

**Freedom of
Information Act
— Best Practices —**

Responding to FOIA Requests: Facts and Resources

Introduction

The use of animal models in biomedical research is a highly regulated activity and records detailing the use of animals are often submitted to federal agencies and state public bodies. Animal Care and Use Programs (ACUP) should always be in full compliance with relevant laws and regulations. Those responsible for managing the ACUP should also realize that records in the possession of a federal agency or state public body are subject to the federal Freedom of Information Act (FOIA) or state open records laws.

Open records laws embody the principle that an open government and informed citizenry are vital to the functioning of a democratic society and are needed to check against corruption and to hold the government accountable. However, these laws also recognize that disclosure of certain information may conflict with fundamental societal values, such as personal privacy. Therefore all open records laws contain exemptions to protect some sensitive information.

The federal FOIA governs requests made to federal agencies such as the NIH, the Department of Agriculture, and the Department of Veterans Affairs. The federal FOIA does not govern access to records held by state or local government agencies, or entities deemed by state law to be governmental bodies. All states have their own open records laws governing public access to state and local government records. Many of the state laws are generally patterned after the federal FOIA, but they vary by state and often contain important differences. Under these laws, public universities are considered state governmental bodies and are therefore subject to state open record requests.

With the goal of ending responsible use of animals in research, animal rights activists are increasingly using public information requests under the federal FOIA and state open records laws to target institutions. That information has been used to issue misleading press releases, request investigations, and ultimately ask for enforcement actions against research facilities for alleged noncompliance with animal welfare laws. More recently that information has been used to call for an end to specific research programs at several federal agencies and public institutions.

Institutions should understand these laws well and fully comply with open records laws when requests are received.

This document provides information about FOIA responsibilities and suggestions to assist institutions when responding to open records requests.

Records Governed by the Federal FOIA and State Open Records Laws

Federal FOIA means the federal Freedom of Information Act. The federal FOIA governs access to records in the possession of federal agencies such as the NIH, the Department of Agriculture, the Department of Veterans Affairs, etc.

State open records laws are state statutes that govern access to records in the possession of state and local governments and other state public bodies, such as public universities. State open records laws vary by state and have various names including: Sunshine Laws, Freedom of Information Laws, Public Records Laws and Open Records laws. To avoid confusion we will refer to all of these laws as open records laws.

1. Those individuals within the ACUP who are responsible for record keeping, should be aware of the proper institutional procedures for responding to state open records requests and federal FOIA requests.
2. A point person within the institution should be identified who will be responsible for state open records requests and federal FOIA requests to ensure the system facilitates an orderly response.
3. Understand which records are subject to disclosure.
4. Be aware of commonly requested documents.
5. Understand how animal rights activists target institutions.
6. Do not post the personal information in the public domain.
7. Always be in full compliance with relevant laws and regulations, but do not provide extraneous information that is not required by law; extraneous information may be taken out of context and used by animal rights activists to target you.
8. Accurately estimate the costs of complying with a state open records request.
9. Review all exemptions to determine whether sensitive information falls within the protection of an exemption.
10. Apply institutional document retention policies and keep all records required by law or otherwise necessary for business, research or operational purposes.

Facts and Resources

1. **Those responsible for the management of the ACUP should be aware of the proper institutional procedures for responding to state open records requests and federal FOIA requests.**
2. **Identify a person within the ACUP management structure to work with the institutional point person.**
3. **Identify a point person within the institution who will be responsible for state open records and federal FOIA requests to ensure the system facilitates an orderly response.**

The designated point person should be familiar with the sensitive nature of animal research documents and have a full understanding of both the federal FOIA and state open records laws. Depending on the administrative structure of the institution, the point person may be someone within the office of the university counsel, the vice president of research or the compliance office.

Institutions should establish separate procedures for responding to requests from federal agencies seeking information in response to federal FOIA requests and individuals and organizations requesting information under the state open records laws.

Federal FOIA	Requests under the federal FOIA are submitted directly to federal agencies, such as the NIH or the USDA. If a federal agency receives a request which involves information that may be confidential, the agency will contact the institution, and the agency will give the institution a short period of time to object to disclosure. For example, the NIH allows five working days. <i>See</i> 45 C.F.R. §5.65; Executive Order 12,600.
State Open Records Requests	Requests under state open record laws may be submitted to the IACUC office or to the office responsible for managing the animal resources. Such requests should be immediately sent to the institutional point person. Likewise, the point person, when receiving a request from an animal rights activist or group, should immediately notify the unit whose records are being requested.

4. **Understand which records are subject to disclosure.** Any information in a federal agency’s possession at the time a request is made must be disclosed under the federal FOIA, unless part or all of the information falls within one of nine limited statutory exemptions. Many state open records laws are modeled after the federal FOIA. However, there may be important differences based on the state law and court interpretations of the state law. For example, IACUC minutes are subject to open records requests in some states but not in others (some state courts have held that IACUCs are public bodies while others have held that they are not).¹ Several states also have adopted statutory exemptions that permit the names, addresses and phone numbers of researchers to be redacted.² All differences should be fully understood by the designated point person and the institution’s legal counsel.
5. **Always be in full compliance with relevant laws and regulations, but do not provide extraneous information that is not required by law; extraneous information may be taken out of context and used by animal rights activists to target you.**

For example,

- Rats, mice and birds are not covered by the Animal Welfare Act and do not need to be included in USDA Annual Reports.
- Privately owned animals taking part in clinical trials do not need to be included in USDA Annual Reports.

When submitting noncompliance reports to OLAW, review the reports to ensure they include only required information. The following suggestions may help ensure only required information is reported:

- Describe the noncompliance in terms that are accurate and sufficient, without going beyond what is required by law.⁶
- Contact university counsel for assistance in writing noncompliance reports.

- Ensure only the required individuals are included in noncompliance reports. OLAW requires the grant number and category of personnel involved (e.g., principal or co-principal investigator, technician, animal caretaker, student, veterinarian, etc.) be included but does not require names.⁷
- Review your institution’s PHS assurance to determine what information must be reported. There may be different requirements for non PHS-funded research.

6. Be aware of commonly requested documents. These include:

NIH	USDA	Universities
<ul style="list-style-type: none"> * Grant applications * Progress reports * OLAW investigations * PHS animal welfare assurances * Noncompliance complaints * Administrative actions³ * Correspondence between the NIH and a particular university or investigator (including emails). <p>All of these items must generally be released; however, some information may be redacted (redacted information may include: Social Security numbers, names of researchers other than the PI, percent of effort, references to unpublished articles, etc. See full list of federal FOIA exemptions on pg. 6).⁴</p>	<ul style="list-style-type: none"> * Inspection reports <ul style="list-style-type: none"> • Including photographs or videos * Teachable Moments * Investigations * Annual reports * Registration applications * Correspondence between the USDA and the institution (including emails). <p>All of these items must generally be released; however, some information may be redacted (redacted information may include: names of individuals, proprietary information on attachments). Results of investigations are generally only released once the investigation is complete.</p>	<ul style="list-style-type: none"> * Research protocols * Noncompliance complaints * IACUC minutes * IACUC notes * IACUC investigations * Sick/dead animal reports * Photographic and video records of research * Correspondence between the university and a federal agency (including emails), usually regarding a specific grant. <p>The disclosure of these items differs between states, depending on state open records laws and court decisions interpreting state laws. For example, IACUC minutes are subject to open records requests in some states but not in others.⁵</p>

7. Accurately estimate the costs of complying with a state open records request. Institutions should establish a policy that captures the actual costs of complying with records requests and enforce it. This policy should include the cost of searching, reviewing, mailing, and duplicating the records sought. For example, in accordance with federal FOIA regulations, the NIH charges FOIA requestors 10 cents per page for duplication, and search time is charged at the hourly rate of the searcher (first 2 hours of search time and the first 100 pages of duplication are free).⁸ If estimated costs exceed a certain amount, it should also be appropriate to request advance payment of fees before responding to a FOIA or open records request. Review your state open records statute to determine the appropriate charges.

8. Review all exemptions to determine whether sensitive information falls within the protection of an exemption. The federal FOIA and most state open records laws contain limited statutory exemptions designed to protect sensitive information. Additionally, some state courts have held that certain information is protected from disclosure based on state common law even if no statutory exemption exists in the state open records laws.⁹ When responding to a state open records request, review all relevant exemptions to identify the information that is legally protected by an exemption. For more information about exemptions under state open records laws, review your state’s open records law. See below for more information about exemptions in the federal FOIA.

Federal FOIA Exemptions

The federal FOIA contains nine exemptions designed to protect sensitive information from disclosure. Exemptions 4, 6 and 7 are the most commonly used exemptions to protect research information.

Exemption 1 of the federal FOIA protects records which are specifically authorized under criteria established by an Executive Order to be kept secret in interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order.

Exemption 2 of the federal FOIA protects records related solely to the internal personnel rules and practices of the agency.

Exemption 3 of the Federal FOIA protects records specifically exempted from disclosure by statute, provided that such statute: a. Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issues; or b. Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Exemption 4 of the federal FOIA protects confidential business information from disclosure. This includes trade secrets and commercial or financial information that are confidential. When submitting confidential information to a federal agency, follow the established procedures to ensure the confidential information is clearly identified.

A trade secret is information relating to the production process, including production data, formulas, and processes, and quality control tests and data, as well as research methodology and data generated in the development of the production process. Such information must be (1) commercially valuable, (2) used in one's business and (3) maintained in secrecy.

Commercial or financial information may be deemed confidential if review establishes that the applicant faces active competition in the area to which the information relates and that substantial competitive harm would result from disclosure. Information such as safety data, efficacy or potency data, and environmental data may be such confidential information.

Exemption 5 of the federal FOIA protects interagency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency.

Exemption 6 of the federal FOIA protects information involving matters of personal privacy. This exemption permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." Information such as home addresses and social security numbers may be redacted under Exemption 6.

Federal FOIA Exemptions (cont.)

Exemption 7 of the federal FOIA protects records compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records:

- a. Could reasonably be expected to interfere with enforcement proceedings;
- b. Would deprive a person of a right to a fair trial or an impartial adjudication;
- c. Could reasonably be expected to constitute an unwarranted invasion of personal privacy;
- d. Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished records on a confidential basis;
- e. Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
- f. Could reasonably be expected to endanger the life or physical safety of any individual.

Under this exemption the results of investigations are generally only released once the investigation is complete and information such as home addresses and social security numbers may be redacted from such records.

Exemption 8 of the federal FOIA protects records that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

Exemption 9 of the federal FOIA protects geological and geophysical information and data, including maps, concerning wells.

- 9. Apply institutional document retention policies and keep all records required by law or otherwise necessary for business, research or operational purposes.** For example, under federal law, financial records, supporting documents, statistical records, and all other records pertinent to a grant award are required to be retained by the grant recipient for a period of three years.¹⁰ The three-year period begins from the date of the submission of the final expenditure report, or for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report. After this period, documents generally do not need to be retained unless retention is required by state law.

DISCLAIMER:

This document is intended to provide general information about the federal Freedom of Information Act and state open records laws. It does not provide legal advice, nor is the information it provides a substitute for legal advice. You should contact an attorney for legal advice and other legal services.

NOTES:

- ¹ Compare Medlock et al. v. Board of Trustees of the University of Massachusetts et al., 31 Mass. App. Ct. 495 (Mass. App. Ct. 1991) (held that open meeting law did not apply to animal care and use committees of university); American Society for the Prevention of Cruelty to Animals, et al., v. Board of Trustees of the State University of New York, et al., 184 A.D.2d 508 (N.Y.A.D. 1992) (held that university's laboratory animal users' committee was not an "agency" subject to Freedom of Information Law); Animal Connection Of Texas v. University of Texas Southwestern Medical Center at Dallas, 2002 WL 1397427 (Tex. App. Dallas, 2002) (held that state IACUC was a "medical committee" under Health and Safety Code and therefore was exempt from Open Meetings Act); Students for Animals v. The Rector and Board of Visitors of The University of Virginia, and Animal Care Committee, etc., 12 Va. Cir. 247 (Va. Cir. Ct. 1988) (held that IACUC did not meet the definition of an "organization" and was therefore not subject to state Open Records law); with Students for the Ethical Treatment of Animals v. Chairman of UNC Chapel Hill IACUC et al., 101 N.C. App. 292 (N.C. App. 1991) (held that the IACUC is a public body subject to North Carolina Public Records laws).
- ² See U.C.A. 1953 § 63G-2-305(52) (exempts the "the name, home address, work addresses, and telephone numbers of an individual that is engaged in, or that provides goods or services for, medical or scientific research"); and O.R.S. § 192.501(30) (exempts the "name home address, professional address or location of a person that is engaged in, or provides services for, medical research at the Oregon Health and Science University that is conducted using animals other than rodents").
- ³ People for the Ethical Treatment of Animals (PETA) routinely files complaints with the NIH, USDA and Universities. Several months after filing the complaint, PETA often submits a FOIA request asking for any administrative actions, such as grant repayment requests, compliance oversight evaluations, investigations, etc., that were taken in response to its complaint.
- ⁴ These items are generally withheld under FOIA Exemptions 4 and 6.
- ⁵ See *supra* note 1.
- ⁶ For reporting requirements, see Office of Laboratory Animal Welfare (OLAW), Office of Extramural Research, Guidance on Prompt Reporting to OLAW under the PHS Policy on Humane Care and Use of Laboratory Animals, Notice Number NOT-OD-05-034, available at: <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-05-034.html>
- ⁷ *Id.*
- ⁸ 45 C.F.R. §§5.41-5.45.
- ⁹ See Carlson v. Prima County, 141 Ariz. 487 (1984) (held that "the common law limitations to open disclosure ... are based on the conflict between the public's right to openness in government, and important public policy considerations relating to protection of either the confidentiality of information, privacy of persons or a concern about disclosure detrimental to the best interests of the state").
- ¹⁰ Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, And Other Non- Profit Organizations, OMB Circular A-110, as amended.



National Association for Biomedical Research
1100 Vermont Ave, N.W. Suite 1100
Washington, D.C. 20005
(202) 857-0540
www.nabr.org
