

**UNDERSTANDING FOIA:
HOW TO FOLLOW THE LAW WHILE PROTECTING YOUR OWN PRIVACY**

**University Senates Conference
University of Illinois**

The Illinois Freedom of Information Act (FOIA) is our state's version of a federal law regarding the disclosure of public records (<https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=85&ChapterID=2>).

Illinois law mandates that "public records" – defined as "documentary materials pertaining to the transaction of public business" – must be made available to the public upon request. Any employee of the state of Illinois who possesses a copy of a public record, whether they have produced it or received it, must make that record available if it is requested.

According to state law, the university's FOIA compliance obligations are the responsibility of a designated "FOIA Officer." However, ultimate authority for interpretation and application of FOIA rests with the Illinois Attorney General through the Public Access Counselor (PAC). University personnel, including and especially the FOIA Officer, rely on published opinions from the Public Access Counselor and the courts in applying FOIA, including its exemptions or limitations. Appeals can be, and are, made but the final decision does not rest with the university.

The members of the University Senates Conference strongly support the FOIA law and the principles underlying it: we support transparency, accountability, and the right of all members of the public to be informed about official activities, including those carried out at the University of Illinois.

However, the number and frequency of FOIA requests is steadily climbing (See Appendix 1). Any university employee can be FOIA'd at any time by any individual who files such a request (even anonymously). No purpose or justification needs to be offered. This makes it possible for FOIA to be maliciously misused to harass faculty and staff, to threaten their privacy, and to seek to embarrass or attack them and, potentially, the University of Illinois as an institution.

This commentary is meant to provide a faculty perspective on how FOIA works and how to responsibly follow the law while taking active steps to help safeguard potentially private or otherwise protected information.

IT'S NOT JUST YOUR UNIVERSITY EMAILS

A few key points:

(1) FOIA requests can cover any communication pertaining to the transaction of university business. According to the Act, the format of the "public record" is irrelevant. A "public record" might take the form of an email message sent or received through a university or a personal account, a text message sent from a personal phone, a voice mail, a recorded Zoom session, or other media of communication, if it is judged to be relevant to the transaction of university business. **For the FOIA law, it does not matter whether one uses public, university, or personal resources to produce a document – the document must be provided to the requester as long as that document pertains to the transaction of public business and does not fall under one of several exemptions (see below).**

(2) The FOIA law, as written, does not suggest that a member of the public – or anyone else – has a right to surveil any and all activities of employees of the state. On the contrary, it explicitly states that the

Act is not intended to cause an unwarranted invasion of personal privacy, nor to allow the requests of a commercial enterprise to unduly burden public resources, or to disrupt the duly-undertaken work of any public body independent of the fulfillment of any of the fore-mentioned rights of the people to access to information.

Furthermore, the law limits the public's "right to know" to the provision of "public records." **Not everything is a public record – only "documentary materials pertaining to the transaction of public business."**

(3) FOIA includes a list of exemptions to what is open to public inspection, including but not limited to personal notes, draft documents, trade secrets, "course materials or research materials used by faculty members," "records in which opinions are expressed, or policies or actions are formulated," and communications unrelated to the transaction of public business (see Section 7 of the Act).

While these exemptions offer some protections, if you are the subject of a FOIA request, you are expected to deliver anything the University of Illinois FOIA officers request, and usually within the five business days required by the FOIA law, although an extension can be granted. The standard practice at this institution is to gather the requested

documents by sending the requests to employees or others who may be in possession of such documents. Some employees choose to have IT departments pull documents such as emails or files off of servers directly without the employee's active participation. In most cases, employees gather and submit potentially responsive documents themselves. After the FOIA officers receive the documents, they determine which ones may be withheld or redacted in accordance with the law.

We advise you to establish a practice of organizing your communications so that the FOIA staff can easily identify materials that do not "pertain to the transaction of public business," or that fall under one of the exemptions. We offer a number of specific suggestions, below.

(4) Sometimes requests that are filed with the FOIA office are so broad that they could capture personal communications that have nothing to do with "public business." For such overtly personal communications even to be collected and reviewed may constitute a threat to privacy. It is not the case that all records produced or received by an employee are related to public business simply because the sender or receiver is employed by the State of Illinois. We believe that subjects of a FOIA request should have the right to appeal to the University of Illinois FOIA office when they believe that a request they have received is overly broad or potentially intrusive.

(5) FOIA does not require a requester to provide a reason for a request, and some FOIA requests appear to serve no ostensible purpose but to harass and embarrass individuals. Responding to them can represent literally weeks of work. Further, since the same person can be FOIA'd repeatedly, the potential to harass an individual by imposing such a workload is disturbing. Because FOIA does contain some protections against "recurrent requesters," communication with the FOIA office can help them to identify harassing patterns of recurring requests.

In a national political climate in which organizations and individuals with extreme political agendas have targeted and harassed faculty members, the potential of the Freedom of Information Act to be weaponized represents a serious threat, especially to certain individuals, and members of certain groups, who are at greater risk of being maliciously targeted.

FOIA "HYGIENE": HOW TO PROTECT YOURSELF

(1) **A good general rule, going forward, is to remember that any copies you save of any of your communications – in any medium – can potentially be made public.** Above all, use care in what you put in writing, particularly in your emails. Personal comments to a

friend, spouse, or partner; rumor or gossip; crude humor; or snarky comments about a colleague could be deemed to be subject to disclosure.

(2) For your personal and private communications that do not pertain to the transaction of public business, establish a habit of communicating in ways that do not create documents that could be comingled with potentially public records. Rather than using University accounts for your non-university communications, be sure to use personal email, phone calls, in-person conversations, or other personal media.

(3) If you do use document-producing media for communications that are not related to the transaction of public business, you are not required to keep copies of those communications – and you might consider making your recipients aware of this principle, as well. As you begin to establish a system of retention of your public records, you may want to also review your archives of past emails and text messages, in both your University and personal accounts.

(4) A good general rule is to avoid using your university email for non-university communications. Remember also that most email messages retain the full thread of previous messages and replies. The content to be concerned about might not be in the latest message, but in earlier messages within the same thread.

(5) The FOIA staff are thoughtful and conscientious people, but they must read and redact thousands of pages every week, under strict time limits imposed by the law. Get in the habit of clearly identifying drafts, notes, and other documents that are exempt or that do not pertain to the transaction of public business. This will help the FOIA officers as they evaluate whether a document is subject to disclosure or whether it is covered by FOIA exemptions. Drafts and personal notes, for example, are included in the FOIA list of exempt items. If you share a draft with a colleague, mark it “DRAFT” or “FOR DELIBERATIVE PURPOSES” both on the document and in the email subject line; and likewise if you share personal notes or keep copies of them.

(6) After FOIA staff gather documents that may potentially respond to a filed request, they must review them to identify those that may be withheld or redacted. You may ask the FOIA office to provide you with copies of the final records before they are given to the requester so that you have a chance to review them. Keep in mind that the FOIA office must comply within the very short time frame that is mandated by law. The clock starts running as soon as the FOIA office receives the request, not when the office receives the potentially responsive documents from you or others. Therefore, you should work quickly to gather potentially responsive documents and share them with the FOIA office. Similarly, if you are working with the FOIA office to review final

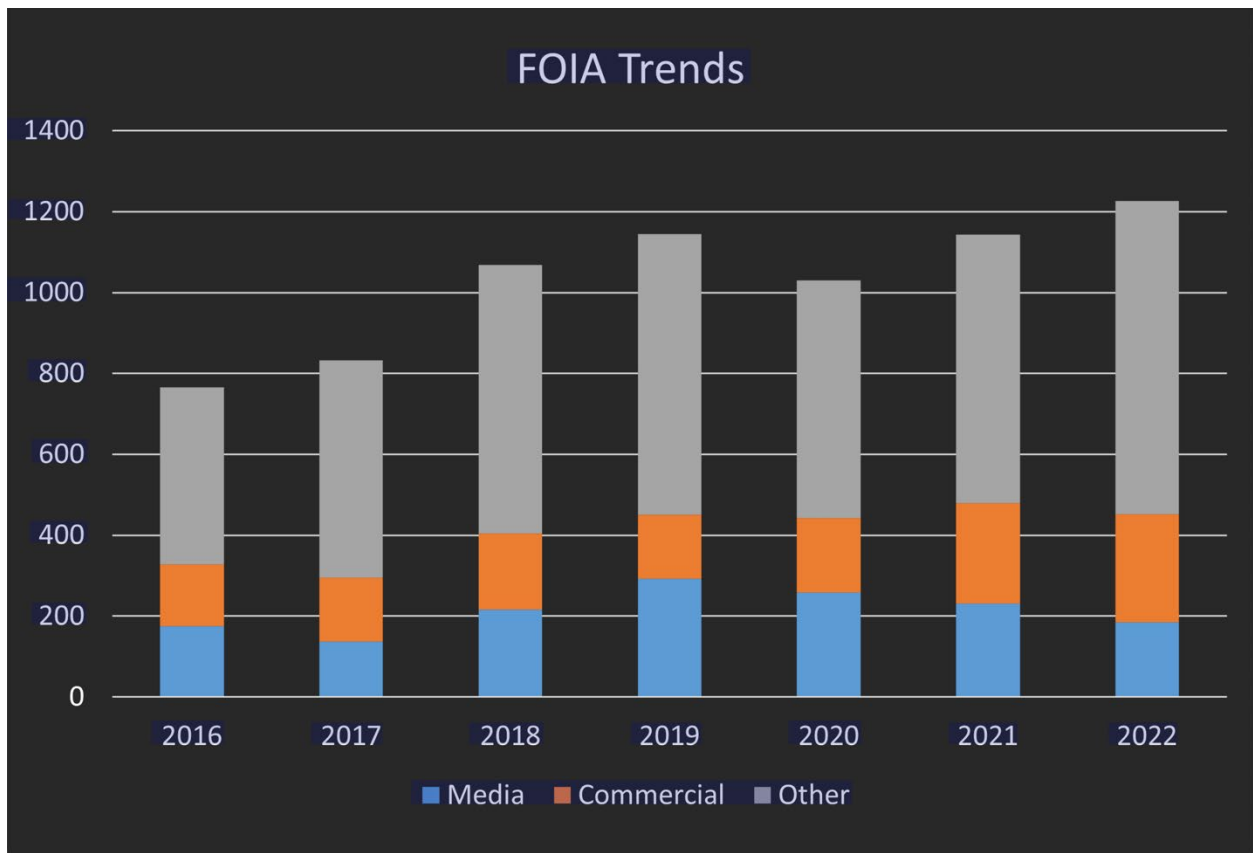
responses, notify them as quickly as possible if you think further changes may be warranted.

(7) If you receive a request that is overly general or voluminous, respond to the FOIA officer to inquire whether the request could be considered “burdensome” under section 3(g) of the FOIA law. If a requester files a request that is too general or that cannot reasonably be fulfilled within the legal time frame, the FOIA office is authorized by law to ask the requester to more narrowly focus the request.

(8) Remember that FOIA is a document production law, not a document retention law. Independent of FOIA, there are state and regulatory requirements for preserving certain kinds of documents and records. The university's Records and Information Management Services (RIMS) office provides guidance and support to all members of the university community in meeting these requirements and can help you in distinguishing between materials that are and are not considered university records. Notice that RIMS says that non-university records “should be disposed of as soon as possible after their primary usefulness has expired” (see Appendix 2).

(9) Once you receive a FOIA request, you are required by law to respond. Do not destroy public records that are in your possession after you receive the request.

APPENDIX 1



These numbers come from the U of I System FOIA Office. Everyone expects the numbers to keep going up in the future.

APPENDIX 2

WHAT RECORDS ARE YOU REQUIRED TO RETAIN?

The University policies on records retention and email use can be found on the Records and Information Management Services (RIMS) website:

<https://answers.uillinois.edu/systemoffices/94810>

Beyond the requirements of FOIA, the University Office of Records and Information Management Services (RIMS), in coordination with the University Archivists, distinguishes between email communications that must be retained, either for short-term support of business functions or for consideration as having archival value, and those that do not have to be retained.

Note that RIMS distinguishes which materials are considered “university records,” which must be retained for some period of time in order to assure an accurate account of university business. Faculty members who are not in leadership positions have less stringent requirements than do senior administrators, but may still be required to retain certain records.

Permission must be secured before disposing of University records. However, not everything produced by faculty members would meet the definition of “records” in the University General Rules and the Illinois State Records Act. Drafts and duplicate copies that have no archival value, for example, are considered non-records.

According to [RIMS policy](#), other examples of non-records include “materials used merely for reference purposes, or materials that communicate information of short-term value.” When faculty members produce what the RIMS defines as “non-records” and is not otherwise considered of value to their teaching and research, they “should be disposed of as soon as possible after their primary usefulness has expired.” No permission is required for the disposal of non-records. However, all documents, correspondence, and other materials that are retained even for reference purposes or in support of teaching and research, remain open for consideration in responding to FOIA requests.