

## **The New York Agriculture Producer's Guide To FOIA: How to Get the Information You Need From Government Agencies**

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You may find a time when you may want to see the documents available to the public about yourself or your agriculture operation. There are two main federal statutes that guide the process of obtaining information from the federal government: (i) Freedom of Information Act ("FOIA") and (ii) Privacy Act ("PA"). In New York, requests can be made to state administrative agencies through the Freedom of Information Law ("FOIL"). This article seeks to provide New York agriculture producers with a simple guide to making FOIA/PA or FOIL requests.

### **Background and Applicability**

FOIA was enacted in 1966 by President Lyndon B. Johnson who believed that a democracy works best with transparency in the system without harming national security. There is no longer a burden to show that you "need to know" the requested information. Instead, you have a "right to know." The burden is now on the government to show its need for secrecy. However, this "right to know" does not come without limitations. A FOIA request can only be made to federal government agencies, which broadly includes government corporations (*e.g.*, Federal Crop Insurance Corporation), government controlled organizations, and independent regulatory agencies (*e.g.*, Library of Congress, Government Accountability Office, Congressional Research Service). FOIA is *not* applicable to private companies or persons who receive Federal contracts or grants, or private organizations.

Additionally, the PA allows U.S. citizens seeking information about *themselves* to receive greater information than what would typically be released to the general public. The primary purpose of the PA is to provide individuals with more control over the gathering, dissemination, and accuracy of information about themselves contained in government files, and to promote greater privacy for citizens. The PA serves to protect cattle producers from environmental groups or other citizens that may wish to obtain private information about your property or livestock operation.

Even though FOIA and PA only apply to *federal* government agencies, every state has enacted its own open public records act or right-to-know act that are applicable to state and local governmental agencies. In New York, Public Officers Law § 84 et seq. establishes the Freedom of Information Law ("FOIL"). If you are unsure whether your documents are regulated by the federal or state agency (such as the U.S. Environmental Protection Agency ("EPA") or New York Department of Environmental Conservation ("DEC")), it is best to make two separate requests—one request to the federal agency citing FOIA/PA and another to the New York governmental agency citing FOIL.

## **Decide If It Is Necessary To File a FOIA Request**

Not all agency records require a written FOIA request. In 1996, Congress passed the Electronic Freedom of Information Act (“E-FOIA”). E-FOIA requires government agencies to have electronic FOIA “reading rooms” available online. The information you seek may be available online such as regulations, agency decisions and statements of policies, staff manuals (*e.g.*, U.S. Department of Agriculture (“USDA”) Rural Development Handbooks), forms, and agency publications such as pamphlets, brochures, and books created after November 1, 1996. See 5 U.S.C. § 552(a)(2). For example, the soil composition on your property is available from the Natural Resources Conservation Service (“NRCS”) online at <http://www.nrcs.usda.gov/>. All previous records before November 1, 1996 are not required to be in electric format; however, upon request to the agency, even these can be made available to you in electronic form.

## **Choose The Government Agency or Agencies To Request Documents**

On either the federal and state level, there is not one central office that manages all FOIA of FOIL requests so you must contact the department or agency itself. Even if you know that you need to obtain records from the USDA, it is helpful if you know the specific sub-agency, such as the Risk Management Agency (“RMA”) for information on your livestock or crop insurance. Any federal records that are more than twenty-five years old are archived with the National Archives and Records Administration (“NARA”).

If you are unclear as to the department or agency, you can call the Federal Citizen Information Center toll free at 1-800-FED-INFO to help you locate the right federal government agency. A list of general FOIA contacts is available with the Department of Justice at [www.usdoj.gov/oip/foiacontacts.htm](http://www.usdoj.gov/oip/foiacontacts.htm). In New York, the Committee of Open Government may be helpful in directing you to the correct New York governmental agency: One Commerce Plaza, 99 Washington Avenue, Suite 650, Albany, NY 12231 or (518) 474-2518. FOIL requests to the N.Y. Department of Agriculture & Markets should be made to Rebecca Smith either by mail at 10B Airline Drive, Albany, N.Y. 12235 or by e-mail at [FOIL@agmkt.state.ny.us](mailto:FOIL@agmkt.state.ny.us).

## **Draft and Mail Your Written FOIA Request Letter**

You cannot make a FOIA request to a federal agency over the telephone. All FOIA requests *must* be in writing (*i.e.*, postal mail, fax, or email). Most federal agencies do not have FOIA forms so you must draft a written letter. In New York, a form for email FOIL requests is available at <http://www.dos.state.ny.us/coog/emailrequest.html>.

To make sure your letter is handled correctly, mark on both the letter and envelope “Freedom of Information Act Request” (or “Freedom of Information Law” request in New York). The federal government is not required under FOIA to do any research, analyze data, or answer written questions; thus, if you include these types of requests in your FOIA letter, the federal agency is not obligated to answer them. You are encouraged to keep a copy for records and send

your letter by certified mail so that you can have proof of the agency's receipt. Your FOIA request should include the following information:

- Contact information including your full name, address, phone number;
- Description of records requested (*e.g.*, aerial photographic reproductions from the Farm Service Agency or National Agriculture Library, all records pertaining to a piece of property);
- Identification of locations of files are located, such as a regional EPA or USDA office if known;
- The maximum amount that you are willing to pay for documents;
- Written authorization signed by yourself or an official representative of your cattle operation; and,
- Request that non-exempt material be segregated.

### **Wait for Government Response**

Federal governmental agencies are required to *respond* to FOIA requests within twenty business days, excluding weekends and holidays, beginning from receipt of the request. However, the government is not required to *send you the requested documents* within twenty days; instead, the government will likely send you written confirmation of its intent to comply with the request within a reasonable time. In this letter, the government agency might also give you a figure of estimated costs where you are required to agree or cancel the request. If the files are urgent, then you can specifically request that your FOIA request be expedited (include the reasons for the urgency).

In some cases, there is a faster turnaround for requests to New York agencies. N.Y. Public Officers Law § 89(3) requires that a state agency either grant or deny access to the FOIL request in whole or in part, or if more time is needed, to minimally acknowledge the receipt of the request in writing within *5 business days*. This acknowledgment must include an approximate date that the agency will either grant or deny the request. This date must be “reasonable under the circumstances” but is typically within twenty business days.

### **Pay Fees**

There is no initial fee to file a FOIA request; however, federal agencies are allowed to request “reasonable standard charges for document search, duplication, and review. . . .” See 5 U.S.C. § 552(a)(4)(A)(ii)(I). Unless no relevant documents were found, the federal agency will send you a letter giving you an estimate of the charges. You will either agree to the costs or

cancel the request.

The fees do vary somewhat among agencies; however, for example, the USDA currently charges \$0.20 per page for photocopying and \$15 to \$40 per hour for search charges, depending on the complexity of the search. If the total fee does not exceed \$25.00, the USDA will not charge you a fee at all. There may be additional fees for aerial photographs or negatives of pictures. Black and white or color enlargements, slides, microfilm, scans, and audio/videotape reproductions can also be ordered for an additional fee from most administrative agencies. In New York, there is a \$0.25 per page copying fee “or the actual cost of reproducing” the records which may include the hourly salary of the lowest paid employee with the skills necessary to complete the request. See Public Officers Law § 87(1)(b)-(c).

At this time, you may also request a fee waiver. Your fees will only be waived if you can persuade the government that it is within the public interest to disclose the document. Waivers are not granted in cases where an individual livestock producer is not be able to pay the fee—public interest must be argued. If you do not pay your fee, most administrative agencies will begin levying interest charges on an unpaid bill. If affordability is a deterrent for obtaining a FOIA request, as noted above, you should state a maximum fee that you are willing to pay in your original request (*e.g.*, \$100.00 or \$250.00 maximum).

### **Review FOIA Request**

After the agency has received your fees, it will process your request. The agency may send you a written “initial determination” of documents available. FOIA allows for access to all federal agency records except for documents pertaining to sensitive law enforcement and national security matters. The nine exempted FOIA materials are as follows:

1. Classified national defense files;
2. Internal agency rules and practices;
3. Information prohibited under another federal law;
4. Trade secrets and confidential business information;
5. Inter-agency or intra-agency communications;
6. Information involving matters of personal privacy (but may be obtained under the PA);
7. Certain types of information compiled for law enforcement (*e.g.*, documents for an ongoing investigation);

8. Information relating to the supervision of financial institutions; and
9. Geological information on wells.

See also N.Y. Public Officers Law § 87(2) for New York exemptions. For example, a company that you are thinking about negotiating a contract with may have pending prosecution with either the U.S. District Attorney or the Attorney General of the State of New York. In such a case, the government is not required to disclose the information that may affect its case.

After receiving your FOIA/FOIL request from the government, make sure that the government did not withhold something that it should not have or inadvertently omitted requested documentation. The government is required to use a “reasonable effort” when searching for your records. If you feel that you are missing some records, you can write a letter appealing to either the federal or New York agency. Be sure to check the maximum time period for preparing an appeal which varies somewhat among government agencies.

Finally, if you find incorrect information in public records about yourself or your agriculture operation, you should write back to the agency explaining the changes that you are requesting. Should you request for such changes to be made, the agency is required by law to notify you of its receipt of such an amendment, typically within ten days. The federal agency may request further proof before it will make the correction in the public records on you or your farm.