



# Freedom of Information Act (FOIA) Overview and Q&A

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## USGS Community for Data Integration (CDI)

# Purpose

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To learn about the Freedom of Information Act's (FOIA), 5 U.S.C. § 552, impacts on USGS (or partner) data, our science and our collaborative partnerships

# Transparency in Science



# Overview

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- Authority
- What is the FOIA and 2016 FOIA Amendments
- Historical Snapshot
- FOIA Matters
- What Can/Cannot be Requested?
- Our Data and the FOIA
- Key Questions
- Hot / Misc. Topics
- Q&A

# Authority

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- [5 U.S.C. 552](#) (Including text of the FOIA Improvement Act of 2016)
- [43 Code of Federal Regulations \(CFR\) Subtitle A, Part 2](#), DOI Freedom of Information Act; Records and Testimony
- [383 Department Manual \(DM\) 15](#), Freedom of Information Act Policy, Responsibilities, and Procedures, effective August 5, 2016
- [383 DM 15, DOI FOIA Handbook](#), dated July 15, 2014
- [Survey Manual 318.1, FOIA – General](#), dated September 27, 2012
- [DOI FOIA Guidance](#) and Resources
- Office of Science & Technology Policy (OSTP), [Federal Funded Scientific Research](#), dated May 9, 2013

# What is the FOIA?

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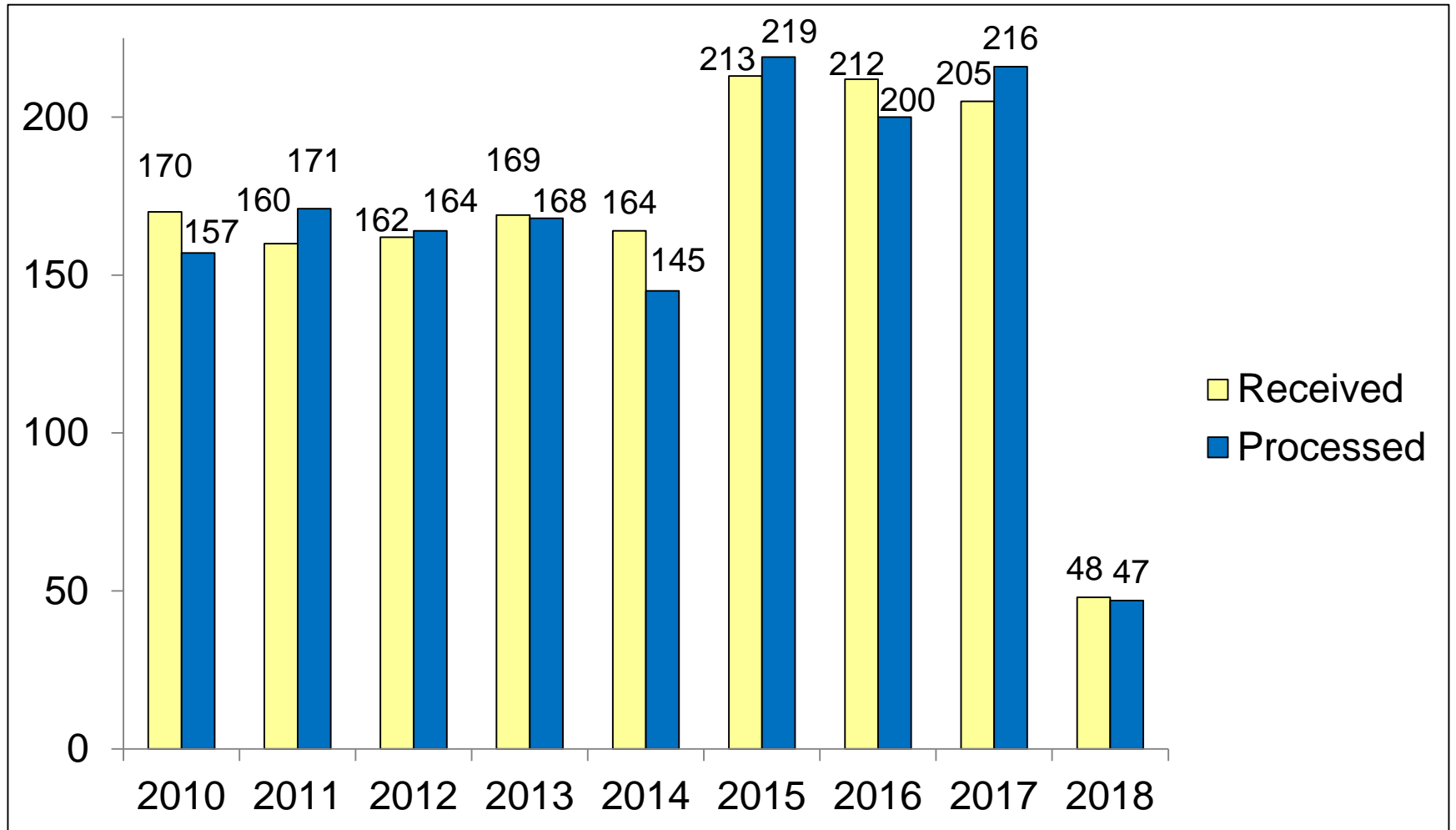
- The FOIA provides the public with the right to access government records - *Transparency key aspect of a democracy*
- Purpose is to establish a general philosophy of full agency disclosure of information unless information is exempted under one of the FOIA's nine exemptions
  - and is either prohibited from release by law
  - or there is a foreseeable harm

# Impact of 2016 FOIA Amendments on USGS

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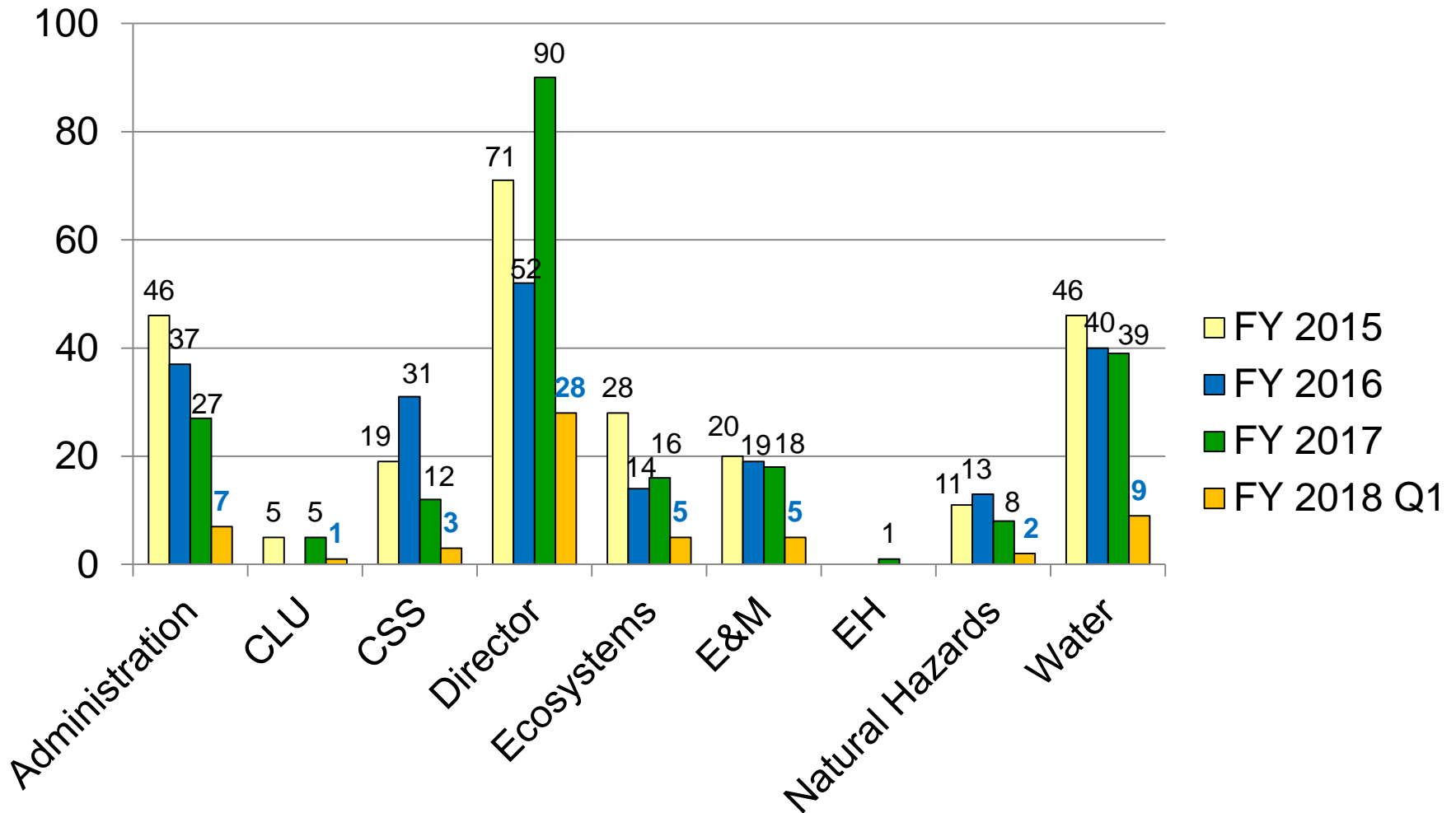
- Required to post frequently requested records (requested at least 3 or more times) to the internet
- Can only withhold information if we reasonably foresee that disclosure would harm an interest protected by an exemption (discretionary exemptions) or disclosure is prohibited by law (statutory exemption)
- Cannot use Exemption 5 (deliberative process privilege) on records that are 25 years or older than the date the records are requested
- Proactive disclosures through Records Management – amended Federal Records Act, 44 U.S.C. § 3102, to include a requirement that agencies establish procedures for identifying records of general interest or use to the public that are appropriate for public disclosure and for posting such records in a publicly accessible format

# Historical Snapshot of FOIA Program FYs 2010-2018

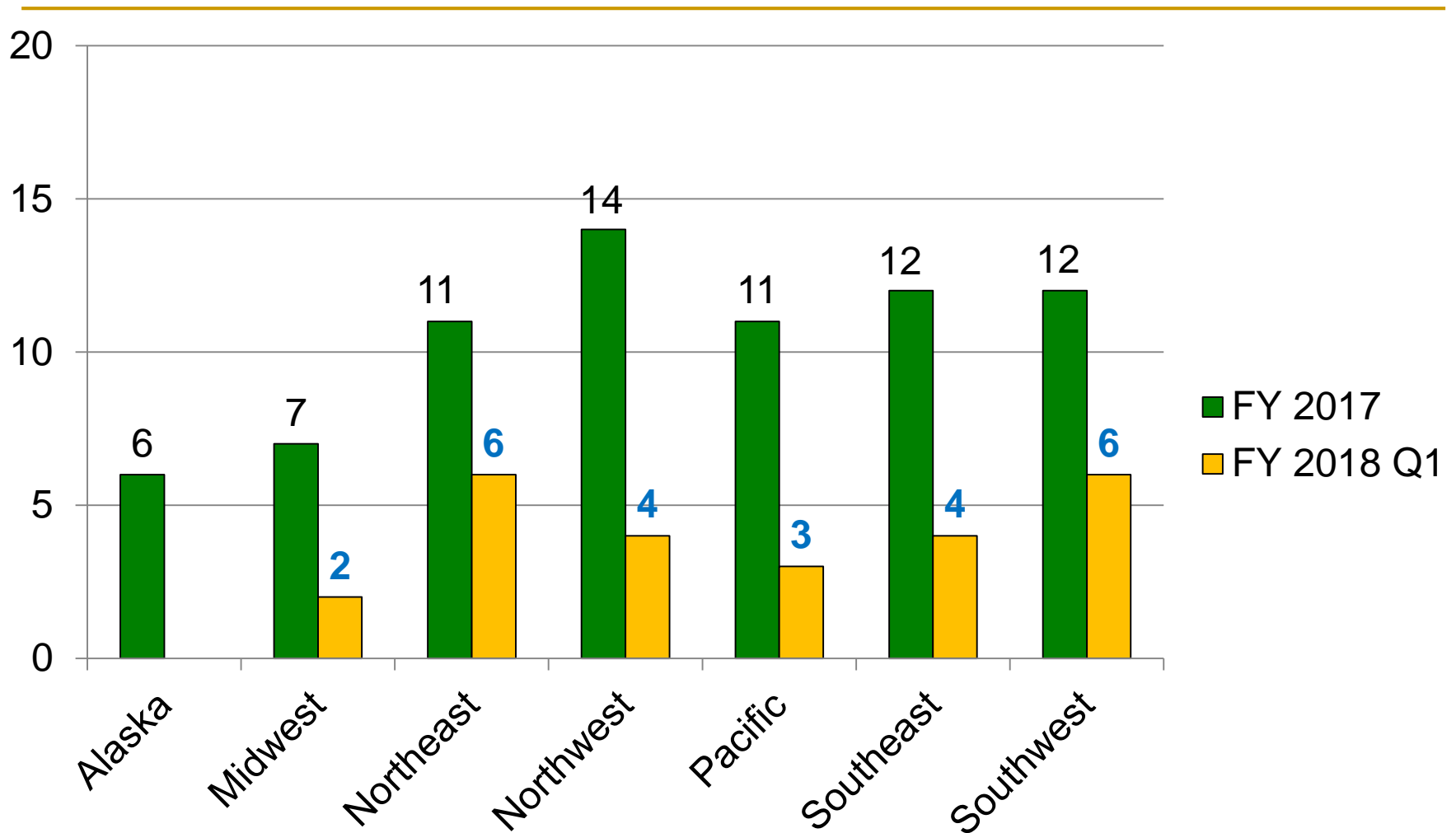




# FOIA Requests by Mission Area Received and Processed



# FOIA Requests by Region Received and Processed



# FOIA Matters

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- USGS required to respond to all FOIA requests
- Identity of the requester or their planned use of the information is not relevant in most release determinations
  - Generally, a release to one is a release to all
- When withholding information in full, must provide the requester with the number (or pages) of records that we withheld
- Must cite to a specific FOIA Exemption, if a FOIA Exemption applies

## FOIA Matters (cont'd)

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- Each FOIA request has the potential of litigation
- Was USGS Acting as a Consultant or a partner in a Task Force/Collaborative project/study?
- If we intend to use a discretionary FOIA exemption, we must determine if there is a forseeable harm and articulate that forseeable harm in the case file.
  - Need to prepare our case file in the event that the FOIA requester appeals our decision or files a lawsuit against us in federal court

# What can or cannot be requested under FOIA?

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- Requester can request any USGS record, written or electronic in our possession
- NOT OBLIGATED TO:
  - Answer questions
  - Create new records to respond to a request
    - Exception:
      - Creating a record would save significant amount of time and effort
- Not required to search for or provide records to another bureau/agency/department to process a FOIA request they received

# Our Data and the FOIA

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- FSP 502.8 defines data as “observations or measurements (unprocessed or processed) represented as text, numbers, or multimedia. **Data are considered noninterpretive information.**”
  - OSQI (internal) FSP FAQs explain what “new interpretive” information is, specifically, “interpretive information includes information products that develop arguments describing the meaning or implications of data, including those presented by others as fact but also as opinion. Information products that are a synthesis of others' work are considered interpretive.”

## Our Data and the FOIA (cont'd)

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- OSQI's Distinctions between New Research or Interpretive Information Products ... or Noninterpretive Information Products webpage describes the following phrases:
  - ❑ Noninterpretive – *“information products [that] contain only descriptions or statements and are primarily factual or observational in nature.”*
  - ❑ Interpretive
  - ❑ Not new interpretive
  - ❑ New interpretive
  - ❑ Scientific data – *“USGS does not consider scientific data to be interpretive.”*
    - See the Examples of Scientific Data that Can Stand Alone

## Our Data and the FOIA (cont'd)

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- OSQI's Distinguishing Noninterpretive, Interpretive, and New Interpretive USGS Information Products workflow decision document covers noninterpretive information and its footnote states that the information product may be released at the Science Center-level.
    - Information Product contains basic observations or measurements (data) in static form (e.g. tables, figures) or represented by animation, video, or audio, along with definitions and descriptions of those data (e.g. metadata)



## Our Data and the FOIA (cont'd)

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- FSP [502.5](#) states, “USGS data and information that have not undergone appropriate review and approval are considered documents that are deliberative and predecisional and must not be released.”
  - ❑ Contradicts the FOIA
  - ❑ Once we receive a FOIA request, we must process the request according to the law, the FSPs [do not apply](#).
- Raw data and noninterpretive scientific data do not qualify for protection under FOIA Exemption 5 (deliberative process privilege)
- Interpretive data and scientifically analyzed data may qualify for protection under FOIA Exemption 5

# Our Data and the FOIA (cont'd)

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## ■ Real world scenarios

- ❑ Location data of Endangered Species is **not** protected by FOIA Exemption 5 or the Endangered Species Act. See more in Hot Topics below.
- ❑ Released Mexican wolf raw data (pre-publication)
  - The deliberative process may include the process of quality assurance/quality control to filter and remove data. The raw data is the data taken at the time of collection.
- ❑ Whooping Crane telemetry data (pre-publication)
- ❑ Desert tortoise blood samples, annual and perennial vegetation data, soil samples/tests/analysis
- ❑ Ground penetrating radar data, GPS files
- ❑ Bathymetry/Depth data

# Key Questions

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- The FOIA Program needs to know the following:
    - Are records involved with a contentious issue?
  
    - Was USGS acting as a Consultant or a partner in a Task Force/collaborative project/study?
      - Is there a data sharing agreement, tech transfer agreement or CRADA in place?
  
    - Was another federal agency/department or state entity involved with the project/study? If a state or a state university, state may law may impact our release determination.
  
    - Did your record search locate responsive records that belong to another federal agency/department or state entity?
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## Key Questions (cont'd)

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- The FOIA Program needs to know the following (cont'd):
  - ❑ Has a partner received a request for the same or similar information?
  - ❑ Is the matter in litigation or in a state/federal hearing?
  - ❑ Is the information already publicly available (USGS, fed agency, state agency, etc.)?
  - ❑ Is the information approved for release?
- Must provide all responsive documents to FOIA Program

# Hot Topics

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- USGS overreliance on FOIA Exemption 5 (deliberative process privilege)
  
- Discretionary Exemption
  - Inter-Agency Records (e.g. USGS/EPA or USGS/FWS records)
  
  - Intra-Agency Records (e.g. Water Mission and Hazards records)
  
  - 3<sup>rd</sup> party/non-federal entity acting as a consultant?
  
  - May include draft documents, peer reviews, scientifically analyzed data

## Hot Topics (cont'd)

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- FOIA = law, FSPs = bureau policy
  - Provide all responsive records to FOIA Program to determine releasability
  
- Raw Data – Cannot withhold information following FSP, either a FOIA Exemption applies or it does not
  - Generally, Exemption 5 does not protect raw (factual) data (based on federal case law)

# Hot Topics (cont'd)

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## ■ Animal Care and Use Protocols

- ❑ We cannot follow NIH's practice of working with FOIA requests to agree to receive a redacted version of a record and not applying a FOIA exemption

## ■ Endangered Species

- ❑ Endangered Species Act is not a FOIA Exemption 3 statute
- ❑ Site-Specific Location data – limited FOIA Exemptions
  - Exemption 3 – if collected from NPS land/park (NPS Omnibus Management Act) Data collected from a cave on Federal lands?
  - Exemption 4 – very unlikely
  - Exemption 5 – no
  - Exemption 6 – unlikely, depends on the information
- ❑ Generally, release the data

## Hot Topics (cont'd)

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- Using gov't email for personal purposes and using personal email for official purposes (see Section 10, Federal Records Act of 2014)
  - Center relationships with states/state universities and the FOIA
  - Have our partners already released information to the public or to the same FOIA requester?
  - Data Sharing Agreement, Tech Transfer, CRADA?
    - ❑ Does the agreement discuss ownership of information?
    - ❑ Does the agreement discuss the release of information?
    - ❑ Not all agreements are protected by CRADA statute
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# Hot Topics (cont'd)

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- DOJ gov't wide FOIA training
  - Available on DOI Learn: [Freedom of Information Act \(FOIA\) for Federal Employees](#)

# Misc. Topics

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## ■ Proactive Releases of Information

### □ “Frequently requested records”

- 3 or more requests for substantially same records
- FOIA Improvement Act of 2016 requires agencies to post on-line

## ■ Agency v. Non-Agency Records

- 2-part then a 4-part test
- Records provided to scientists in their personal capacity?
- Records used for a USGS purpose, mission, study/project?
- How are the records filed?

## ■ Practice effective records management

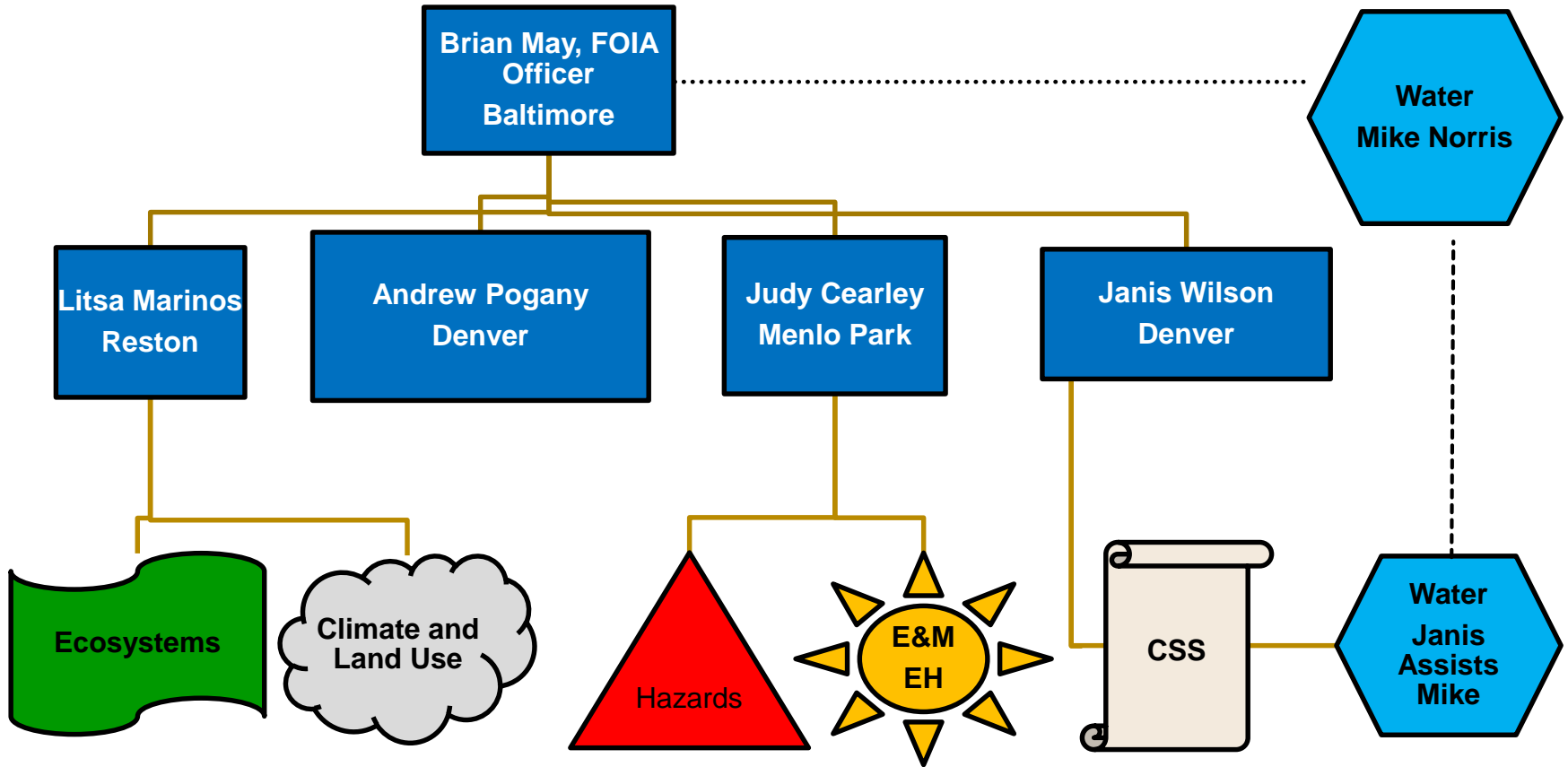
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# Conclusions

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- FOIA is an affirmative release statute; USGS FOIA Program has an obligation to release as much information as possible under to the law.
- If you receive a FOIA request, forward it to the FOIA Program
- Not required to create records to answer a request or search for records to help another agency/bureau answer a request
- Requests for data present a unique challenge and we need to work together to make the appropriate release determination
- Successful FOIA program requires collaborative team approach

# FOIA Program Structure



# FOIA Program Contact Information

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## ■ FOIA Officer

- ❑ Brian May, Baltimore, 443-498-5521, [bmay@usgs.gov](mailto:bmay@usgs.gov)

## ■ FOIA Team

- ❑ Stavroula (Litsa) Marinos, Reston, 703-648-7179, [smarinos@usgs.gov](mailto:smarinos@usgs.gov)
- ❑ Judy Cearley, Menlo Park, 650-329-4035, [jcearley@usgs.gov](mailto:jcearley@usgs.gov)
- ❑ Janis Wilson, [jewilson@usgs.gov](mailto:jewilson@usgs.gov) and Andrew Pogany, [gpogany@usgs.gov](mailto:gpogany@usgs.gov), Denver, 303-202-1476,
- ❑ (Water) Mike Norris, Pembroke, 603-226-7847, [mnorris@usgs.gov](mailto:mnorris@usgs.gov),

## ■ Webpages and Email

- ❑ [Public](#)
- ❑ [Intranet](#)
- ❑ [foia@usgs.gov](mailto:foia@usgs.gov)

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# Questions?