

**Department of
Veterans Affairs**

Memorandum

Date:

From: Assistant Secretary for Information and Technology and Chief Information Officer (005)

Subj: Update to Freedom of Information Act Substantial Interest Notification Process (VIEWS 03208266)

To: Under Secretaries, Assistant Secretaries, and Other Key Officials

1. This is an update to the Release of Freedom of Information Act (FOIA) Information memorandum dated February 11, 2014 (VAIQ# 7441746) regarding release of FOIA information. It is important to review our processes to ensure that we can continue to improve our performance and responsiveness.
2. The FOIA Coordinating Committee met in March 2020 and focused on short and long-term improvements to our FOIA program with a focus on the Substantial Interest (SI) Notification process. Attachment 2 provides the updated guidance to be followed when determining and processing an SI request. The plan will be implemented immediately and will be reflected in the revised guidance to be followed by all Department of Veterans Affairs (VA) FOIA Officers.
3. The SI notification process is consistent with VA FOIA regulations, 38C.F.R. § 1.555(c), which states that a FOIA Officer determines that the component maintains responsive records that either originated with another component or which contain information provided of substantial interest to another component.
4. The results of the working group will be shared to include an improve process to formally designate and train your FOIA Officers and FOIA Analysts.
5. For additional information or any questions, please contact your Administration's FOIA Officer or VA FOIA Service at (202) 322-3652 or vacofoiaservice@va.gov.

James P. Gfrerer

Attachment: 2

Signed February 11, 2014 Release of FOIA Information Memorandum
Addendum Substantial Interest Notification Process

Attachment 2: Update to Freedom of Information Substantial Interest Notification Process

1. This is an update to the Release of FOIA Information memorandum, dated 2/11/2014, regarding Release of Freedom of Information Act (FOIA) Information. It is important to occasionally review our processes to ensure that we can continue to improve our performance and responsiveness.

2. The FOIA Coordinating Committee met during March 2020 and focused on both short- and long-term improvements to our FOIA program. The short-term plan will be implemented immediately while the longer plan will continue to be worked and will be reflected in revised guidance to be followed by all VA FOIA Officers.

3. The Substantial Interest (SI) notification process is consistent with VA FOIA regulation 38 C.F.R. § 1.555(c) which provides that when a FOIA Officer determines that the component maintains responsive records that either originated with another component, or which contain information provided by, or of substantial interest to, another component then the FOIA Officer will either:

(c)(1) Respond to the request, after consulting with the component that originated or has a substantial interest in the records involved; or

(2) Refer the responsibility for responding to the request or portion of the request to the component best able to determine whether to disclose the relevant records, or to the agency that created or initially acquired the record as long as that agency is subject to the FOIA. Ordinarily, the component or agency that created or initially acquired the record will be presumed to be best able to make the disclosure assessment. The referring component shall document the referral and maintain a copy of the records that it refers.

Further, 38 C.F.R. § 1.555(e) provides:

(e) Notice of referral. Whenever a FOIA Officer refers all or part of a request and responsibility for processing the request to another component or agency, the FOIA Officer will notify the requester in writing of the referral and provide the requester the name and contact information of the entity to which the request has been referred, after consulting with the entity to which the request is to be referred to ensure that the request is being referred to the correct entity. If only part of the request was referred, the FOIA Officer will inform the requester and identify the referred part at the time of the referral or in the final response.

4. What constitutes a FOIA request of substantial interest:

An SI FOIA request is one where, in the component's judgment, the subject matter of the released documents may be of interest or potential

interest to VA senior leadership. Any requests involving the current administration, previous administrations, Members of Congress (correspondence, calendars, travel, or otherwise), those related to a threat to the public health; requester or requested documents will garner media attention or is receiving media attention; request is for records associated with meetings with prominent elected, business, and/or community leaders; request is for congressional correspondence; request is from a member of the media; request is from a member of an advocacy group, watchdog organization, etc.; request is for records associated with a controversial or sensitive subject; or high profile local or national incidents or situations involving VA beneficiaries, employees or officials; and incidents involving an alleged breach of the public trust (e.g., waste, fraud, or abuse) or current or previous VA leadership would be included .

5. The VACO FOIA support office will identify incoming FOIA requests of substantial interest to the Office of the Secretary and other Senior Leadership throughout VA. This initial SI notice will alert leadership to potential follow-up inquiries that may be forthcoming. Each Administration and VACO Program office will monitor the VACO FOIA Substantial Notification email group. Each Administration and Program Office is required to keep the VACO FOIA Service informed on personnel changes to allow maintenance of the email list.

6. When a FOIA request is submitted directly to a FOIA office, other than VACO FOIA Service, the FOIA professional will review the request to determine if the request contains SI equities based on the above criteria. If the request is determined to be an SI FOIA, the FOIA professional will do the following: upload the request into the FOIAXpress (FX) system; after consultation with responsible FOIA Offices, assign to all FOIA offices that may have responsive records (each referral must have a separate FOIA case number assigned); notify their leadership of the SI request and, provide a copy of the request to the VACO FOIA Service for additional SI notifications. When providing the copy of the request to the VACO FOIA Service, the FOIA professional will identify all FOIA case numbers assigned to the request and the responsible office to which each case number is associated.

7. If a FOIA request is received directly by a field or regional FOIA office consult with the Administrations FOIA Officer for guidance. The Administration FOIA Officer will forward to the VACO FOIA Office for additional VACO FOIA notifications.

8. If the request is received by the VACO FOIA Support Office, they will acknowledge receipt of the SI FOIA request in an approved summary format and notify the referring component that a SI notification has been sent to VA Leadership. Additional notifications may be made by Administrations to their respective leadership chains based upon internal notification procedures. Administrations will be notified if additional documentation describing the request is needed.

9. When uploading SI FOIA requests to FX, you must select the SI option from the drop-down box located in the Requester Category section under “Categories” (multiple categories may be selected). Additionally, you must include an annotation in the comments section of FX, to include; SI notification, office responsible for release, and if additional leadership review is required. The FOIA professional will link all tracking numbers assigned to the request in FX and include in the notes section of FX the responsible office (s) to which each tracking number is associated. The VACO FOIA office will maintain a spreadsheet with all SI notifications made.

10. Initial SI notification will be made via email to the SI group. The FOIA Officers will coordinate with their respective leadership for inclusion and representatives for SI notification. The FOIA Officers will report to their respective leadership chains for additional review.

Weekly SI meetings will be conducted

Substantial Interest (SI) Notification Template:

To: VA FOIA SI Review

Subject: SI FOIA Notification, (FX tracking #)

Date received:

Attached to this email is a FOIA Request The details pertaining to this request are outlined below:

Who: [insert name of FOIA requester]

Affiliation: [insert organization such as ABC News]

What: Requesting the following:

Assigned/Referred VA FOIA Officer: [insert your name] (assigned program office)

Attachment: Attach a scanned dated copy of the request

Due date: 20 working days from date of request is perfected

11. A weekly SI review will be established, meeting with applicable personnel and representatives from component FOIA services. During the weekly meeting stakeholders will identify if they want to review documents prior to final release. Where a pre-release review is requested by leadership, the stakeholder requesting the review will receive a pre-release notification three working days prior to release.

Substantial Interest (SI) Review Template

To: VA FOIA SI Review

Subject: SI FOIA Review, [Facility Name, FX Tracking Number]

Body of the email:

Attached to this email is a response to a FOIA request received by [VA Program Name] from [Requester name and affiliation] on [date request was received].

The details pertaining to this request are outlined below:

What: Requesting the following:

[Transcribe exactly what the requester is seeking]

Assigned FOIA Officer: [insert your name]

Indicate Number of Processing Days Remaining or Number of Days in Backlog Status: [example -10 or 10 days remaining]

Attachment: Attach the following:

- a. A copy of the initial FOIA Request
- b. The proposed Initial Agency Decision Letter
- c. Copies of responsive records as you intend to release them to the requester (with proposed redactions not applied).

12. In addition to the Office of General Counsel's (OGC) inclusion in the SI process, OGC will confirm with the reporting activity following initial SI notification (paragraph 10) that they need to review records identified as responsive to the request prior to final SI review and release. Additionally, pursuant to paragraph 13 below, topics that require FOIA/Litigation Coordination will be identified and addressed by OGC prior to final SI review and release. Final OGC review will take place five business days prior to final notification of SI release. If OGC review will require more than five days, an estimated time will be provided to the FOIA officer to meet the requirements of 38 C.F.R. 1.556(c) and 1.561(e)(4). Final release of an SI Request will not occur without OGC clearance.

13. FOIA/Litigation Coordination (FLC): With respect to matters in litigation, FOIA professionals should coordinate with appropriate OGC personnel in order to ensure consistency within the Department with respect to the disclosure of agency records.

a. This process is different than the S Notification process, yet has a few similarities. The FLC is meant to ensure that VA OGC litigators are not caught by surprise if a VA Component releases records, pursuant to a FOIA request, that may impact pending departmental litigation

b. All FOIA Officers will review the VA Lit site prior to FOIA processing. The OGC active litigation hold SharePoint site should be consulted to determine if there is an active litigation. Prior to release the FOIA Officer should consult this website and consult with the attorney identified as the POC for the litigation.

<https://vaww.ogc.vaco.portal.va.gov/litigation/Lists/active/AllItems.aspx>. All FOIA Officers should maintain contact with District Counsel offices in addition to checking the active litigation hold SharePoint to be cognizant of pending local matters. As all VA litigation is not posted on the litigation hold SharePoint site, FOIA Officers, particularly in VHA, should continue the present practice of reaching out to local leadership to check the list of facility litigation to determine if any FOIA's involve existing litigation. Those FOIA Officers without an existing practice should check with local leadership for a list of existing litigation. The FOIA Officer should then reach out to the assigned attorney advising that a FOIA request is the subject of or filed by parties to the litigation. In addition, if it's determined by OGC that a specific topic should be in the FLC process, they will advise the VACO FOIA support office of the topic and the OGC POC, and

current list of topics will be provided to agency FOIA officers. The OGC will continue work to create a comprehensive list of pending litigation.

14. Once an SI FOIA case has been reviewed for final release, records determined by the processing FOIA office as meeting the definition of “likely to become the subject of subsequent requests due to the nature of the subject matter” shall be provided to the VACO FOIA Office for posting to the VA FOIA Library.

15. The results of the working group will be shared in the coming weeks to include an improved process to formally designate and train your FOIA Officers and FOIA Analysts. Thank you for your support as we continue to improve the FOIA release processes at VA.

16. For additional information or any questions, please contact your Administration’s FOIA Officer.