

Environmental Investigations



Public Access to Records of California and Federal Agencies

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MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENT Barack Obama

- A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government.
- All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

- “A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.”
James Madison



FOIA

The Freedom of Information Act

- Codified at 5 U.S.C. § 552
- Enacted in 1966, and amended in 1974, 1986, and 1996.
- Allows for public access to documents held by agencies of the executive branch of the Federal Government.
- Does not apply to records of elected officials or of the Federal Judiciary.
- Does not apply to records of state and local governments.

Information Available Online

- The FOIA requires the Federal Government to publish certain information online. This information can be viewed online at the website of the Government Printing Office, <http://www.gpoaccess.gov>.
- This information includes
 - Descriptions of agency organization and office addresses;
 - Statements of the method of operation of an agency;
 - Rules of procedure for an agency and the forms used by an agency; and
 - Substantive rules of an agency and statements of general policy of an agency.

Information Online (cont.)

- Beyond the information available through the Government Printing Office, the FOIA also requires individual agencies to make certain information available on their own websites. This includes
 - Final Opinions in the adjudication of cases
 - Statements of policy and interpretations of an agency that are not available in the Federal Register
 - Administrative Staff manuals and instructions to staff that affect a member of the public
 - Copies of records previously released under a FOIA request that are or are likely to become the subject of later requests for substantially the same records
 - An index of those records

FOIA Requests

- If a member of the public wants a Federal agency record that is not required to be published online, a Freedom of Information Act request must be made.
- A FOIA request is nothing more than an informal letter that reasonably describes the type of records desired. No lawyer is necessary to request records under the FOIA.

Procedure for Requesting Records Under FOIA

- Write a letter to a Federal Agency that you believe has the records you want. Describe the records you want as specifically as possible.
- State the format in which you want the records. If the agency stores its records electronically, it is required to give you electronic copies if that is what you want.
- Mark both the letter and envelope as "Freedom of Information Act Request."

Procedure for Requesting Records Under FOIA (cont.)

- Include your name and address in the letter so that the agency knows where to send the record.
- Address the request to the appropriate agency. There is no one office of the federal government that handles all FOIA requests. Rather, each individual agency handles requests for records independently.
- A list of addresses for many of the FOIA offices of federal agencies is available at the Justice Department's website at <http://www.usdoj.gov/oip/foiacontacts.htm>.

FOIA Request Drafting Tips

- FOIA requests must be for records rather than merely for information. An agency is not required to create any records in order to respond to a FOIA request.
- Requests must "reasonably describe" the records sought. Care should be taken to phrase a FOIA request in a manner that makes an agency's search as simple as possible. For example, instead of asking for all records related locations within 5 miles of a specific address, ask for all records related to a zip code or a city.
- Include a phone number in the request letter. This may speed up the process by allowing the agency to contact you with any questions.

FOIA Request Drafting Tips (cont.)

- In certain circumstances, the Federal Agency is permitted to charge fees for compiling the records you request. You may ask to be notified in advance if the charges will exceed a certain amount. Also, if you are willing to pay at least up to a certain sum of money for the records, the letter may state this.
- In certain circumstances, such when the failure to obtain records within a certain amount of time would endanger a person's life or safety, you may be entitled to expedited processing. If you believe you are so entitled, state so in the letter.
- Keep a copy of the letter. It is also helpful to send FOIA requests by certified mail so that you have a copy of the request's receipt.

Fees

- The fees an agency may charge vary by the type of requestor.
- When documents are requested for commercial use, fees may be charged for document search, duplication, and review.
- When documents are requested for educational or non-commercial scientific use, fees may be charged for document duplication only.
- When documents are requested by anyone else, fees may be charged for document search and duplication (but not review).



Fees (cont.)

- If disclosure of the documents is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and if disclosure is not primarily in the commercial interest of the requestor, then the agency must furnish the documents without charge or at a reduced charge.
- For small requests for non-commercial purposes, i.e. those that require less than two hours of search time and involve the production of no more than 100 pages of documents, there will be no charge.
- There is also no charge if the cost of collecting the fee would exceed the amount collected.

FOIA Response Procedure

- A Federal Agency has 20 days, excluding weekends and holidays, to determine whether to respond to a FOIA request. Disclosure of the documents must follow promptly afterwards.
- In "unusual circumstances," an agency may extend this time period for up to ten working days.
- Unusual circumstances exist when the agency needs to
 - search for and collect the records from facilities separate from the office processing the request;
 - search for, collect, and examine a voluminous number of records; or
 - Consult among two components of the agency or consult with another agency having a substantial interest in the determination of the request.
- If an agency fails to respond within these time periods, the requestor may seek judicial review.

FOIA Response Procedure (cont.)

- When a request is denied, in part or in full, the agency must specify the reasons for the denial and that there is a right to appeal the determination to the head of the agency.
- An administrative appeal is completed simply by another informal letter, this time to the head of the agency that denied the request. There is no charge for filing an administrative appeal and no drawback to doing so. A lawyer could be helpful but is not necessary.
- FOIA specifies no time limit to file an administrative appeal, but some agencies have their own time limits.
- An agency must make a determination on an administrative appeal within 20 working days.

Judicial Appeals

- After an administrative appeal is denied, a requestor has the right to file an appeal in the U.S. District Court where the requestor resides.
- In court, the burden is on the government to justify withholding the documents.
- Legal assistance at this point is advisable.
- The court has discretion to award reasonable attorney's fees and costs to a successful litigant.

FOIA Exclusions

- In usual circumstances, if a federal agency has a document that is responsive to a FOIA request but exempt from disclosure, the agency must identify the document and explain why it is exempt. In three circumstances, an agency is permitted to treat a requested record as if it did not exist. These include
 - Documents whose disclosure could be expected to interfere with a law enforcement investigation.
 - Informant records maintained by a criminal law enforcement agency.
 - Records maintained by the FBI pertaining to foreign intelligence, counterintelligence, or international terrorism.

FOIA Exemptions

- More commonly used than exclusions. Documents must be identified, but need not be disclosed. A document that is only partially exempt from disclosure must be provided in a redacted form.
- There are nine specifically enumerated exemptions.

Exemption 1: Classified Documents

- Documents that are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified” are exempt.
- Gives the President unilateral power to exempt a document from disclosure.
- The executive order classifying documents will list special procedures for seeking declassification of the documents.

Exemption 2: Internal Personnel Rules and Practices

- Matters that are “related solely to the internal personnel rules and practices of an agency” are exempt.
 - These include trivial administrative matters of no genuine public interest, for example a rule governing break times for employees.
 - Also include administrative manuals whose disclosure would risk circumvention of law or agency regulations.

Exemption 3: Information Exempt Under Other Laws

- Matters that are “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 issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.”
- E.g., the IRC’s prohibition on disclosure of tax returns.

Exemption 4: Confidential Business Information

- Exempt are “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”
- Though not required, the agency will often notify a business whose information it is contemplating disclosure. This gives the business an opportunity to convince the agency that the information is exempt.

Exemption 5: Internal Government Communications

- “Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency” are exempt from disclosure.
- This exemption is meant to safeguard the deliberative policymaking process of government.
- Probably the most difficult exemption to apply.
- Applies to pre-decisional documents, but not to post-decisional documents.

Exemption 6: Personal Privacy

- “Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” are exempt.
- Bias in favor of disclosure in this instance.

Exemption 7: Law Enforcement

- “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
 - (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 information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
 - (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”

Exemption 8: Financial Institutions

- Exempts information “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.”
- E.g., reports prepared by the Federal Reserve.

Exemption 9: Geological Information

- Exempts “geological and geophysical information and data, including maps, concerning wells.”
- This is a rarely used exemption.



Sample FOIA Request Letter

(http://www.pacbio.gov/cic_text/feil_prog/foia/letters.htm)

Date
 Agency FOIA Officer
 Name of agency or agency component
 Address

Dear _____,

Under the Freedom of Information Act, 5 U.S.C. subsection 552, I am requesting access to [identify the records as clearly and specifically as possible].

If there are any fees for searching for or copying the records, please let me know before you work on my request. [Or, please supply the records without informing me of the cost if the fees do not exceed \$_____ which I agree to pay.]

If you deny all or any part of this request, please cite each specific exemption you think justifies your refusal to release the information and notify me of appeal procedures available under the law.

Optional: If you have any questions about handling this request, you may telephone me at _____ (home phone) or at _____ (office phone).

Sincerely,

■
 Name
 Address

Public Records Act Procedures

- No notice is necessary to inspect documents in person.
- If documents are requested by letter, the agency has up to ten days to determine whether or not to produce the records requested. If the records or personnel needed for consultation are not readily available, this period can be extended by the agency for up to fourteen days.
- Records should be provided at the time the determination is made. If this is not possible, they must be provided within a reasonable period of time.
- A denial to a Public Records Act request must be in writing.

Required Assistance

- When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records, shall do all of the following, to the extent reasonable under the circumstances:
 - (1) Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated.
 - (2) Describe the information technology and physical location in which the records exist.
 - (3) Provide suggestions for overcoming any practical basis for denying access to the records or information sought.

Electronic Documents

- Unless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person and, when applicable, shall comply with the following:
 - (1) The agency shall make the information available in any electronic format in which it holds the information.
 - (2) Each agency shall provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.

Exemptions

- When a document requested contains exempted material but is not entirely exempt, the document must be redacted and disclosed. This is so even though redaction is time consuming. If, however, the burden is so great as to clearly outweigh the public interest in disclosure, non-disclosure is permitted.
- Once material has been disclosed to any member of the public, it is no longer exempt from disclosure to other members of the public.

Section 6255: Catch-All Exemption

- The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

Pending Litigation Exemption

- Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.
- To be exempt under the pending litigation exemption, a document must have been prepared specifically for use in the litigation.

Personnel and Medical Records

- Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.
- Exemption does not apply to personnel information that is generally public in nature, such as the qualifications of a government employee.

Geological Exemption

- Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.

Real Estate Appraisals

- The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained. However, the law of eminent domain shall not be affected by this provision.

Enforcement Procedures

- If a request is not responded to or denied, the requestor may file a lawsuit in state court:
 - Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.
- At this point, legal help is advisable.

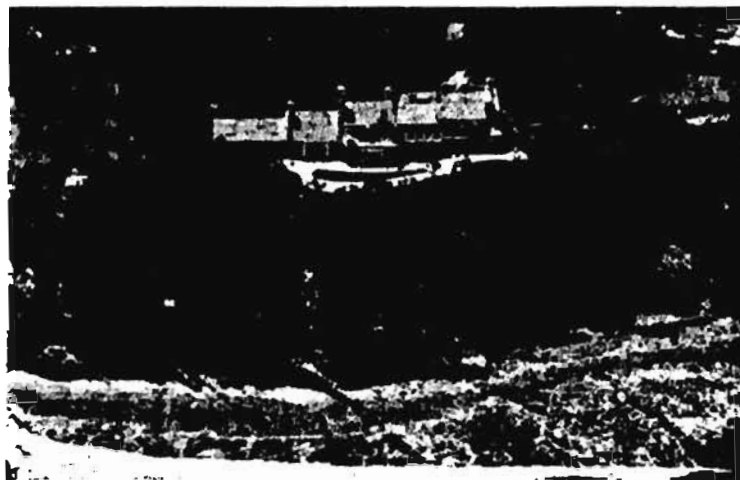
Enforcement (cont.)

- The court shall decide the case after examining the record in camera
- If the court finds that the public official's decision to refuse disclosure is not justified under Section 6254 or 6255, he or she shall order the public official to make the record public. If the judge determines that the public official was justified in refusing to make the record public, he or she shall return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure.

Attorney Fees

- Attorney fees and costs are mandatory to a prevailing plaintiff. Attorney fees will be awarded to the government only if the plaintiff's case was clearly frivolous.
 - The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is clearly frivolous, it shall award court costs and reasonable attorney fees to the public agency.

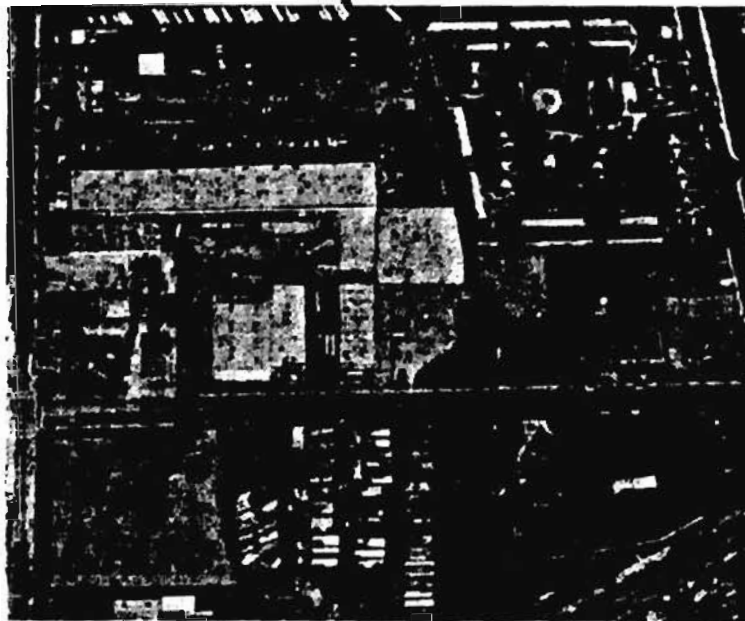
Use of Aerial Photographs In Environmental Investigations



Uses

- Document historical uses of property
- Land use issues
- Enforcement actions
- Pollution control

Compton 2001



2001



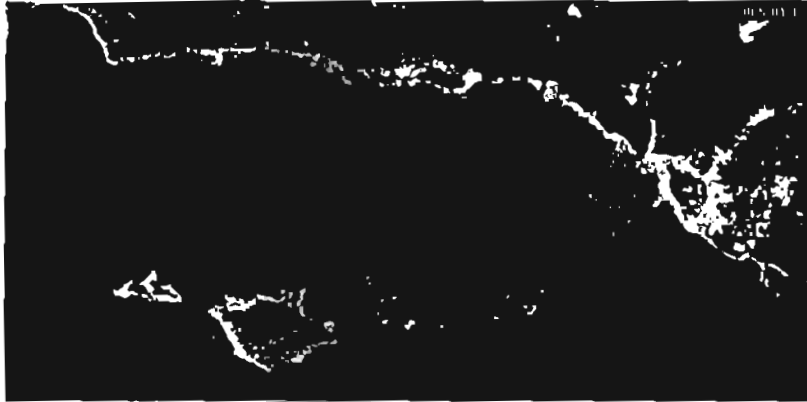
2001



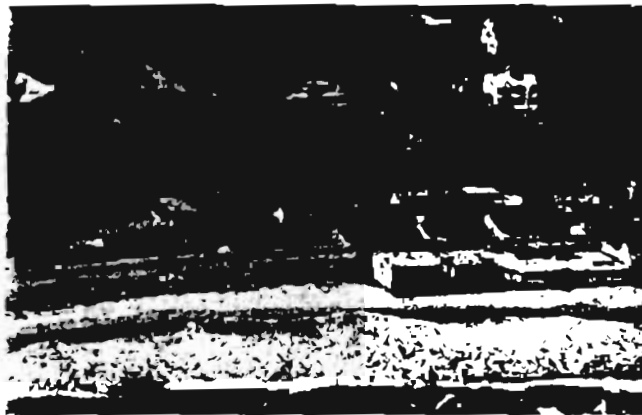
Site 1998



Storm Water Plume



Enforcement (Coastal Act)



Sources

California Coastal Records Project

www.californiacoastline.org

Fair Child Collection

<http://web.whittier.edu/fairchild/home.html>

TerraServer-USA

<http://terraserver-usa.com/>

Sources for Aerial Photos (in digital format)

- www.mapmart.com/aerialphotography/aerial.htm
 - Major cities – 0.3 to 0.5 meter resolution (~\$10/square mile)
 - Rest of U.S. – 1 and 2 meter resolution
- www.landsat.com/aerial.html
 - Los Angeles – 1 foot resolution \$399
 - California – 1 meter resolution \$799
- Some aerial photos available at no charge from USGS
 - <http://egsc.usgs.gov/isb/pubs/booklets/aerial/aerial.html>

Issue for Digital

- Issues for Digital Aerial Photos
- Resolution: 1 foot to 6 feet/pixel
- Color / Black and White
- Format: Geotiff is geo-referenced tiff, compatible with
 - Image viewers
 - GIS (Geographic Information Systems)
- Other remote-sensing technologies available, e.g.
 - Landsat: 7 spectrum points for reflection, 1 point for emission
 - Allows different types of vegetation to be discriminated
- <http://landsathandbook.gsfc.nasa.gov/handbook/handbook.html/chapter6/chapter6.html>