ✦ Search for records
- ✦ Analysis of responsive records
 - Are consultations/referrals required?
- ✦ Letter to requestor itemizing ALL responsive records
- ✦ Appeal/Litigation



Your FOIA Responsibilities

- ✦ You will receive search requests from your component's FOIA officer.
- ✦ Unless your job specifically entails FOIA processing responsibility, the limit of your involvement in FOIA is searching for responsive records & providing general withholding/release recommendations.



Your FOIA Responsibilities Cont'd

- ✦ The FOIA Officer considers your withholding/release recommendations in light of the statute, identifies any applicable exemption(s) and makes the final release determination. They may consult with you prior to final release.
- ✦ It is imperative you provide input to your FOIA Officer by the stated deadline as the statute mandates a response to the requester within 20 business days.



Search & Review Tips

- ✦ Developing a strong administrative record is key
 - Where did you locate responsive records?
 - When did you begin your search?
 - Once you’ve “cast your net” for records, you need not go back to capture recent records after you complete your initial search. It benefits everyone to initiate and complete your search as quickly as possible.
 - Is there information you believe should be withheld? Why?
 - Who conducted the search and review? What is their pay grade?
 - How much time was spent on search and review?



Search Tips Cont'd

- ✦ Think about the following places when conducting a search:
 - Files, desks, boxes, safes, computers (including email), discs and other storage media
- ✦ Think about the following types of documents when conducting a search:
 - Calendars (including Outlook), telephone message slips, hand-written notes, draft and final documents (hard copy and e-version), audio/videotapes, photos, transmittal/routing slips, fax cover sheets, e-mail, correspondence files, subject matter files



FOIA Exemptions

1. Classified Information
2. Internal Personnel Rules and Agency Practices
3. Statutory Exemptions
4. Trade Secret or Commercial Information
5. Common Law Privileges
6. General Privacy
7. Government Investigations
8. Financial Institutions
9. Geological and Geophysical Information



FOIA Exemption Application

- ✦ The FOIA does not allow an agency to withhold information from a requestor simply because the disclosure of the requested record would be embarrassing to the agency.
- ✦ Please keep this in mind when creating records.



FOIA Exclusions

1. Pending criminal investigation when subject is unaware;
2. Informant records in certain circumstances;
3. FBI foreign intelligence or counterterrorism records.



FOIA Exclusions

- ✦ What is an exclusion?
 - When a request is for records subject to an exclusion, the agency may treat those records as not being subject to the FOIA. This is different from “Glomarization” where the agency neither admits nor denies that it has responsive records. The correct response to a request for records that are covered by an exclusion is that no records responsive to the request exist.



Federal Records Act (FRA) v FOIA

- ✦ Both laws address Federal records management
- ✦ FRA speaks to Federal records retention and destruction
- ✦ FOIA speaks to Federal records access
- ✦ Cannot destroy a record once it has become subject of a FOIA request or litigation, even if destruction permitted by FRA
- ✦ FRA Key Agency – National Archives and Records Administration
- ✦ FRA questions: Kathy Schultz, DHS Senior Records Officer, 202-447-5075



FOIA Records Retention

- ✦ General Records Schedule 14
- ✦ Destroy files two years after final response if records were released in entirety
- ✦ Destroy files seven years after final response if any withholdings (full or partial) or subject of an appeal. Although NARA authorizes destruction after six years, the statute of limitations on a FOIA claim is seven years. Therefore, we should retain any appeal/denial files for seven years after the last communication with the requester.



Privacy Act v FOIA

- ✦ **FOIA/PA Interface -1st Party Access**

- ✦ Requests by an individual for access to his/her record should be processed under both FOIA and the Privacy Act
 - Does PA exemption apply?
 - If no, release the record.
 - if exemption applies, make FOIA analysis and release if required by FOIA.
 - Requester gets the benefit of the statute with the more liberal release requirement!



Questions? Concerns?

Please do not hesitate to contact us if we can be of assistance on any disclosure matter:

Privacy Office FOIA Number: (703) 235-0790
FOIA@dhs.gov

Catherine M. Papoi, J.D.
Deputy Chief FOIA Officer
Director, Disclosure & FOIA

Vania T. Lockett
Associate Director, Disclosure & FOIA Operations

William H. Holzerland
Associate Director, Disclosure Policy & FOIA Program Development



Homeland
Security