Department of the Interior
Departmental Manual

Freedom of Information Act Handbook
(383 DM 15)

Effective Date: 4/22/04
Chapter 1: General

Originating Office: Office of the Chief Information Officer

1.1 Purpose. This Departmental Manual Handbook, authorized in 383 DM 15 provides policy and general guidance for administering and implementing the Freedom of Information Act (FOIA) in the Department of the Interior (DOI). The Handbook is to be used in conjunction with:

A. The Freedom of Information Act, 5 U.S.C. 552;

B. DOI's FOIA regulations, 43 CFR Part 2, Subparts A through E (see Appendix A to this Handbook);

C. The Privacy Act, 5 U.S.C. 552a;

D. DOI's Privacy Act regulations, 43 CFR Part 2, Subpart G;

E. The Departmental Manual, 383 DM 1-13, Privacy Act of 1974;

F. The Department of Justice (DOJ) FOIA Updates/FOIA Post;

G. The most recently issued DOJ FOIA Guide and Privacy Act Overview and Case List; and

H. Office of the Chief Information Officer/Information Resource Management bulletins or other directives (e.g., IRM Bulletin No. 96-04).

As the Handbook's purpose is to provide internal guidance, it is subject to the requirements of the FOIA and the Department's FOIA regulations. In the event that there are any inconsistencies between this Handbook and the Department's FOIA regulations, the FOIA regulations will prevail.

1.2 Policy. It is the Department's policy to make records available to the public consistent with the letter and spirit of the FOIA and the Privacy Act. The Department will furnish

nonexempt records promptly to any member of the public upon written request and in compliance with the fee structure specified in Chapter 4. Bureaus and offices are expected to comply fully with the policies and procedures in this Handbook.

1.3 Applicability.

A. The policy and procedures set forth in this Handbook apply to all bureaus and offices of the Department, including the Office of the Secretary. They cover all records that are in the possession and control of the Department that come within the scope of the FOIA (5 U.S.C. 552). See Paragraph 3.24 of Chapter 3 concerning the applicability of the FOIA to certain Federal grant documents.

B. The procedures do not apply to:

(1) Records published in the Federal Register (see 43 CFR 2.4(b)).

(2) Records that fall under the two law enforcement exclusions available to DOI (there is a third record exclusion which is not applicable to DOI):

(a) Records or information compiled for law enforcement purposes and covered by the disclosure exemption described in paragraph 5.9 of Chapter 5 if--

(i) The investigation or proceeding involves a possible violation of criminal law, and

(ii) There is reason to believe that--

(A) The subject of the investigation or proceeding is not aware of its pendency, and

(B) Disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings.

(b) Informant records maintained by a criminal law enforcement component of the Department under an informant's name or personal identifier, if requested by a third party according to the informant's name or personal identifier unless the informant's status as an informant has been officially confirmed.

1.4 Authorities.

A. The Freedom of Information Act, as amended, 5 U.S.C. 552.

B. The Electronic FOIA Amendments of 1996, P.L. No. 104-231.

C. Executive Order 12,600 of June 23, 1987, Predisclosure Notification Procedures for Confidential Commercial Information.

D. The Privacy Act of 1974, as amended, 5 U.S.C. 552a.

E. 43 CFR Part 2, Records and Testimony: Freedom of Information Act, 43 CFR Part 2, Subparts A through E.

F. The Departmental Manual, 383 DM 15, Freedom of Information Act.

G. The Departmental Manual, 383 DM 1-13, Privacy Act of 1974.

1.5 Definitions.

A. Act and FOIA mean the Freedom of Information Act, 5 U.S.C. 552, as amended.

B. Action office means the office that is responsible for preparing the response to a FOIA request.

C. Agency means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Federal Government, or any independent regulatory agency.

D. Agency record means any documentary material that is (1) either created or obtained by an agency in the transaction of agency business and (2) under agency control.

(1) Agency records include:

(a) Books, papers, maps, charts, plats, plans, architectural drawings, photographs, and microfilm;

(b) Machine-readable materials such as magnetic tape and disks;

(c) Electronic records (including e-mail messages);

(d) Audiovisual material such as still pictures, sound and video recordings; and

(e) All other documentary materials, regardless of physical form, format or characteristics.

(2) This definition generally does not cover records of an individual that are:

(a) Created and maintained primarily for an individual's convenience;

(b) Not subject to agency creation or retention requirements;

(c) Not distributed to other agency employees for their official use; and

(d) Not integrated into the agency's official file system.

(3) Records of contracting and compacting tribes under the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended, generally are not subject to the FOIA. They also are not subject to the Privacy Act.

E. Appeal means a written challenge by a FOIA requester to the sufficiency of the FOIA response (this includes fax and e-mail) when permissible such as when--

(1) Records or parts of records have been withheld;

(2) The bureau informs the requester that he/she has not adequately described the records sought, or that it does not possess responsive records, and the requester has reason to believe that the bureau does or questions the adequacy of the bureau's search;

(3) The bureau did not address all aspects of the request for records;

(4) A fee waiver has been denied;

(5) A request for expedited processing has been denied or not responded to on time;

(6) A decision has not been made on a request within the time limits provided in paragraph 3.2 of Chapter 3; or

(7) The requester believes there is a procedural deficiency (e.g., fees are improperly calculated).

F. Bureau means any major component of the Department administering its own FOIA program. A list of these components is contained in Appendix A of DOI's FOIA regulations (43 CFR Part 2).

G. Commercial or financial information should be given their ordinary meanings when assessing whether information qualifies for protection under exemption 4. Further, records are commercial so long as the submitter has a commercial interest in them. See paragraph 5.6 of Chapter 5.

H. Commercial-use request means a request from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester

falls into this category, the bureau will consider the identity of the requester and intended use of the records in addition to any other available information about the requester.

I. Direct costs mean those expenses that a bureau actually incurs to provide special services in searching for and duplicating (and in the case of commercial-use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary and benefits of the employee performing the work and the cost of operating duplicating equipment, as well as the unusual costs attributed to performing special services. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept. Calculating direct costs is necessary only for special services as direct costs are already factored into the charges established for duplication, and search and review costs.

J. Duplication means making a copy of a record, or the information contained in it, to respond to a FOIA request. Copies can take the form of paper, microform, photographs, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others.

K. Educational institution means a preschool, a public or private elementary or secondary school, or an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, which operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

L. Expedited processing means giving a FOIA request priority, and processing it ahead of other non-expedited requests pending in the bureau because a requester has shown an exceptional need or urgency for the records.

M. FOIA request means a written request (this includes fax and e-mail) made by any member of the public for Federal agency records.

N. Free-lance journalist means a representative of the news media who is able to demonstrate a solid basis for expecting publication through a news organization, even though not actually employed by it. A publication contract or past record of publication, or evidence of a specific free-lance assignment from a news organization may indicate a solid basis for expecting publication.

O. Frequently requested documents means documents that have been requested at least three times under the FOIA. It also includes documents the agency anticipates would likely be the subject of three or more requests.

P. Initial denial means the first letter sent to the requester denying either part or all of the initial request for a record, a fee waiver, or expedited processing.

Q. Multitrack processing means placing simple requests, requiring relatively

minimal efforts to respond, in one processing track and more voluminous and complex requests in one or more other tracks. Requests in each track are processed on a first-in/first-out basis.

R. Noncommercial scientific institution means an institution that is not operated for commerce, trade or profit, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

S. Perfected request means a FOIA request for records which adequately describes the records sought, which has been received by the FOIA office of the agency or agency component in possession of the records, and for which there is no remaining question about the payment of applicable fees.

T. Privacy Act request means a written request (paper copy with an original signature) made by an individual for information about himself or herself that is contained in a Privacy Act system of records. The Privacy Act applies only to U.S. citizens and aliens lawfully admitted for permanent residence. Therefore, only those individuals may make Privacy Act requests.

U. Privacy Act system of records means a grouping of records about individuals under the control of a Federal agency from which information is retrieved by the name of the individual or by some identifying particular assigned to the individual.

V. Published research findings means research findings that are either:

(1) Published in a peer-reviewed scientific or technical journal; or

(2) Publicly and officially cited by a Federal agency in support of an agency action that has the force and effect of law.

W. Reading room materials means records (paper or electronic) that are required to be made available to the public under 5 U.S.C. 552(a)(2), as well as other records that a bureau, at its discretion, makes available to the public for inspection and copying without requiring the filing of a FOIA request.

X. Representative of the news media means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that is (or would be) of current interest to the public. Examples of news media entities include, but are not limited to, newspapers, television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. To be in this category, a requester must not be seeking the requested records for a commercial use. Further, a bureau

normally will not consider requests for records involving news dissemination to be commercial-use requests.

Y. Requester means any individual who has asked in writing to see or receive a copy of an agency record.

Z. Research data means the recorded factual material commonly accepted in the scientific community as necessary to validate research findings, but not such things as trade secrets, commercial information, personnel and medical information and any similar information, which is protected under law.

AA. Responsible official means the person in the action office who is charged with preparing the response to the initial request.

BB. Review means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. It also includes the deletion of exempt material or other processing necessary to prepare the record(s) for disclosure, including routine consultation among bureau staff and attorneys regarding the applicability of exemptions; and time spent considering any formal objection to disclosure made by a submitter under 43 CFR 2.23(f).

CC. Search means the process of looking for and retrieving agency records and information responsive to a request (manually or by automated means).

DD. Submitter means any person or entity outside the Federal Government from whom the Department directly or indirectly obtains commercial or financial information. The term includes, but is not limited to individuals, corporations, and state, local, tribal, and foreign governments. This term does not include the Federal Government.

EE. Workday means a regular Federal workday. It does not include Saturdays, Sundays, or Federal legal holidays.

1.6 Responsibilities.

A. Departmental.

(1) The Chief Information Officer (CIO) is delegated authority for administering the FOIA and related laws in the Department. The CIO is also assigned appellate authority for deciding appeals after obtaining advice, in certain instances, from the Office of the Solicitor (see 210 DM 18.1H).

(2) The Departmental FOIA Officer, located in the Information Management Division (IMD), OCIO, has overall responsibility for developing and administering the FOIA Program in DOI. This includes developing regulations, guidelines, procedures, and standards for the Department's FOIA program; providing program oversight, technical assistance, and training

to employees to ensure compliance with the Act; and preparing the Department's annual report to the Department of Justice/Congress. The Departmental FOIA Officer, along with the Department's FOIA Appeals Officer, has primary responsibility for developing and conducting FOIA training for DOI.

(3) The Department's FOIA Appeals Officer, also located in IMD, is responsible for administering the FOIA Appeals Program in DOI. This includes making decisions on appeals; developing guidelines, procedures, and standards for the Department's FOIA Appeals Program; providing program oversight, technical assistance and training to employees to ensure compliance with the Act; and maintaining the information prescribed under 43 CFR 2.30.

(4) The Office of the Secretary (OS) FOIA Officer, located in the National Business Center (NBC), is responsible for tracking and managing Departmental FOIA requests and coordinating sensitive requests involving multiple bureaus and offices, as well as administering and providing program oversight for the OS FOIA program.

(5) The FOIA Officers for the bureaus, the Office of Inspector General, and the Office of the Solicitor (SOL) are responsible for administering their own FOIA programs, including developing policies and procedures consistent with Departmental guidance (see paragraph 1.6B, below).

(6) SOL is responsible for making legal interpretations of the Act and providing guidance to bureaus and offices. The SOL provides legal reviews of FOIA determinations and appeals, as necessary, and assists in developing the FOIA regulations. Along with the Departmental FOIA Officer and the FOIA Appeals Officer, SOL assists in training Departmental staff.

B. Bureaus. Heads of Bureaus are responsible for ensuring that their Bureaus perform the following:

(1) Develop and issue internal procedures to ensure compliance with the law and the Department's policy and procedures implementing the FOIA;

(2) Designate a FOIA Officer and an alternate to serve in his/her absence to implement the Act within the bureau–this individual is the primary contact between the Departmental FOIA Officer and the bureau for FOIA activities;

(3) Track and manage the FOIA requests that their bureau receives consistent with the requirements in Chapter 2;

(4) Maintain records necessary for the preparation of the annual report prescribed in 383 DM 15.6;

(5) Comply with the public information requirements prescribed in 5 U.S.C.

552(a)(2) (see paragraph 1.7 of this Chapter);

(6) Develop and maintain a FOIA home page to ensure compliance with E-FOIA;

(7) Provide technical assistance and training to ensure that personnel within each organization that handles FOIA requests are familiar with the Act and able to respond to requests in accordance with DOI's FOIA regulations and the procedures in this Handbook; and

(8) Make all employees aware of their statutory obligations under the FOIA and the Privacy Act, which include providing thorough and prompt responses to the requests, identifying and protecting sensitive information, including privacy-protected information, and identifying information that should be made available to the public.

1.7 Reading room materials.

A. Under 5 U.S.C. 552(a)(2), bureaus and offices are responsible for making the information listed in subparagraphs (1) through (5), below, available for public inspection and copying unless the materials are promptly published and copies offered for sale. Bureaus must make any such records created on or after November 1, 1996, available electronically, preferably via the Internet (in an electronic reading room), or by other computer telecommunication methods or electronic means, as well as in hard copy, as quickly as practicable. The electronic availability requirement applies only to those records that DOI created–not to those generated elsewhere. This requirement applies to the following categories of records:

(1) Final opinions rendered in the adjudication of cases;

(2) Policy statements and interpretations which have been adopted by DOI and are not published in the Federal Register;

(3) Administrative staff manuals and instructions affecting the public;

(4) Copies of records that have been or are likely to become the subject of frequent FOIA requests, and an index of those documents as described in paragraph 1.8 of this Chapter; and

(5) A subject matter index of the bureau's reading room records.

B. Bureau FOIA Officers should work with their program offices, directives staff, and other offices, as appropriate, to identify those documents that must be made available to the public under 5 U.S.C. 552(a)(2) of the FOIA.

C. Bureaus may, at their discretion, make other records available for inspection and copying in reading rooms or in their electronic reading rooms via the Internet. Bureaus should

have a computer with Internet access along with a printer available in their reading rooms or at another location for the public to use in accessing this information. Bureaus do not have to maintain a hard copy of the information listed in paragraph 1.7A (1) through (5), above, if the public can access and print a copy of the material from the electronic reading room.

1.8 Frequently Requested FOIA Documents.

A. Under 5 U.S.C. 552(a)(2)(D), bureaus and offices will make available for public inspection and copying all records that have been released to any person under section 552(a)(3) (i.e., released pursuant to a FOIA request) of the FOIA if they determine that the records have become or are likely to become the subject of frequent FOIA requests for substantially the same records (e.g., travel records of high level officials, reports generating considerable public interest (e.g., certain records relating to an energy or Endangered Species Act controversy), the FOIA annual reports to DOJ/Congress, lists of credit cardholders, etc.). Documents that have been requested at least three times under the FOIA are considered "frequently requested documents."

B. Prior to making records available for public inspection in reading rooms and/or electronic reading rooms (see paragraph 1.7A of this Chapter), bureaus must determine whether any information in the records should be withheld from public release, and make any necessary redactions (deletions). They should carefully consider the interests of the Government and commercial entities, the personal privacy of individuals, and any potential security implications that might be impacted by disclosure before placing any document in a reading room or posting it to their FOIA website.

(1) If information is deleted from a document prior to placing it in a reading room, the bureau will indicate the volume of information that has been deleted on the document and the exemption used to withhold it. If a requester would like access to the entire record, he/she must submit a FOIA request to the appropriate FOIA Contact. However, this does not guarantee that the entire record will be released. If a requester submits a FOIA request for reading room materials and is not satisfied with the bureau's response, he/she may file an appeal.

(2) The requester also may request a fee waiver (for copying charges) for information in a reading room. Such requests will be processed under the procedures in paragraphs 4.14 and 4.16 of Chapter 4.

C. If the Departmental FOIA Officer or a Bureau FOIA Officer receives a FOIA request for reading room materials, he/she will forward the request to the FOIA Contact who is responsible for the records (see Appendix A to the FOIA regulations for a list of DOI's FOIA Contacts). In that case, or where a requester files a request directly with the appropriate FOIA Contact, the FOIA Contact should advise the requester by telephone or e-mail that the requested information is available via the Internet or in the reading room. Then, the FOIA Contact should advise the requester by written notice that if the bureau does not hear from him/her within 20 workdays, it will assume the requester is satisfied and will close the file on the request. The requester, nevertheless, may ask the bureau to process his/her request as any other FOIA request. In that case, the bureau will have to do so. The time limit starts when the FOIA request is

received by the appropriate FOIA Contact, providing it complies with all the procedures in 43 CFR 2.8 and 2.10. If the information is not available electronically or the requester does not have access to the Internet, the FOIA Contact may either send the requester the information or forward the request to the appropriate reading room and provide the name and telephone number of a contact.

D. The Department (OCIO) will maintain an index of records that are frequently requested under the FOIA (only those specified in paragraph 1.8A, above), based on input provided by the bureaus and offices, and make the index available to the public in reading rooms and/or via the DOI FOIA home page or by other electronic means. Each bureau/office will:

(1) Ensure that the information they submit to OCIO is accurate, complete, and up-to-date; and

(2) Advise OCIO of necessary changes.

1.9 Bureau FOIA Websites.

A. Each Bureau FOIA Officer is responsible for developing and maintaining a FOIA website to ensure compliance with E-FOIA. (Information pertaining to the Office of the Secretary is included on the Department's FOIA Home Page.) The bureau's website will comply with the mandates affecting web publishing in DOI, e.g., web privacy policy; Section 508 of the Rehabilitation Act (29 U.S.C. 794d), as amended by the FY 2001 Appropriation for Military Construction Act (Pub. L. 106-246) and OCIO Bulletin 2001-06, adopting the web technical standards for accessible technology as developed by the Architectural and Transportation Barriers Compliance Board (Access Board); the Department's and the bureaus' information quality guidelines, and Section 515(a) of the Treasury and General Appropriations Act for FY 2001. The bureau's FOIA website should be designed to ensure the public's search for information is fast, easy, logical, and customer friendly. The Bureau FOIA Officer will review the information on its FOIA website regularly to ensure that it is current, of high quality, accurate, and usable.

B. The bureau's home page should contain a "FOIA link/button" which is readily visible and connects to its own FOIA home page as well as a "general information link/button" which connects to the Department's Reference Guide for obtaining information under the FOIA, Privacy Act, and by other means.

C. Bureau FOIA websites should supplement the information already provided on the Department's FOIA home page (http://www.doi.gov/foia) and should include links to both the DOI FOIA home page and the bureau's home page. At a minimum each bureau's FOIA home page should include the following components:

(1) A link to DOI's Reference Guide for obtaining information under the FOIA, Privacy Act, and by other means (http://www.doi.gov/foia/foitabl.htm). A bureau also may include specific guidance on how to request information from the bureau. A list of records

routinely available to the public without submitting a FOIA request should also be included if available.

(2) An electronic reading room where documents required to be made available under 5 U.S.C. 552(a)(2) may be found–this includes frequently requested FOIA documents. If documents are already posted to DOI's FOIA home page, the bureau may link directly to that website.

(3) A link to the index of frequently requested documents.

(4) A link to the index and description of DOI's major information systems.

(5) A list of the bureau's FOIA contacts, including their name, telephone and fax numbers, and mailing and e-mail addresses.

(6) Any FOIA policies or guidance developed by the bureau. To avoid discrepancies and to ensure policies are accurate and up-to-date, the bureau will include only those policies and procedures that it has developed. With regard to all other pertinent FOIA/Privacy/Records/information resources management policies, etc., the bureau will link to the appropriate Departmental sites.

1.10 Requests Not Covered.

A. The following types of requests are not covered under the FOIA:

(1) A request by an employee of a Federal agency acting in an official capacity. The FOIA does not govern exchanges of information between Federal agencies (see the DOJ FOIA Update, Winter 1985, Vol. VI, No. 1, p. 6).

(2) A request from a congressional committee or subcommittee (usually the chairman of the committee) on a subject within its jurisdiction. The FOIA does not give agencies the authority to withhold information from Congress (see 5 U.S.C. 552(d)). The Office of Congressional and Legislative Affairs must be consulted when requests for documents are received from Members of Congress or a congressional committee to ensure proper coordination and conformity of responses.

(3) A request to declassify national security classified materials. Such requests are processed under 43 CFR 2.41.

(4) A request for information, as opposed to a request for records (see paragraph 3.1 of Chapter 3).

B. In order for a document to be considered a record subject to the provisions of the FOIA, it must be in the bureau's possession and control as of the date the bureau begins its

search for responsive records.

(1) There is no obligation for the bureau to create or compile a record to satisfy a request--for example, by combining or compiling selected items from manual files, preparing a new computer program, or calculating proportions, percentages, frequency distributions, trends or comparisons or creating maps--to respond to a request (see 43 CFR 2.7(d)(1) and Appendix B, Illustration 1*). Normally, if a bureau is extracting information from an existing computer database, this would not constitute the creation of a new record. However, a bureau has the option of creating a new record if–

(a) Doing so will provide a more useful response to the requester,

(b) It is less burdensome than providing the existing records, and

(c) The newly created record is fully responsive to the request.

(2) If a bureau decides to create a new record in responding to a request, the fee will not be more than the fee for the individual records.

C. The FOIA applies only to records maintained by agencies within the Executive Branch of the Federal Government, including the Executive Office of the President, and independent regulatory agencies. The personal staff of the President and units within the Executive Office of the President whose sole function is to advise the President do not fall within the definition of agency. Entities whose functions are not limited to advising and assisting the President (e.g., the Office of Administration within the White House) are subject to the FOIA.

D. Presidential transition teams are not Federal agencies subject to the FOIA. However, information prepared by the bureaus and provided to a transition team normally would be considered an agency record under the FOIA.

1.11 Who Can Make a FOIA Request? Any individual (including a non-U.S. citizen), corporation, association, public interest group, or the media; a State, local, or foreign government; or an Indian tribe can make a request under the FOIA. The only exception is a fugitive from justice. Official requests from other Federal agencies and Congress are not subject to the FOIA (see paragraph 1.10A(1) and A(2) of this Chapter).

1.12 Privacy Act Access Requests. If an individual requests information pertaining to him/herself that is contained in a Privacy Act system of records, it will be processed under both the Privacy Act and the FOIA, regardless of the statute(s) cited, to afford the individual the greatest access to information about him/herself (see paragraph 1.5T of this Chapter). Only U.S. citizens and aliens lawfully admitted for permanent residence may make Privacy Act requests. Such Privacy Act access requests are processed according to the Department's Privacy Act

** Note: It is possible that some of the illustrations referenced in the text do not appear sequentially.*

regulations (43 CFR Part 2.62 through 2.66), and the Departmental Manual (383 DM 6). See paragraph 3.15 of Chapter 3 for a more detailed explanation.

1.13 Personal Records. The FOIA only applies to agency records (see paragraph 1.5D of this Chapter), not to the personal records of individual employees. The distinction between agency and personal records can be difficult to determine. The determination is heavily fact driven. Similar documents created by different employees might be treated differently depending on the application of the ten factors below. Personal records generally are not subject to agency records retention requirements, and not distributed to other employees for their official use. They are created, used, and maintained primarily for the convenience of the employee. In determining whether documents are personal records, evaluate the documents in light of the criteria given below. See Appendix B, Illustration 2, for examples of how to apply these criteria. Documents should be reviewed on a case-by-case basis considering the totality of the circumstances surrounding each document.

A. Creation. Was the document created or received by an agency employee on agency time, with agency materials, at agency expense? (If not, then it probably is not an agency record, on that basis alone.)

B. Content. Does the document contain substantive information? (If not, then it probably is not an agency record, on that basis alone.) Does it contain personal as well as official business information? Even though a record may have certain personal information, it may nevertheless be an agency record if its release would shed light on the activities of the Government.

C. Purpose. Was the document created solely for an individual employee's personal convenience, e.g., to serve as a memory jogger? Alternatively, to what extent was it created to facilitate agency business?

D. Distribution. Was the document distributed to anyone else for any reason, such as for a business purpose?

E. Use. To what extent did the document's author actually use it to conduct agency business? Did others use it?

F. Maintenance. Was the document kept in the author's possession, or was it placed in an official agency file? Personal records should be maintained separately and not placed in official files along with agency records. The placement of a record in an agency file creates the presumption that it is an agency record. Once a FOIA request is received for an agency file, any personal records in that file will automatically be subject to disclosure under the FOIA.

Note: The nature of the document rather than its location or marking must be considered. The fact that an employee stamps a record "Personal" and places it in his/her desk drawer does not in and of itself make it a personal record.

G. Disposition. Was the document's author free to dispose of it at his/her personal discretion? What was the actual disposal practice?

H. Control. Has the agency attempted to exercise control over the document through applicable maintenance and disposition regulations? Did it do so by requiring the document to be created in the first place? If so, then it is an agency record.

I. Segregation. Is there any practical way to segregate out any personal information in the document from official business information?

J. Revision. Was the document revised or updated after the fact for record keeping purposes?

1.14 Litigation.

A. If a bureau FOIA Contact or Designated FOIA Attorney is aware of any litigation pending, he/she will notify the Bureau FOIA Officer and the Branch of General Legal Services, Division of General Law, SOL. Individuals located in the field also will notify the appropriate headquarters, regional or field solicitor, as well as the Division of General Law.

B. When a requester sues the Department for withholding records or the submitter of the information sues the Department to prevent disclosure (reverse FOIA suit), the responsible official will cooperate with SOL in responding to the litigation.

1.15 Production of Records (Subpoena). If the production of any record of the Department is sought for use in Federal, state, territorial or tribal judicial, legislative or administrative proceedings, e.g., by a subpoena, bureaus must consult with SOL. In addition, in certain circumstances, the procedures in 43 CFR 2.80 through 2.90 will be applicable.

1.16 Disciplinary Action. In accordance with the FOIA (5 U.S.C. 552(a)(4)(F)), where a court issues a written finding that the circumstances surrounding an improper withholding of agency records raises questions whether agency personnel acted arbitrarily or capriciously with regard to the withholding, the Office of Special Counsel is required to initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee primarily responsible for the withholding. If the Office of Special Counsel recommends that corrective action be taken, the Department must comply.