



FAS Note: This internal NASA memo from November 1989 was disclosed by Rep. Howard Wolpe in 1992. It was repudiated by NASA Administrator Richard Truly immediately thereafter.

SUGGESTIONS FOR ANTICIPATING REQUESTS UNDER FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA) (5 U.S.C. section 552) requires that copies of all documents maintained in the course of conducting Government business must be provided to requesters unless the documents fall within certain narrow exceptions. As a result, the safest and most practical course of action is to prepare all documents in a manner that assumes that they will ultimately be publicly disclosed. Some general suggestions:

At the conclusion of meetings or at the end of the day review your notes and consider whether you really need to retain them. If you do, take time to rewrite them in such a way as to minimize any adverse impact should they be publicly disclosed. Then destroy your old notes.

Avoid retaining drafts of documents. Each draft constitutes a separate document potentially subject to disclosure.

Use yellow stick-ons or other similar attachable tabs to annotate personal copies of documents you wish to retain. Annotations on a document make the annotated copy a separate document potentially subject to disclosure. If retained, yellow stick-ons would also be subject to FOIA disclosure. However since there is no obligation under FOIA to provide documents in any particular order or relationship to each other, furnishing out of context copies of stick-ons can render any information released significantly less meaningful. In this regard, printing rather than writing in script also generally makes it harder to assign authorship (and context) to a particular note or document.

Wherever possible try to record only factual information and avoid prematurely documenting your opinion. If you must document your opinion take care to at least reference in the document (i.e. on the same page) all appropriate qualifications. This can help make out of context quotation at least a little more difficult.

Attempt to make each document (i.e. page) stand alone. Avoid cross references to other documents that can lend context to a document and thereby enhance its informational value should it ultimately be disclosed.

There are basically only three exemptions to FOIA that will have any real applicability to Government entities engaged in conducting scientific research: the national security exemption, the deliberative process exemption and the confidential business information exemption. FOIA exempts from disclosure documents properly classified pursuant to an executive order. This exemption is intended to protect information that must be kept secret in the interest of national defense or foreign policy. FOIA also exempts from disclosure inter-agency and intra-agency memoranda and correspondence that are pre-decisional and deliberative in nature. This exemption is intended to protect full and frank discussion within the Government in order to assure proper Government action by exempting recommendations, opinions and advice from mandatory disclosure. Finally, FOIA exempts from disclosure documents containing commercial information provided to the Government on a confidential basis. This exemption is intended to preserve the Government's ability to obtain necessary financial and otherwise commercially sensitive information from those business entities with which it deals. Some suggestions for enhancing the utility of these exemptions:

Make sure that any documents to be protected as classified have in fact been processed and handled in accordance with all procedural requirements of the participating department or agency with the strongest connection to the national defense.

Clearly identify and draft documents as recommendations rather than decisions.

If you must document a decision, make sure that it is consistent with the decision that you ultimately intend to make public. Do not cross reference any pre-decisional documents or prior recommendations in a decisional document unless you intend to specifically adopt them as part of your decision.

At the first indication of any potential controversy with outside parties involve your legal counsel. Not only can he or she provide specific advice on FOIA, but counsel's participation in the preparation of particular documents may serve as an additional basis for asserting that they are exempt from FOIA based on a claim of attorney work product privilege.

Require commercial entities with which you deal to clearly mark appropriate documents as containing confidential information.