

The New York Agriculture Producer's Guide To FOIA and FOIL: How to Get the Information You Need From Government Agencies

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New York agriculture producers may find a time when they may want to see the documents available to the public about themselves or their agriculture operation. There are two main federal statutes that guide the process of obtaining information from the federal government: (i) Freedom of Information Act (“FOIA”) and (ii) Privacy Act (“PA”). In New York, requests can be made to state administrative agencies through the Freedom of Information Law (“FOIL”). This article seeks to provide New York agriculture producers and agribusinesses with a background of the laws governing the freedom to government information and describe the procedure for making FOIA/PA or FOIL requests to either federal or New York agencies.

Background and Applicability of FOIA and PA

FOIA was enacted in 1966 by President Lyndon B. Johnson who believed that a democracy works best with transparency in the system without harming national security. There is no longer a burden to show that an agriculture producer “needs to know” the requested information. Instead, agriculture producers have a “right to know.” The burden is now on the government to show its need for secrecy. However, this “right to know” does not come without limitations. A FOIA request can only be made to federal government agencies, which broadly includes government corporations (e.g., Federal Crop Insurance Corporation), government controlled organizations, and independent regulatory agencies (e.g., Library of Congress, Government Accountability Office, Congressional Research Service). FOIA is *not* applicable to private companies or persons who receive Federal contracts or grants, or private organizations.

Additionally, the PA allows agriculture producers seeking information about *themselves* to receive greater information than what would typically be released to the general public. The primary purpose of the PA is to provide individuals with more control over the gathering, dissemination, and accuracy of information about themselves contained in government files, and to promote greater privacy for citizens. The PA serves to protect agriculture producers from environmental groups or other citizens that may wish to obtain private information about a particular property or agriculture operation.

Overview of New York Laws

Even though FOIA and PA only apply to *federal* government agencies, every state has enacted its own open public records act or right-to-know act that are applicable to state and local governmental agencies. In New York, the Committee on Open Government oversees the administration of the Freedom of Information Law, Open Meetings Law, and Personal Privacy Protection Law. Each are discussed in more detail below.

Freedom of Information Law. First, the New York Freedom of Information Law, Article 6 of the Public Officers Law, is analogous to FOIA on the federal level and gives the public the ability to obtain agency records. Each government agency in New York has promulgated its own set of rules and regulations to manage FOIL requests. FOIL allows access to “agency records,” which does not include documents from the New York Judiciary; however, the public can obtain court documents by contacting the Clerk of Court separately pursuant to New York Judiciary Law § 255 and paying copying charges. An “agency” is defined as “any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental . . . function for the state or any one or more municipalities. . . .” *Id.* at 86. Importantly, FOIL does not require an agency to “create records;” therefore, if the records requested do not exist then the New York agency is not required to disclose them. The New York Committee on Open Government has an informational video available on FOIL available at <http://www.dos.state.ny.us/video/coog.html>. New York agriculture producers can also request a DVD to be mailed to them by contacting the Committee on Open Government.

Open Meetings Law. Second, the New York Open Meetings Law (“OML”), Article 7 of the Public Officers Law, gives the public the right to attend and keep apprised of meetings held by New York public bodies. A “public body” is defined as “. . . any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department.” Under the OML, every meeting by a public body is open to the general public except “executive sessions.” See *id.* at § 103. The statute provides notice and minute requirements for meetings held by public bodies, valid purposes of executive meetings, and enforcement mechanisms by the public. See *id.* at §§ 104-07. Meeting minutes must be available to the public within two weeks (or within one week for executive sessions) even if the draft minutes have not yet been approved by the public body. There are a few exemptions to this statute as described in section 108 including judicial or quasi-judicial proceedings (except zoning boards of appeals), some deliberations of political committees, conferences and caucuses, and confidential matters pursuant to federal or New York law.

Personal Privacy Protection Law. Third, the New York Personal Privacy Protection Law (“PPPL”), Article 6-A of the Public Officers Law, pertains to personal information collected by New York agencies. The PPPL allows individuals to correct or amend records pertaining to them and prevents the disclosure of personal information to the public. If a New York farmer believes that an agency has information about them he/she should contact the administrative agency itself. Similar to FOIL, PPPL requires that the inquiry specifically describe the records sought (including name, address, date of birth, identification number, and a description of events/occurrences) to assist agency staff in locating the requested records.

Decide If It Is Necessary To File a FOIA Request

Not all agency records require a written FOIA/FOIL request. In 1996, Congress passed

the Electronic Freedom of Information Act (“E-FOIA”). E-FOIA requires government agencies to have electronic FOIA “reading rooms” available online. The information sought may be available online such as regulations, agency decisions and statements of policies, staff manuals (e.g., U.S. Department of Agriculture (“USDA”) Rural Development Handbooks), forms, and agency publications such as pamphlets, brochures, and books created after November 1, 1996. See 5 U.S.C. § 552(a)(2). For example, soil composition a piece of property is available from the Natural Resources Conservation Service (“NRCS”) online at <http://www.nrcs.usda.gov/>. Similarly, New York administrative agencies have a myriad of information available online (e.g., regulations, annual reports, worksheets, maps). All previous records before November 1, 1996 are not required to be in electric format; however, upon request to the agency, even these can be made available in electronic form.

Choose The Government Agency or Agencies To Request Documents

On either the federal and state level, there is not one central office that manages all FOIA of FOIL requests so New York farmers must contact the department or agency itself. Even if a New York agriculture producer knows that he/she needs to obtain information from the USDA, it is helpful to contact the specific sub-agency, such as the Risk Management Agency (“RMA”) for information on livestock or crop insurance. Any federal records that are more than twenty-five years old are archived with the National Archives and Records Administration (“NARA”).

If an agriculture producer is unclear as to the department or agency, he/she should call the Federal Citizen Information Center toll free at 1-800-FED-INFO for assistance. A list of general FOIA contacts is available with the Department of Justice (“DOJ”) at www.usdoj.gov/oip/foiacontacts.htm. In New York, the Committee of Open Government can also offer some direction and can be reached at One Commerce Plaza, 99 Washington Avenue, Suite 650, Albany, NY 12231 or (518) 474-2518. FOIL requests to the N.Y.S. Department of Agriculture & Markets should be made to Rebecca Smith either by mail at 10B Airline Drive, Albany, N.Y. 12235 or by e-mail at FOIL@agmkt.state.ny.us. If an agriculture is unclear whether to make the request to the federal (e.g., U.S. Environmental Protection Agency) or state agency (e.g., N.Y.S. Department of Environmental Conservation), then a separate request should be made to both these agencies under FOIA and FOIL, respectively.

Draft FOIA/FOIL Request Letter

New York agriculture producers cannot make a FOIA request to an agency over the telephone. All FOIA requests *must* be in writing (i.e., postal mail, fax, or email). New York agriculture producers are encouraged to keep a copy for records and send the request via certified mail, return receipt. Most federal agencies do not have FOIA forms so producers must draft a written letter. In New York, a form for email FOIL requests is available at http://www.oms.nysed.gov/foil/sample_request.htm. To make sure a letter is handled correctly, producers should mark on both the letter and envelope “Freedom of Information Act Request” (or “Freedom of Information Law” request in New York). As stated above, New York requests

should not be made to the N.Y. Committee on Open Government; alternatively, the requests should be directed to the “records access officer” for the state administrative agency.

Government agencies are not required to do any research, analyze data, or answer written questions; thus, if New York producers and agribusinesses include these types of requests, the agency is not obligated to answer them. The FOIA/FOIL request should include the following information:

- Contact information (e.g., full name, business/farm name, address, phone number);
- Description of records requested (e.g., aerial photographic reproductions from the Farm Service Agency or National Agriculture Library, all records pertaining to a piece of property);
- Identification of locations of files are located, such as a regional EPA or USDA office if known;
- The maximum amount willing to pay for documents;
- Written authorization signed by individual or an official representative of the agriculture operation; and,
- Request that non-exempt material be segregated.

FOIA/FOIL requests can be denied if the request is too ambiguous so New York agriculture producers should should sufficiently describe the documents requested.

Wait for the Government Agency to Respond

Federal governmental agencies are required to *respond* to FOIA requests within twenty business days, excluding weekends and holidays, beginning from receipt of the request. However, the government is not required to *send the requested documents* within twenty days; instead, the government will likely send a written confirmation of its intent to comply with the request within a reasonable time. In this letter, the government agency might also list a figure of estimated costs giving the agriculture producer a chance to either agree or cancel the request. If the files are urgent, then New York agriculture producers should ask that their request be expedited and include the reasons for the urgency.

Compared to federal agencies, there is a faster turnaround for FOIL requests to New York government agencies. N.Y. Public Officers Law § 89(3) requires that a state agency either grant or deny access to the FOIL request in whole or in part, or if more time is needed, to minimally acknowledge the receipt of the request in writing within *5 business days*. This acknowledgment must include an approximate date that the agency will either grant or deny the request. This date

must be “reasonable under the circumstances” but is typically within twenty to thirty business days.

Pay Fees

There is no initial fee to file a FOIA request; however, federal agencies are allowed to request “reasonable standard charges for document search, duplication, and review. . . .” See 5 U.S.C. § 552(a)(4)(A)(ii)(I). Unless no relevant documents were found, the federal agency will send the producer or agribusiness a letter giving you an estimate of the charges. At this time, the entire request can be cancelled if it is cost prohibitive.

The fees do vary somewhat among agencies --the USDA, for example, currently charges \$0.20 per page for photocopying and \$15 to \$40 per hour for search charges (depending on the complexity of the search). If the total fee does not exceed \$25.00, the USDA will not charge a fee at all. There may be additional fees for aerial photographs or negatives of pictures. Black and white or color enlargements, slides, microfilm, scans, and audio/videotape reproductions can also be ordered for an additional fee from most administrative agencies. In New York, agencies cannot charge more than a \$0.25 per page copying fee “or the actual cost of reproducing” the records which may include the hourly salary of the lowest paid employee with the skills necessary to complete the request. See Public Officers Law § 87(1)(b)-(c).

Fees will only be waived if the government can be persuaded that it is within the public interest to disclose the document. Waivers are not granted in cases where an individual agriculture producer is not be able to pay the fee. If fees are unpaid, most administrative agencies can levy interest charges. If affordability is a deterrent for obtaining either a FOIA or FOIL request, New York agriculture producers should state a maximum fee that they are willing to pay in their original request (e.g., \$100.00 or \$250.00 maximum).

Review FOIA/FOIL Request and Make Sure Documents Were Properly Exempted

After the agency has received the fees, it will process the request. The agency may send the agriculture producer a written “initial determination” of documents available. FOIA allows for access to all federal agency records except for documents pertaining to sensitive law enforcement and national security matters. The nine exempted FOIA materials for federal agencies are as follows:

1. Classified national defense files;
2. Internal agency rules and practices;
3. Information prohibited under another federal law;
4. Trade secrets and confidential business information;
5. Inter-agency or intra-agency communications;
6. Information involving matters of personal privacy (but may be obtained under the PA);

7. Certain types of information compiled for law enforcement (*e.g.*, documents for an ongoing investigation);
8. Information relating to the supervision of financial institutions; and
9. Geological information on wells.

New York has similar exemptions enumerated at N.Y. Public Officers Law § 87(2). The ten exemptions for New York government agencies is when disclosure would:

1. Violate a federal or state statute (*e.g.*, N.Y. Environmental Conservation Law § 3-0301(2)(r));
2. Invade personal privacy;
3. Impair present contract negotiations or awards;
4. Cause substantial injury to the competitive position of an enterprise or disclose trade secrets;
5. Interfere with law enforcement, deprive a person of fair trial, identify a confidential source, or reveal criminal investigative techniques (*e.g.*, wind energy company under criminal investigation by the NY Office of Attorney General);
6. Cause endangerment to the life or safety of any person;
7. Produce inter- and intra-agency materials which are not statistical data tabulations, instructions to staff that may affect the public, final agency determinations, or external audits;
8. Produce examination questions or answers which are requested prior to the final administration of questions;
9. Jeopardize an agency's security of information and technology assets; and,
10. Produce recorded images prepared pursuant to Vehicle and Traffic Law § 1111(a)-(b) (*i.e.*, Traffic control signal indicators).

After receiving the FOIA/FOIL request from the government, agriculture producers should make sure that the government did not withhold something that it should not have or inadvertently omitted requested documentation. The government is required to use a "reasonable effort" when searching for records. If an agriculture producers feels that there are missing records, he/she should write a letter appealing to either the federal or New York agency. New York producers should be cognizant of the maximum time period for preparing an appeal with that particular government agency.

Finally, if an agriculture producer finds incorrect information in the public records about themselves or their property, they should write back to the agency requesting the necessary changes. In these cases, the agency is required by law to notify that producer of its receipt of such an amendment (typically within ten days). The government agency may request further proof before it will make the correction in the public records on that individual producer or his/her farm.

So Why Is This Important For New York Agriculture Producers?

New York agriculture producers should understand and exercise their right to public documents for several reasons. First of all, it is a sound business practice to run FOIA/PA requests on an agriculture operation or agribusiness to make sure there is not any incorrect information available to the public. Environmental activist groups run FOIA/FOIL requests on agriculture operations; thus, New York farms and agribusinesses should regularly monitor what information is available to the public. Not only does this prevent incorrect information from getting in the wrong hands but it also gives insight on the public image of an agriculture operation (like setting up a google alert for a farm or agribusiness). Second, if the government ever conducts tests on a farm or its livestock (e.g., tests sheep for scrapies), agriculture producers should formally request a copy of these records via these state and federal statutes. Government agencies may be hesitant to voluntarily disclose this information. Third, if an agriculture producer is ever in dispute with a government agency, one of the first things the producer should do is run a FOIA/FOIL request with that agency. If an attorney is retained, he/she will likely run a FOIA/FOIL request so it would be helpful to already have this information to give to your attorney. Make sure to archive copies of all requests in your farm's records. Finally, the heart of FOIA/FOIL hinges on government accountability and transparency with the public. New York agriculture producers and agribusinesses should make FOIA/FOIL requests as concerned citizens to help keep our democracy in check.

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