Part 408 – Records

Subpart C – Freedom of Information Act and Privacy Act

408.40 Scope

This subpart clarifies requirements for privacy that relate to Natural Resources Conservation Service (NRCS) programs contained in the 2008 Farm Bill. This subpart also explains how to recognize Freedom of Information Act (FOIA) and Privacy Act (PA) requests and discusses procedures for referring those requests to the proper persons for processing. Additional information on the FOIA and the PA is in National Instruction (NI) 120-300, http://directives.sc.egov.usda.gov/.

408.41 Purpose of the Acts and New Requirements

A. The Freedom of Information Act, 5 U.S.C. Section 552, as amended by the Freedom of Information Reform Act of 1986, generally provides that any person has a court-enforceable right to access Federal agency records, except when portions of those records are protected from disclosure by one of nine exemptions or by one of three new special law enforcement record exclusions.

B. The Privacy Act of 1974, 5 U.S.C. Section 552a, was enacted to protect individuals against unwarranted invasions of their privacy stemming from the collection, maintenance, use, and disclosure of personal information about them by Federal agencies. It also grants individuals the right of access to records maintained on themselves unless covered by an exemption, provides procedures for correcting errors in those records, and requires that agencies publish notification of systems of records that are maintained on individuals.

C. New requirements for confidentiality were set forth in Section 1619 of the Farm Bill. Section 1619 prohibits the Secretary of Agriculture, USDA employees, and USDA cooperators from releasing certain information that has been provided by agricultural producers and landowners to the USDA for the purpose of participating in the programs of the USDA. In order to implement the confidentiality requirements of Section 1619, NRCS has developed an “Acknowledgment of Section 1619 Compliance” form for NRCS cooperators to sign, which legally binds them to comply with the confidentiality provisions set forth in Section 1619.

D. To create “an unprecedented level of openness,” “agencies should exercise discretion to make a broader range of records available beyond the minimum required by the FOIA, which includes material maintained in the NRCS Reading Room.” Agencies are directed to “take affirmative steps to make information public” without waiting for a specific request and to “use modern technology to inform citizens about what is known and done by their government.” All proactively disclosable records should be posted online on Agency websites.

408.42 Open Government Act of 2007

A. The “Openness Promotes Effectiveness in our National Government Act of 2007,” also referred to as the OPEN Government Act of 2007, amended several procedural aspects of the FOIA, setting forth new Agency requirements and statutorily mandating existing practices that assist requesters and facilitate the processing of FOIA requests.
B. This new legislation amends the FOIA in a number of significant ways:

1. Restores the “catalyst theory” for assessment of attorney fees in litigation in those instances in which an agency unilaterally changes its position by releasing records absent a court order, including pursuant to a settlement agreement. Under the catalyst theory, a requester is eligible for fees if the agency releases documents after a suit is filed in the absence of a court order.

2. Requires agencies to pay attorney fees to a prevailing party from agency appropriations rather than the Judgment Fund, 31 U.S.C. 1304. Any attorney fees due to FOIA requesters who litigate agency tardiness or withholding will come from agency appropriations.

3. Prohibits agencies from charging and collecting search and duplication fees if the strict 20 day, plus 10 days in unusual circumstances, FOIA deadlines are not met, unless there are exceptional circumstances.

4. Clarifies for the purpose of fees who is a “representative of the news media,” recognizing electronic media, and permitting agencies to consider the past publication records of a requester who is seeking fee limitation by asserting status as a representative of the news media. This includes bloggers to some extent.

5. Directs the Attorney General to report to the Special Counsel any judicial findings of arbitrary and capricious withholding by an agency.

6. Makes clear that “date of receipt” for a FOIA request is no later than 10 days after the request is first received by any component of the Department, even though the request might not have reached the Department agency responsible for answering it.

7. Clarifies and limits current agency practice by providing that the 20 day clock for responding to a FOIA request is stopped (1) for one reasonable request by the agency for additional information from the requester about the request or (2) if necessary to clarify with the requester issues regarding fee assessment. The clock restarts once the agency receives the requester’s response to a request for information or clarification.

8. Mandates that whenever a record is released in part, the exemption claimed for any redactions are written in the record where the redaction has been made.

9. Redefines the term “records” specifically to include information maintained for the government by a government contractor for the purpose of records management.

10. Enacts into law some requirements that already have been implemented under Executive Order 13392, Improving Agency Disclosure of Information, including provisions requiring agencies to appoint a Chief FOIA Officer, appoint a FOIA public liaison, assign an individualized tracking number to each request, and provide a telephone line or internet service that will provide information to a requester concerning status of a request.

11. Establishes an Office of Government Information Services within the National Archives and Records Administration to review agency FOIA policies, procedures, and compliance; to recommend policy changes to the President and Congress; and to offer mediation services to agencies and FOIA requesters.

12. Adds additional FOIA statistics that agencies must report in their annual FOIA reports.

408.43 FOIA Service Center and Public Liaisons

Executive Order 13392 requires Agencies to establish FOIA Service Centers and FOIA Public Liaisons. The FOIA Service Center is the first level of contact for FOIA requesters to seek information concerning the status of their FOIA request and information about the Agency’s FOIA response after a determination has been made. A requester may submit
feedback about the service that he or she received from the Service Center and address their concerns to the NRCS FOIA Public Liaison at 301-504-2286.

408.44 Distinguishing and Handling Requests under FOIA

A. An office receiving a request for material that is readily available to the public should treat the request as a routine request rather than a request under FOIA, even if it cites FOIA. The material should be provided to the requester within 20 days. Examples of information that may be routinely provided without a FOIA request are:

1. Publications, soil surveys, brochures
2. Job sheets
3. Press releases
4. Permanent directives, including manuals, handbooks, General Manual parts, technical notes, technical releases, and material from the Field Office Technical Guide (FOTG), such as standards and specifications, soil data, resource management systems, cost-return data, and noncopyrighted references. (Note: If the request is for materials normally sold to the public through the Government Printing Office, tell the requester where the materials may be purchased.)

B. The following information related to wetland determinations conducted by NRCS employees or others designated by NRCS to act on its behalf is not releasable to the public:

1. Site visit reports and documentation of site conditions prepared by NRCS.
2. Wetland delineation data sheets prepared by NRCS
3. Technical determinations (e.g., functional assessments, scope and effect determinations) made by NRCS

C. If the requesting party wants additional wetland information, such as those items considered to be “proprietary” within the meaning of 5 U.S.C. Section 552(b)(4), a FOIA request must be submitted. The following types of information meet the definition of “proprietary” within FOIA:

1. Trade secrets
2. Privileged or confidential commercial or financial information obtained from a person

D. Requests for information found in NRCS records that is not normally created for or distributed to the public are treated as FOIA requests even in the absence of a FOIA reference.

E. No written request is required for an employee to see his or her own official personnel file or for an owner, operator, producer, or participant to see his or her own owner, operator, producer, or participant file.

408.45 Processing FOIA Requests

A. All FOIA requests must be in writing. If an oral request is received, advise the requester to make the request in writing either by mail, fax, or email. For requests for records in the State, provide the name and State office address of the State Conservationist or the State FOIA/PA officer. For requests for records that are national in scope, have the requester send the written request to FOIA Officer, USDA-Natural Resources Conservation Service, Administrative Services Division, P.O. Box 2890, Washington, DC 20013.

(120-408-GM, 1st Ed., Amend. 95, Sep 2010)
B. State Conservationists in each State should appoint a FOIA/PA officer. All FOIA and PA requests for records in the State must be referred to that person for processing.

(1) Field and area offices may not respond to FOIA requests unless the FOIA/PA officer for that State specifically instructs local offices to release records after the FOIA/PA office has reviewed the written request.

(2) If requests are received in field and area offices, they must be forwarded the same working day they are received to the FOIA/PA officer in the State office. This is particularly important since the law requires that requests be answered in 20 working days.

C. Do not ask the requester why he or she wants the information. Encourage the requester to be as specific as possible in describing the records. Do not indicate whether or not the records will be released or whether fees will be charged. Refer these matters to the State FOIA/PA officer.

D. NRCS, consultants, or contractors of NRCS must not provide nonpublic information that—

(1) Reflects on the owner’s, operator’s, producer’s, or participant’s personal, commercial, and financial matters

(2) Causes substantial harm to the competitive position of the owner, operator, producer, or participant

(3) Impairs the Government’s ability to obtain necessary information in the future

E. As a general matter, requests for personal information contained in files referenced by a personal identifier are exempt from release under exemptions (b)(3) or (b)(6) of the FOIA, or both, and therefore should be denied under the PA. The FOIA officer should be contacted if questions arise whether to release information covered by the FOIA and PA pursuant to one of the exemptions under the Acts.

408.46 Privacy Act of 1974

A. The Privacy Act of 1974 addresses records containing personal information about individuals. The PA requires that when a Federal agency maintains records on an individual, the records must be maintained in a Privacy Act System of Records, which is approved by the Office of Management and Budget and published in the Federal Register. NRCS has a Privacy Act System of Records for its owner, operator, producer or participant files, volunteers, and employees. Employees whose duties require handling records in these systems must, at all times, protect the integrity, security, and confidentiality of these records. Employees must exercise care so that information contained in these files is not inadvertently disclosed to any unauthorized source, including families, friends, or others who have no need to know. Keep all private information in secure areas when not in use during office hours.

B. District conservationists are the system managers for owner, operator, producer, and participant files in their offices. They should be familiar with the system, which is described in Section 408.45. When records are used for the seven “routine uses” listed in the system, no other authority is needed.

C. The fact that records are in a Privacy Act System of Records does not necessarily mean that they are not releasable under FOIA. Use common sense in the type of information placed in a file.

D. Persons responsible for handling records should also be familiar with the criminal sanctions in the Privacy Act:
(1) Unauthorized Disclosure.—An employee, contractor, or consultant of NRCS having access to NRCS records that contain individually identifiable information who discloses, publicly releases, publishes, or causes to be published to any person may be fined up to $10,000 or imprisoned for up to 1 year.

(2) Failure to Publish Public Notice.—Any employee who willfully maintains a system of records without meeting the public notice requirements is guilty of a misdemeanor and may be fined up to $5,000. Do not maintain any files on individuals other than those listed in the NRCS Records Guide.

(3) Obtaining Records under False Pretenses.—Any individual who willfully requests or obtains any record concerning an individual from NRCS under false pretenses is guilty of a misdemeanor and may be fined up to $5,000.

408.47 Privacy Act System of Records – Owner, Operator, Producer, or Participant Files - USDA/NRCS

A. System Name.—Program Owners, Operators, Producers, or Participants – Natural Resources Conservation Service, USDA/NRCS

B. System Location.—Program owner, operator, producer, or participant files are maintained in all NRCS county field offices, mostly USDA field service centers in the county seat. Addresses of each field office are listed in the telephone directories of the field office locations under the heading, “United States Government, Department of Agriculture, Natural Resources Conservation Service.” Addresses may also be obtained at http://www.nrcs.usda.gov/. Program owner, operator, producer, or participant files are also maintained in USDA data centers in Fort Collins, CO; Kansas City, MO; and St. Louis, MO.

C. Categories of Individuals Covered by the System.—Owners, operators, producers, or participants with NRCS programs.

D. Categories of Records in the System.—The system consists of electronic databases and file folders containing information on an individual’s conservation plans, cost-share agreements, conservation practice designs, resource maps, resource inventories, assistance notes, personal and economic data, and other material necessary to provide assistance to the owner, operator, producer, or participant in conserving natural resources on his or her lands.

E. Authority for Maintenance of the System.—16 U.S.C. Section 590 a-f, q, q-1 and other applicable authorities.

F. Routine Uses of Records Maintained in the System, Including Categories of Users and the Purposes of Such Uses:

(1) Records may be disclosed to cooperating Federal, State, and local agencies, as necessary for implementation of conservation programs.

(2) Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

(3) Disclosure to Federal, State, and local agencies, when necessary to certify that a conservation plan is in effect for land users to qualify for other USDA program benefits.

(4) Referral to the Department of Justice when any of the following is a party to litigation or has an interest in such litigation (only if the agency determines that such disclosure is relevant and necessary to the litigation and compatible with the purpose for which the records were collected):

(i) The agency or any of its components
(ii) Any employee of the agency in his or her official capacity
(iii) Any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee
(iv) The United States, where the agency determines that litigation is likely to affect the agency or any of its components as a part of litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records by the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

(5) Disclosure in a proceeding before a court or adjudicative body before which the agency is authorized to appear, when any of the following is a party to litigation or has an interest in such litigation (only if the agency determines that such disclosure is relevant and necessary to the litigation and compatible with the purpose for which the records were collected):
   (i) The agency or any of its components
   (ii) Any employee of the agency in his or her official capacity
   (iii) Any employee of the agency in his or her individual capacity where the agency has agreed to represent the employee
   (iv) The United States, where the agency determines that litigation is likely to affect the agency or any of its components

(6) Referral of any record within this system to the appropriate Federal, State, local, or foreign agency responsible for investigating or prosecuting a violation of law, or of enforcing or implementing a statute, rule, regulation, or order issued pursuant to the law, when information available indicates a violation or potential violation of law.

(7) Disclosure may be made to contractors or to technical service providers when a written authorization has been received by the agency from the owner, operator, producer, or participant. Such disclosure shall be made subject to the purposes for which the contractor or technical service provider is hired.

G. Policies and Practices for Storing, Retrieving, Accessing, Retaining, and Disposing of Records in the System

(1) Storage.—Records are maintained in an electronic retrieval system and in file folders in county field offices.

(2) Retrievability.—Records can be retrieved by name of owner, operator, producer, or participant, or location on a map, unit identification number, location code, farm type, soil resources survey area, soil resources conservation district code, resource management systems and practices, and program contract information.

(3) Safeguards
   (i) System access is restricted to authorized NRCS employees and conservation district employees working to assist with the implementation of natural resources programs.
      • NRCS field employees are authorized to access system records of owners, operators, producers, or participants in their service area or outside of their service area if the owner, operator, producer, or participant has authorized access.
      • Conservation district employees are authorized to access system records of their district owners, operators, producers, or participants only in their official capacity as district employees.
   (ii) The electronic data retrieval system is secured by the USDA Common Computing Environment user authentication process and USDA eAuthentication
login and password protection. Manual files are maintained in file cabinets. Offices are locked during nonbusiness hours.

(4) File Retention.—Records are maintained as long as the owner, operator, producer, or participant qualifies for conservation programs.

(5) System Managers and Address.—District conservationists or other designees are in charge of delivering services in county offices. Addresses of each field office are listed in the telephone directories of the field office locations under “United States Government, Department of Agriculture, Natural Resources Conservation Service.” Addresses may also be obtained at http://www.nrcs.usda.gov/.

(6) Notification Procedures

(i) Any individual may request information regarding this system of records, or information as to whether the system contains records pertaining to him or her by contacting the respective district conservationist or other designee.

(ii) If the specific location of the record is not known, the individual should address his or her request to the Director, Administrative Services Division, USDA-Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013, who will refer it to the appropriate field office.

(iii) A request for information pertaining to an individual should contain: name, address, and other relevant information (e.g., name or nature of program, name of cooperating body, etc.).

(7) Record Access Procedures.—Any individual may obtain information as to the procedures for gaining access to a record in the system that pertains to him or her by submitting a written request to the district conservationist or his or her designated representative, or to the Director, Administrative Services Division, USDA-Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013.

(8) Contesting Record Procedures.—Any individual may obtain information as to the procedures for gaining access to a record in the system that pertains to him or her by submitting a written request to the district conservationist or his or her designated representative, or to the Director, Administrative Services Division, USDA-Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013.

(9) Record Source Categories.—Information in this system comes from owners, operators, producers, or participants and from the NRCS field conservationists who provide technical and program assistance to them.