

# Considering the Usefulness of Standard FOIA Provisions in Interagency Agreements

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## Abstract

The Freedom of Information Act (FOIA), 5 U.S.C. §552, is a disclosure statute, which requires federal agencies to disclose information unless such information is covered by one or more of the nine FOIA's exemptions. Each U.S. government agency or component is responsible for responding to requests related to their own data. However, to the extent that the agencies have jointly or collaboratively created information, documents, or data, or shared information under an Interagency Agreement, each agency has an interest in the information disclosed to a requester under the FOIA. While Interagency Agreements commonly include citations of government-wide and department-wide authorities that allow an agency to engage in collaborative activities with another Federal agency, few Interagency Agreement's cite the FOIA. As, perhaps the most pervasive instrument of coordination in the federal government, the Interagency Agreement assigns responsibility for specific tasks, establishes procedures, and binds the agencies to fulfill mutual commitments.<sup>i</sup> A standard provision in Interagency Agreement's concerning the protection of information "to the extent permitted by Federal laws and regulations" may help agencies remain cognizant of the consultation and referral procedures required under the FOIA when agencies receive requests for records that are of interest to another Federal agency. Consultation and referral procedures ensure that agencies are making fully informed and consistent disclosure determinations, in a manner that maximizes efficiency and does not put the requester at a disadvantage.<sup>ii</sup> Additionally, they ensure that FOIA requesters understand how their requests are being handled, and have a point of contact to obtain information about the status of any of the records subject to their requests. This paper discusses the usefulness of the inclusion of standard FOIA language in applicable Interagency Agreements. While our discussion is specific to the Census Bureau, the topic is relevant to other Federal agencies. Finally, this paper provides a recommendation for specific FOIA language in Census Bureau IAA's.

## Introduction

The FOIA provides individuals with a statutory right to submit a written request for access to certain records maintained by the Executive Branch of the Federal government. The Act outlines agency records subject to disclosure and defines mandatory disclosure procedures. Access to records is limited to the extent information is protected from disclosure by one or more of the nine FOIA exemptions or three special law enforcement record exclusions. While each Federal agency is responsible for administering the FOIA, there are times when established coordination mechanisms among agencies are necessary to ensure that the involved agencies disclose information in an accurate and timely manner. The Interagency Agreement (IAA) is a tool that can help facilitate this process. Interagency agreements are labeled and described in various formats, such as data sharing agreements, nondisclosure agreements, memorandums of understanding, and assisted acquisition agreements. IAA's are required to document the sharing of information with other agencies and to assign responsibility for specific tasks, establish procedures, and bind the agencies to fulfill shared commitments.<sup>iii</sup> The Census Bureau, for example, commonly uses agreement formats that support terms and conditions for reimbursable work with federal and nonfederal agencies, data sharing, and joint statistical projects. Since nonfederal agencies are not bound by the FOIA, in this paper we consider the usefulness of FOIA provisions only in those Census Bureau IAA's that document the sharing of information between other federal agencies.

The usefulness of standard FOIA provisions in IAA's is an important topic to consider for several reasons. First, the FOIA requires certain administrative procedures for processing requests, as well as options for enforcing the right of access. In the course of processing records responsive to FOIA requests, federal agencies often locate records which either originated with another agency or which contain information that is of interest to another agency. In these

types of scenarios, an agency will either *refer* the requested records to the originating agency for it to process or *consult* with the other agency that has equity in the document to get its views and recommendations regarding the disclosure of the records. These procedures are intended to maximize efficiency such that the requester is not disadvantaged by the referral or consultation process. Second, FOIA language in IAA's will help ensure that agencies making release determinations regarding shared information are fully informed about the *discloseability* of the content of the documents.

## **The Scope of the Freedom of Information Act**

An understanding of FOIA's scope is essential to understanding the usefulness of standard FOIA provisions in IAA's. Often described as the law that gives "the people the right to know," the FOIA generally allows any person, regardless of citizenship, to make a FOIA request. The FOIA applies to executive branch federal agencies and serves as the foundation for public oversight and transparency of government operations. The scope of the FOIA has been shaped by both historical and constitutional factors. In 2009, President Obama issued the Open Government Directive, that among other things, encourages agencies to err on the side of openness when implementing the FOIA. Under the presumption of openness, FOIA professionals routinely make assessments of harm before the release of agency records. Each year, federal agencies release information in response to hundreds of thousands of FOIA requests that contribute to the understanding of government actions.<sup>iv</sup>

While all federal agency records are subject to the FOIA, the FOIA does not require agencies to release all documents that are subject to FOIA requests. Agencies may withhold information pursuant to nine exemptions and three exclusions contained in 5 U.S.C. §552. The nine exemptions are as follows:

- (b)(1) Classified documents;
- (b)(2) Information relating solely to agency internal personnel rules and practices;
- (b)(3) Information exempt under other laws:
  - a. Requires that the data be withheld from the public in such a manner as to leave no discretion on the issue; or
  - b. Establishes particular criteria for withholding information or refers to particular types of matters to be withheld.
- (b)(4) Trade secrets and confidential business information;
- (b)(5) Privileged interagency or intra-agency memoranda or letters that would not be available by law except to an agency in litigation;
- (b)(6) Personal information affecting an individual's privacy;
- (b)(7) Records or information compiled for law enforcement purposes;
- (b)(8) Records of financial institutions; and
- (b)(9) Geological and geophysical information and data.

The three exclusions include:

- (c)(1) Subject of a criminal investigation or proceeding is unaware of the existence of records concerning the pending investigation or proceeding and disclosure of such records would interfere with the investigation or proceeding.
- (c)(2) Informant records maintained by a criminal law enforcement agency and the individual's status as an informant is not known.
- (c)(3) Existence of FBI foreign intelligence, counterintelligence or international terrorism records are classified fact.<sup>v</sup>

Each Federal agency is responsible for processing their own FOIA requests, specifically making disclosure determinations based on the exemptions and exclusions. However, at times, records responsive to a FOIA request contain information of interest to another agency. In such instances, determining the *disclosability* of the material becomes a coordinated effort with agencies making referrals or consulting each other.

## **Referrals and Consultations**

OIP set forth guidance for assisting Federal agencies in making determinations for either referring or consulting with another agency in response to requests for information.<sup>vi</sup> On one hand, referrals normally involve records that originated with a Federal agency other than the one receiving the request for information. The FOIA must also apply to the referred agency or the records cannot be referred to that entity.

On the other hand, consultations entail documents originating with the Federal agency that received a request for information, but another Federal agency may have interest in the requested material, as well. Unlike with referrals, consultations are appropriate in situations where the FOIA does not apply to the recipient entity. FOIA permits “consultation with another agency having a substantial interest in the determination of the request.”<sup>vii</sup> For example, Courts have concluded that agency records that are held by consultants as part of the deliberative process, the document is an interagency memorandum.<sup>viii</sup> While the Federal agency must make the final disclosure determinations in the aforementioned cases, it may take into account feedback from the non-Federal entities, as appropriate, when making its release decisions.

Another distinction between referrals and consultations is that the former offer the opportunity for the agency with equity or interest in requested material to review the information, as well as to generally provide a direct release determination, while with the latter, the Federal agency that received the request for information provides the response after it receives all input. In other words, choosing a referral would mean that “the advantages that would be secured by delegating all responsibility for reviewing the document rather than engaging in ‘consultation’ must then be balanced against any inconvenience to the requester caused by the referral.”<sup>ix</sup> The basis for referrals is also founded in case law, because the FOIA does not mention the need to refer records, rather it explicitly mentions the need to consult, with another Federal agency in cases where that agency may have equity or interest in information, which may be responsive to a request made under the FOIA.<sup>x</sup>

Incorporating portions of the OIP guidance for referrals and consultations, along with other standard FOIA language into IAA’s, not only protects the interests of all parties that may have equity in potentially responsive material and ensures that proper disclosure determinations are made, it also establishes best business practices for the handling of the information.

### **Response Time and Consultations**

Since referrals are most often sent to other Federal agencies for direct response to the information requester, response times for referrals are not discussed in this paper. However, due consideration should be given to the ways in which consultations may affect the response time of FOIA requests. In particular, when a Federal agency consults with another agency, the consulted agency should be mindful of the need for the recipient agency to respond to a request for information within the statutory time limits enumerated in the FOIA. As such, the consulted agency should provide a timely response, especially since the request for information should not be placed on hold by the recipient agency, which means the processing clock keeps running. However, agencies may extend the 20-workday time limit for 10 more workdays when “unusual circumstances” exist. The need to consult with another agency or two or more agency components who have a substantial interest in the responsive information qualifies for this time extension. The Government Accountability Office (GAO) figure below provides a basic overview of the FOIA process from receipt of a request through the release of records to the requester.



Source: GAO analysis of agency information. | GAO-15-02

### Interagency Agreements in Relation to the Freedom of Information Act

Interagency agreements between the Census Bureau and other Federal agencies are executed in accordance with applicable Federal regulations and legal and fiscal requirements, program statutes and regulations, and applicable Department of Commerce directives. Congressional authority for entering into interagency agreements is authorized by the Economy Act (31 U.S.C. §1535, 1536). The Economy Act permits Federal agencies to purchase goods or services from other Federal agencies, if the good or service is available, the purchase is in the best interest of the Governments, the goods or services cannot be provided more cheaply or conveniently by the private sector, and the supplying agency is able to provide the good or service itself or by contract.

Although agreements commonly contain government-wide authorities such as the Economy Act, there are many other statutes that provide authority for interagency agreements. For example, the 2011 Department of Commerce Agreement Handbook identifies the Intergovernmental Cooperation Act, 31 U.S.C. §§6501-6508 and department-wide authorities such as Special Studies Authority, 15 U.S.C. §1525 (first paragraph), and Joint Project Authority, 15 U.S.C. §1525 (second paragraph). Moreover, statutory requirements, administrative regulations, policies, and procedures applicable to the work to be conducted under the interagency agreement, for example, the FOIA, are to be considered “optional agreement provisions.”

We contend that FOIA language in applicable IAA’s should be a standard provision, especially in those IAA’s that involve the sharing of statistical records. Informed and consistent disclosure determinations are important because the FOIA specifies the conditions under which the disclosure of federal agency records, including statistical records, may be compelled.<sup>xi</sup> Statistical records maintained by federal agencies, even those developed by private parties, are subject to disclosure under the FOIA if not otherwise exempt.<sup>xii</sup> While it is the policy of the Census Bureau to make records available to the public to the greatest extent possible, in keeping with the spirit of the FOIA, open government, and transparency, the Census Bureau denies FOIA requests in whole or in part if the information may be withheld under one or more of the nine exemptions described above.

Of interest to the statistical community, are exemptions (b)(3), (b)(4), and (b)(6) described above. For example, Census Bureau information that is protected by Title 13, United States Code, Section 9, requires that census records be used solely for statistical purposes and also makes such records confidential. Furthermore, the Supreme Court ruled, “raw Census data reported by or on behalf of individuals [including address lists],” are protected under the confidentiality provisions of the Census Act, 13 U.S.C. §§ 8 and 9, and therefore, are not disclosable under the Freedom of Information Act, as well as civil discovery. *Baldrige v. Shapiro*, 455 U.S. 345, 361-362 (1982). Accordingly, exemption (b)(3) of the FOIA exempts from disclosure records or portions of records that are made confidential by statute. It should be noted that although statistical records maintained by the Census Bureau may be protected pursuant to Title 13 and therefore exempted from disclosure under exemption (b)(3), FOIA staff are still obligated to conduct a search for records responsive to a request, as well as make the appropriate disclosure determinations. This important distinction further supports the suggestion that the inclusion of FOIA language in

applicable Census Bureau IAA's should be standard practice, because it can serve to remind the other federal agency of the need for consultation so fully informed and consistent disclosure determinations can be made and, to ensure that records protected by statute are not disclosed.

Statistical information with commercial or financial value may be withheld under exemption (b)(4) of the FOIA, which extends protection to "trade secrets and to information which is commercial or financial, obtained from a person, and privileged or confidential" (Title 5 U.S.C. § 552(b)(4)). Such records need not be individually identifiable and may include records of organizations.<sup>xiii</sup> Exemption (b)(6) of the FOIA may be applicable for responsive records if such records will yield sensitive information about individual research participants (Title 5 U.S.C. § 552(b)(6)). This exemption is intended to protect sensitive information identifiable to an individual, including research and statistical information, from unwarranted disclosure.<sup>xiv</sup> This can be done by identifying the level of sensitivity of information involved and emphasizing the harm of disclosing the information. Moreover, if the court determines that disclosure of identifiable agency records "can reasonably be expected to invade [a] citizen's privacy," disclosure will not be ordered.<sup>xv</sup>

Varying statutes, regulatory, or policy protections governing the specific agency maintaining the information supports our premise that standard FOIA language into IAA's is beneficial to all parties that may have equity in potentially responsive material and ensures that proper disclosure determinations are made. Subsequently, the coordinated response of agencies in making disclosure determinations on shared information ensures that requests receive efficient and transparent handling, consistent with federal statutes. Conclusion

In this paper, we have discussed how the use of standard FOIA language in applicable IAA's will be beneficial in processing FOIA requests for shared information documented in the IAA. The strength of the IAA is that it can be used as a tool to reinforce timely and conscientious processing of requests. The conceptual purpose of this paper has been twofold: First, this paper has underscored the need to maximize efficiency such that the requester is not disadvantaged by the consultation process<sup>xvi</sup>. Second, the paper has aimed to focus attention on the shared responsibility of agencies to respond to FOIA requests that contain information of interest to both agencies, which we contend protects the interests of all parties that may have equity in potentially responsive material and ensures that proper disclosure determinations are made, it also establishes best business practices for the handling of the information.

## Recommendation

We suggest that the inclusion of FOIA language in applicable Census Bureau IAA's should be standard practice because it not only reminds the other federal agency of the need for consultation to make fully informed and consistent disclosure determinations, it can facilitate the timely processing of requests for information that involves two or more agencies. We recommend the following language:

"The Parties will share information consistent with applicable statutes and regulations. The Parties recognize that information exchanged that contains any of the following types of information must be protected from unauthorized use and disclosure: (1) confidential commercial information, such as the information that would be protected from public disclosure pursuant to Exemption 4 of the Freedom of Information Act (FOIA); (2) personal privacy information, such as the information that would be protected from public disclosure pursuant to Exemption 6 or 7(C) of the FOIA; or (3) information that is otherwise protected from public disclosure by Federal statutes and their implementing regulations (e.g., Title 13 (USC § 8(b) and 9), 5 USC §552(b)(3), Title 13 (USC § 301(g)), the Privacy Act (5 USC S52a)), and other Freedom of Information Act exemptions not mentioned above. If an agency in receipt of information under this IAA receives a FOIA request for confidential and other non-public information, it will refer the request to the agency where the information originated for the latter agency to respond directly to the requester regarding the *releaseability* of the information at issue. In such cases, the agency making the referral will notify the requester that a referral has been made and that a response will be issued directly from the other agency."

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<sup>i</sup> Freeman, Jody and Rossi, Jim, Agency Coordination in Shared Regulatory Space (March 4, 2011). Harvard Law Review, Vol. 125, 2012; FSU College of Law, Public Law Research Paper, No. 486. Available at SSRN: <http://ssrn.com/abstract=1778363> or <http://dx.doi.org/10.2139/ssrn.1778363>

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- <sup>ii</sup> (Department of Justice, Office of Information Policy Guidance (OIP))
- <sup>iii</sup> Freeman, Jody and Rossi, Jim, Agency Coordination in Shared Regulatory Space (March 4, 2011). Harvard Law Review, Vol. 125, 2012; FSU College of Law, Public Law Research Paper, No. 486. Available at SSRN: <http://ssrn.com/abstract=1778363> or <http://dx.doi.org/10.2139/ssrn.1778363>
- <sup>iv</sup> GAO Report, November 2014.
- <sup>v</sup> 5 U.S.C. §552
- <sup>vi</sup> See DOJ, OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records when Another Agency or Entity Has an Interest in Them (2011).
- <sup>vii</sup> 5 U.S.C. § 552(a)(6)(B)(iii)(III)
- <sup>viii</sup> Sea Crest Constr Corp. v Stubing (1981, 2d Dept) 82 App Div 2d 546, 442 NYS2d 130.
- <sup>ix</sup> McGehee, 697 F.2d at 1111 n. 71.
- <sup>x</sup> See Sussman v. U.S. Marshals Service.
- <sup>xi</sup> Private lives and public policies: Confidentiality and accessibility of government statistics: Edited by George T. Duncan, Thomas B. Jabine, and Virginia A. de Wolf. Washington, DC: National Academy Press, 1993. 274 p. ISBN 0-309-04743-9.
- <sup>xii</sup> Ibid, See St. Paul's Benevolent Educational and Missionary Institute v. U.S., 506 F. Supp. 822 (N. D. Ga. 1980).
- <sup>xiii</sup> Private lives and public policies: Confidentiality and accessibility of government statistics : Edited by George T. Duncan, Thomas B. Jabine, and Virginia A. de Wolf. Washington, DC: National Academy Press, 1993. 274 p. ISBN 0-309-04743-9.
- <sup>xiv</sup> Ibid
- <sup>xv</sup> Ibid, See (see D.O.J. v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989); New York Times Co. v. N.A.S.A., 920 F.2d 1002 (D.C. Cir. 1990) (en banc)).
- <sup>xvi</sup> As earlier noted, referrals aren't included here since they do not affect response times as do consultations.