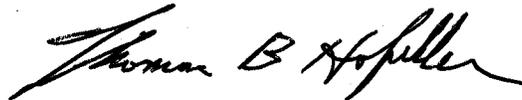


For: FSA Offices

Preserving FSA Records That Are Subject to FOIA Requests

Approved by: Acting Administrator



1 Overview

A Background

Recent FOIA litigation and appeals involving FSA records have raised awareness of FOIA’s statutory requirement to conduct searches to:

- locate responsive records
- segregate and preserve relevant records.

Contact between the Appeals and Litigation Staff (ALS) and other FSA Offices indicates that misunderstandings exist and that FSA may face potential problems.

Records must be properly stored and preserved to ensure that they are available for retrieval, and scheduled for disposal according to approved disposition schedules. This applies to all records, paper and electronic mail (e-mail) messages, and attached files. All official records must be preserved by FSA Offices until further notice.

B Purpose

This notice reminds FSA employees about:

- the FOIA statutory requirement to conduct a reasonable search to locate records in response to a FOIA request
- the requirement to establish individual FOIA request files
- segregating and preserving FOIA request files while a FOIA appeal or litigation is pending
- the consequences for failure to preserve all relevant records while a FOIA appeal or litigation is pending.

Disposal Date	Distribution
January 1, 2009 9-23-08	All FSA Offices; State Offices relay to County Offices

1 Overview (Continued)

C Requirement to Conduct a Search for Records

FOIA requires FSA to make reasonable efforts to search for records that are subject to a proper FOIA request. See 5 U.S.C. 552 § 552(a)(3)(D) for regulations governing the search.

USDA regulations published at 7 CFR 1.5(b) and FSA policy in 2-INFO provide that once FSA receives a FOIA request that reasonably describes the records and any FOIA fee issues are resolved, a search will be conducted to locate records that may be responsive to the request.

2 Segregating and Preserving Records Subject to a FOIA Request, Appeal, or Litigation

A FOIA Request File

Copies of FSA records that are subject to a FOIA request are required to be maintained in separate individual FOIA request files. A separate file should be maintained for each FOIA request. These files must include both the redacted and unredacted responsive records.

B Judicial Review and Production of Records

If FSA denies a FOIA appeal, in part or in its entirety, or fails to meet the administrative deadline in the initial review or appeal processes, the FOIA requester has the right to file a complaint in the appropriate U.S. District Court. In the event the complainant prevails in litigation, the U.S. District Court will order FSA to produce the records that were withheld. Attorneys handling these cases also routinely request copies of all responsive records, including both withheld and released records.

C FOIA Request File Retention Period

FSA records that are denied release in response to an initial FOIA request must be segregated and preserved while a FOIA appeal or FOIA litigation is pending. All relevant records about FOIA requests, including the best copies available of all responsive records, must be preserved until further notice.

See 25-AS, Exhibit 45, for guidance on the type of information that may be included in individual FOIA request files.

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2 Segregating and Preserving Records Subject to a FOIA Request, Appeal, or Litigation (Continued)

D Consequences for Failure to Preserve Records

Failure to preserve records through the conclusion of FOIA litigation could result in court-ordered sanctions against FSA. Sanctions would include attorney fees and litigation costs and, potentially, other penalties such as injunctive relief.

Note: On December 31, 2007, with the passage of the Openness Promotes Effectiveness in our National Government Act of 2007, FOIA was amended to require that attorney fees and litigation costs will no longer be paid from the Judgment Fund. These fees and costs will be paid from FSA's appropriations.

3 National Office FOIA Contacts

A FOIA Requests

For general questions about individual FOIA request files, contact Sue Ellen Sloca, OEA, by either of the following:

- e-mail at sueellen.sloca@wdc.usda.gov
- telephone at 202-720-1598.

B FOIA Appeals

For questions about relevant records pertaining to a FOIA appeal, contact Robin Wieland, ALS, by either of the following:

- e-mail at robin.wieland@wdc.usda.gov
- telephone at 202-690-2814.