

Surface Transportation Board FOIA Reference Guide

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I. Introduction

This reference guide explains how to apply under the Freedom of Information Act (FOIA or the Act), 5 U.S.C. § 552, for records from the Surface Transportation Board (STB or Agency). FOIA provides that Federal government agencies should generally turn over agency records upon the request of any person. However, some agency records may be withheld for various reasons specified in the Act. The formal rules for making FOIA requests to the STB are set forth in the Code of Federal Regulations at 49 C.F.R. § 1001.3 (accessible as a link on the STB's FOIA web page), but this informal reference guide should provide you with the basic information you will need to make a FOIA request to the STB. In addition, this guide explains how to obtain certain records that are available without filing a FOIA request.

II. Types of Records Maintained by the STB

The STB administers the provisions of the Interstate Commerce Act (ICA), as amended by the ICC Termination Act of 1995, concerning economic regulation of railroads. In that capacity, the STB considers, among other things, whether to authorize proposals for the construction, acquisition, abandonment, or merger of rail lines. The Agency also may be called upon to adjudicate disputes that arise out of the proposals that it has already authorized. In addition, the Agency may be asked to resolve rate or service disputes between shippers and rail carriers. The STB has some limited involvement with matters concerning Amtrak and commuter rail operations. Rail safety matters generally fall under the jurisdiction of the Federal Railroad Administration.

In addition to its authority over railroad matters, the STB administers certain provisions of the ICA concerning motor carriers, water carriers, and freight forwarders, as well as provisions concerning certain (non-energy related) pipelines.

The STB maintains records regarding all of its proceedings, as well as records of information that carriers and other parties submit to it. In addition, the STB maintains some

records of its predecessor agency, the Interstate Commerce Commission, that are related to the STB's present functions.

III. Records Accessible Without a FOIA Request

- **Public Records.** You do not have to file a FOIA request to obtain Federal agency records that are routinely available for public inspection. Public STB records include: (1) all STB decisions and notices, such as those concerning a license to construct, acquire, operate over, or abandon a rail line; (2) filings submitted by parties in STB cases; (3) correspondence about environmental matters; (4) certain rail industry data regularly reported to the STB; (5) equipment liens involving rail carriers or water carriers that are recorded at the STB; (6) summaries of contracts involving rail transportation of agricultural products; (7) press releases; and (8) other documents that the Agency determines are of general public interest and likely to be the subject of repeated requests. Many of these public records are available on the Agency's website at www.stb.dot.gov.

FOIA requires agencies to make several types of records available to the public on agency websites. Because these records are made publicly available, they are no longer records that are required to be provided to requesters through FOIA requests. Some records, however (such as records that fall within categories 2-5, or 7 above), are posted on the Board's website even though there is no requirement that agencies make them publicly available. When the agency exercises its discretion to make records publicly available, you may still request such records through the FOIA process if you prefer.

Copies of public records that are maintained by the STB can also be obtained for a fee by contacting the Records Management staff at rcpa@stb.gov or (202) 245-0238 or (202) 245-0406 or via facsimile to (202) 245-0461. HARD RETURN

Access to Waybill Sample data varies depending on whether the data is considered confidential or not. A waybill is a document describing the characteristics of an individual rail shipment. Railroads are required to submit statistical samples of the waybills for the traffic they handle. The Board compiles the data contained in the waybill samples and uses this information to help it monitor the rail industry in general, and the nature and quantities of goods being shipped by rail in particular. A Public Use Waybill File, which contains certain Waybill Sample data, aggregated at the industry level, is available on the Board's website under Industry Data in the Waybill Public User Guide. Certain other Waybill Sample data is available under certain conditions through the STB Office of Economics. The regulations governing release of that data are set forth at 49 C.F.R. § 1244.9. Information about how to access confidential Waybill Sample data is also available on the website. For further information about records involving Waybill Sample data, contact the STB at Economic.Data@stb.gov or (202) 245-0333.

IV. Records Available by FOIA Request

You may make a FOIA request to obtain any Agency record. However, the FOIA does not require an agency to do research for you, to analyze data, to create a record, or to answer questions about information contained in a record. In addition, as noted above, there are various statutory “exemptions” that authorize an agency to withhold certain kinds of information. These exemptions are exceptions to the general rule that Federal agencies make agency records accessible, although an agency has the discretion to release documents even though a FOIA exemption may apply to them. Consistent with former President Obama’s January 21, 2009, FOIA Memorandum and former Attorney General Holder’s March 19, 2009, FOIA Guidelines, this agency will exercise its discretion to release otherwise exempt records when it is determined that such release will not result in actual harm.

When the STB denies a request to release records, either in whole or in part, the Agency will specify why it has withheld that information. Historically, a denial by the STB has usually been based on one of the following statutory exemptions:

- Exemption 4, 5 U.S.C. § 552(b)(4), protects confidential commercial information furnished to the STB by outside parties. Such information may be withheld if disclosure is likely to either impair an agency’s ability to obtain necessary information in the future or cause substantial harm to the competitive position of the entity from which the information was obtained. In determining whether to release such information, the Agency is required to consult with the commercial entity that gave the information to the Agency.
- Exemption 5, 5 U.S.C. § 552(b)(5), protects draft decisions, memoranda, and emails, including those setting forth internal recommendations from STB staff, those that contain attorney work product, and those between different Federal agencies. The purpose of this exemption is to preserve the free and frank expression of comments, opinions, recommendations, and analyses, which is essential to the Agency’s decision-making process.
- Exemption 6, 5 U.S.C. § 552(b)(6), protects information concerning individuals (other than the requester) that, if released, would clearly constitute an unwarranted invasion of their personal privacy. For example, the STB will not release a list of STB employees’ home addresses.

V. How to File a FOIA Request

No special form is required to file a FOIA request. However, a request must be in writing, should be identified clearly with the label “FOIA Request,” and should specify as much information as possible about the record(s) you are requesting. Include the relevant docket number if known. Your request must also state the maximum search fee that you are willing to pay (see below).

A FOIA request can be filed by email to FOIA.Privacy@stb.gov, by fax to (202) 245-0456, or by mail directed to FOIA/Privacy Officer, Surface Transportation Board, 395 E Street, S.W., Washington, D.C. 20423-0001. You should include, along with your address, a day-time phone number and/or email address so that you can be contacted, if necessary, to clarify your request.

VI. Fees

There is no initial fee to file a FOIA request, and FOIA provides for up to two hours of search time and up to 100 pages of photocopying of documents at no fee to any requester other than a commercial requester (defined below). Therefore, in many instances, there will be no fees. Nevertheless, in your request you must state whether you are willing to pay for any additional search time or photocopying costs incurred in responding to your request, as well as the amount that you are willing to pay (starting at a minimum of \$25). The agency will not incur expenses beyond the cap that you set without first obtaining your permission. If the fee exceeds \$250, advance payment will be required prior to you will receive the results.

The fees that you may be charged may include the cost to the Agency of searching for responsive records, the cost of reviewing those records to determine whether they should be released in whole or in part, and the cost of any photocopying of records to be released to you. Be aware that you may be required to pay fees even if the search does not locate any responsive records and even if located records are withheld under one of the FOIA exemptions. However, the Agency will contact you before incurring costs greater than the amount you specify.

For the purposes of determining fees, FOIA requesters are divided into three categories:

- Commercial requesters (those who seek to make a profit from the information, for example, law firms doing due diligence) will be charged fees for any time required to search for records, for any time to review the records to determine whether they should be released or withheld under an exemption, and for any photocopying.
- Educational or non-commercial scientific institutions and representatives of the news media will be charged only for photocopying expenses (after the first 100 pages), not for the time spent searching and reviewing records.
- Other requesters (including people seeking records for personal use, public interest groups, and non-profit organizations) will be charged for search time in excess of two hours and for photocopying beyond the first 100 pages, but not for the time spent reviewing records.

When copying charges are applicable, the STB currently charges \$1.50 per page for photocopying by an STB employee (with a minimum charge of \$7.50) or \$.10 per page of computer generated output (with a minimum charge of \$.25). Rates for searching and/or reviewing records are set forth in the Board's regulations at 49 C.F.R. 1002.1(g)(6), which currently range from \$27.03 per hour to \$71.56 per hour (pro-rated in 15-minute increments and as updated), depending on the salary level of the staff member required to do the search and/or review. Requesters may be able to reduce their fees by arranging to view and/or photocopy documents themselves at the STB headquarters, located at 395 E Street, S.W., Washington, D.C. 20423-0001.

If you are advised or expect that a fee will be charged, you may request a fee waiver of those fees. However, fee waivers are limited to situations in which a requester demonstrates that (1) disclosure of the requested information is likely to contribute significantly to public

understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester, and (2) the information is likely to be widely disseminated. Under the FOIA, financial hardship is not a basis for waiving fees.

VII. Getting a Response to Your Request

The STB is almost always able to respond to a FOIA request within 20 working days from the date of receipt by the Agency. (If the Agency's response will be delayed beyond that point, you will be contacted.) FOIA requests are normally handled on a first come, first served basis. But a FOIA request will be expedited if the requester shows that either (1) there will otherwise be a serious threat to some individual's right or (2) the requester is primarily engaged in disseminating information to the public and the information is urgently needed to inform the public concerning some actual or alleged government activity.

You can check on the status of your request by contacting the STB's FOIA staff. See contact information above (section V.) and on the STB's FOIA webpage. In addition, if you are dissatisfied with the manner in which the FOIA Officer responds to your inquiry, you may contact the STB's FOIA Public Liaison, Craig Keats, by phone at (202) 245-0264, by email at craig.keats@stb.gov, by fax at (202) 245-0456, or by mail at Surface Transportation Board, 395 E Street, S.W., Washington, D.C. 20423-0001.

Once the STB has processed your request and any fee issues have been resolved, the FOIA Officer will send you a written determination. In most cases, any documents that can be disclosed will be included with this letter, although in some cases the documents themselves may be sent within a reasonable time afterwards. The determination letter will advise you whether any documents have been located and whether (and how many) documents are being released or withheld, as well as the basis for denying any part of your request. The letter will also tell you how you may appeal the decision of the FOIA Officer.

VIII. Appeal Rights

You may file an administrative appeal to the Chairman of the STB, Surface Transportation Board, 395 E Street, S.W., Washington, D.C. 20423-0001 within 90 days of the FOIA Officer's determination. You may appeal any or all of the following: (1) a decision by the FOIA Officer to withhold a record (in whole or part); (2) the adequacy of the agency's search, if you believe that there are records responsive to your request that the Agency failed to locate; (3) a denial of a request for expedited processing or a fee waiver; and (4) a determination of the fee category into which you were placed. There is no specific form or particular language needed to file an administrative appeal, but your appeal should reference the request number assigned to your initial FOIA request.

The STB Chairman will make an independent determination as to whether your request was properly resolved by the FOIA Officer. The Chairman will make that determination within 20 working days. Where the appeal concerns withholding of records (in whole or part), the Chairman's determination may: (1) affirm the initial determination in full, in which case it will identify which exemptions (if any) have been appropriately invoked; (2) affirm part of the initial

determination (including identifying appropriate exemptions), but reverse part of the initial determination and release to you some of the information previously withheld; or (3) reverse the initial determination entirely and release to you all the records you requested.

After your administrative appeal has been decided, if you still believe that the STB has not handled your FOIA request in accordance with the law, you may challenge the Agency's action in a lawsuit filed in a Federal court. However, if the STB fails to respond to either your initial request or your appeal within the time allotted (20 working days), you may file suit as soon as those time limits have expired. You have six years to file suit from the time your right to sue begins. (The right to sue begins when you get an unfavorable decision or the agency fails to rule on your request in a timely way.) If you do bring a court action, you may file your suit in a Federal district court in any of the following places: (1) where you reside, (2) where you have your principal place of business (if any), or (3) in the District of Columbia.

You may also seek dispute resolution services from the STB FOIA Public Liaison or the Office of Government Information Services (OGIS). OGIS offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. We encourage you to use OGIS's mediation services, if you feel it would be helpful, and the Board will participate. Of course, using OGIS services does not affect your right to pursue litigation (once your administrative appeal is complete). You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

FOIA litigation is a complex area of law. There are thousands of court decisions interpreting the FOIA. These decisions must be considered in order to develop a complete understanding of the principles governing disclosure of government information. Please understand that attorneys and employees of the STB are prohibited from giving legal advice to members of the public regarding FOIA litigation. Anyone requiring more details about the FOIA, its history, or the case law should consult other sources. (Additional FOIA resources are available on the website of the United States Department of Justice at <https://www.justice.gov/oip/foia-resources>.) No special expertise is required to make a FOIA request, however, and no one should be discouraged from doing so.