



**ADMINISTRATIVE RECORDS &
RESPONSES TO FOIA REQUESTS:
LEGAL & REGULATORY
REQUIREMENTS**

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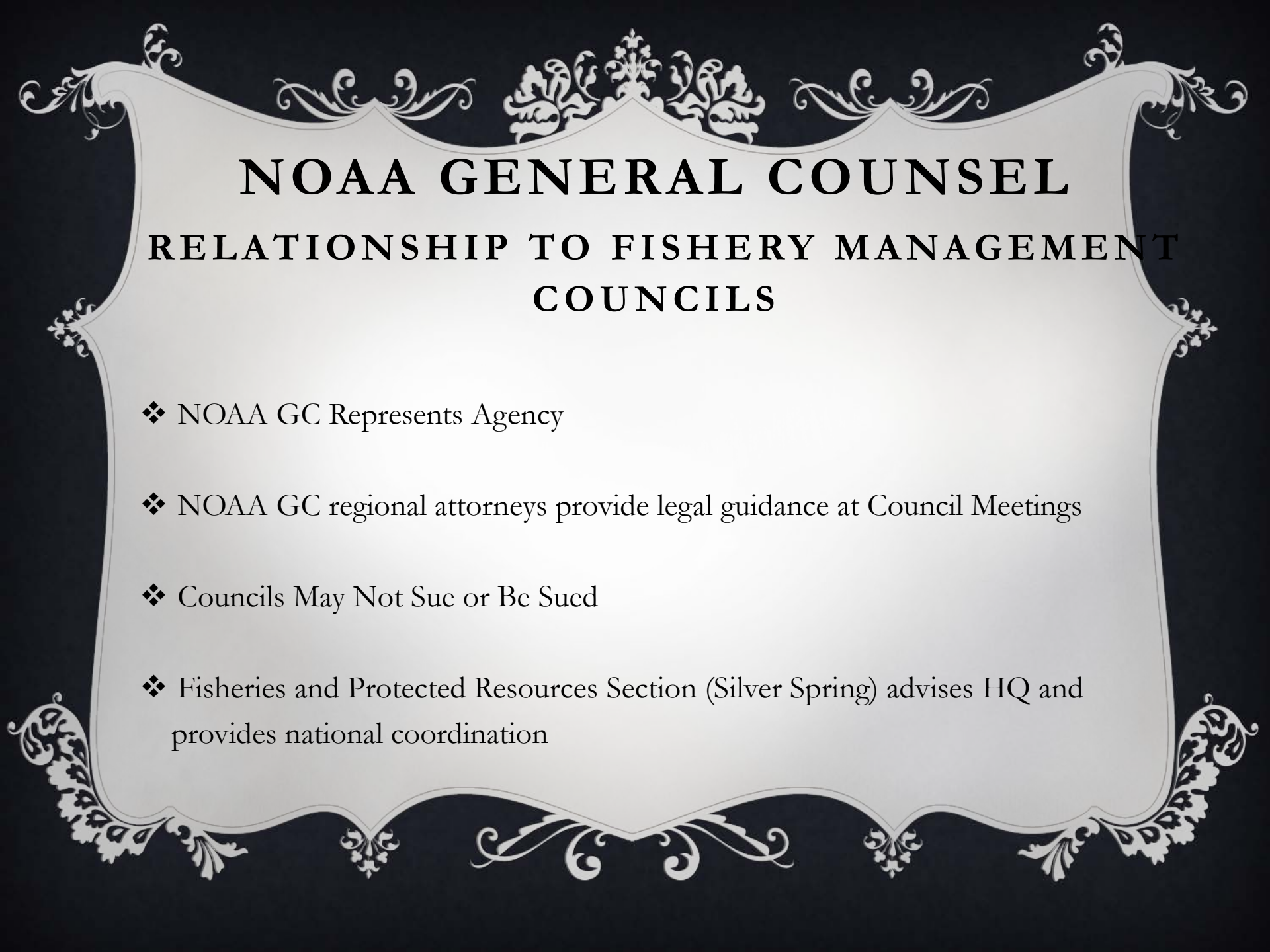


WHAT IS A RECORD?

The Federal Records Act mandates the creation and preservation of “records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.”



PART 1 : ADMINISTRATIVE
RECORDS



NOAA GENERAL COUNSEL

RELATIONSHIP TO FISHERY MANAGEMENT COUNCILS

- ❖ NOAA GC Represents Agency
- ❖ NOAA GC regional attorneys provide legal guidance at Council Meetings
- ❖ Councils May Not Sue or Be Sued
- ❖ Fisheries and Protected Resources Section (Silver Spring) advises HQ and provides national coordination

LITIGATION

❖ **Magnuson-Stevens Act**

- final agency actions can be challenged within 30 days (no later)
- no injunctions
- expedited review

❖ **Other statutes**

- Administrative Procedure Act
- National Environmental Policy Act
- Regulatory Flexibility Act
- Endangered Species Act

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ADMINISTRATIVE PROCEDURE ACT (APA)

- ❖ Provides for “Notice and Comment” Rulemaking
 - 30-day delay in effectiveness
 - Good cause waivers
- ❖ Sets Standards and Procedures for Judicial Review of Federal Agency Actions
 - Applies to Review of MSA Regulations
- ❖ Establishes “Arbitrary and Capricious” Standard for Judicial Review
 - Gives “Deference” to Agency Decisions
 - Provides for Court review “on the Record”



WHAT IS IN THE ADMINISTRATIVE RECORD?

- ❖ Final Decision Document
- ❖ FMPs, Amendments, Committee Reports, SSC Reports
- ❖ ARs from earlier decisions, if relevant
- ❖ Policies, guidelines, directives manuals
- ❖ Reference documents
- ❖ Public Input and Response, including summaries of public meetings, public comments, and Council meeting transcripts
- ❖ Any Other Materials that Contain Relevant Facts

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WHY IS THE ADMINISTRATIVE RECORD SO IMPORTANT?

- ❖ In most cases, the Court can *only* consider the record
- ❖ In other words, we cannot go back after the fact to provide support and a rationale for an action—it must be done at the time the decision is made.
- ❖ If you explain yourself, the court offers your decision deference.



EXAMPLE : A TALE OF TWO RECORDS

❖ Pacific Dawn v. Bryson (2011) and Pacific Dawn v. Pritzker (2013)

❖ Two challenges to the same underlying decisions, two different records, two different outcomes



A TALE OF TWO RECORDS

❖ BACKGROUND:

- Challenges to the Pacific Council's Trawl Rationalization program
- This case came from participants in the program who were challenging the way in which quota shares were initially allocated for whiting

❖ ISSUE:

- Was there a rational justification for the formula used to allocate shares, or was the allocation arbitrary and capricious?

A TALE OF TWO RECORDS

❖ 2011 HOLDING:

- Even if it was conceptually reasonable for Defendants to have relied on a 2003 control date when promulgating regulations in 2010, the manner in which they did so here was not rational.

❖ Why arbitrary?:

- Council used data from after 2003 for some purposes but not others. For example, Council used data from 2004 for allocations to processors, in spite of the control date—treating the two different sectors differently was arbitrary.

A TALE OF TWO RECORDS

- ❖ **2011-2013:** Council and NMFS undertake a year long “reconsideration process.” Council considers a range of potential qualifying years including the original set of years.
 - Following much process, including development of a EA, seven hours of public testimony, and advisory committee reports, Council votes to retain the original qualifying period.
- ❖ **2013:** Reconsidered action is finalized, and then challenged again by Pacific Dawn

A TALE OF TWO RECORDS

❖ 2013 Holding:

- NMFS considered the relevant factors and articulated a rational connection between the facts found and the choices made

❖ Processors v. Harvesters:

- The Court's earlier concerns with the explanation as to why the qualifying period for processors was extended to 2004 were sufficiently addressed during reconsideration

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WITH A RECORD LIKE THIS, HOW COULD WE LOSE?

-
- ❖ We have to take actions that reasonably comply with the statute.
 - ❖ Even if we can support them, our actions still must not be arbitrary.

1. CHEVRON “TWO STEP” PROCESS

**TO DETERMINE WHETHER AGENCY’S INTERPRETATION
COMPLIES WITH THE LAW :**

Step 1: Has Congress spoken directly to the precise question at issue?

YES → Give effect to Congressional Intent!

NO → Go to Step 2

Step 2: Is the agency’s answer based on a permissible construction of the statute?

2. “ARBITRARY AND CAPRICIOUS”

❖ COURTS LOOK AT WHETHER AGENCY:

- relied on factors which Congress had not intended agency to consider
- entirely failed to consider an important aspect of the problem
- offered an explanation for its decision that runs counter to the evidence before the agency
- is so implausible that it could not be ascribed to a difference in view or the product of agency expertise


SO, WE LOST NOW WHAT?

- ❖ Vacatur: Court orders that the challenged action is “set aside.” This means that the subject FMP or amendment is no longer in place.
- ❖ Remand: Court orders agency to fix identified problems, but leaves the challenged action in place in the mean time.
- ❖ No injunctions under MSA, but possible for an injunction under ESA if that is coming into play.



WRAPPING UP ON ADMINISTRATIVE RECORDS

- ❖ The overlapping regulatory requirements can help the Council and NMFS make well-reasoned, well-supported decisions
- ❖ It is as important to comply with *procedural* requirements as *substantive* requirements



PART 2: FOIA



WHAT IS FOIA?

❖ The Freedom of Information Act provides any person with a right of access to federal agency records unless those records are protected from disclosure under the law.

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FOIA MANDATES

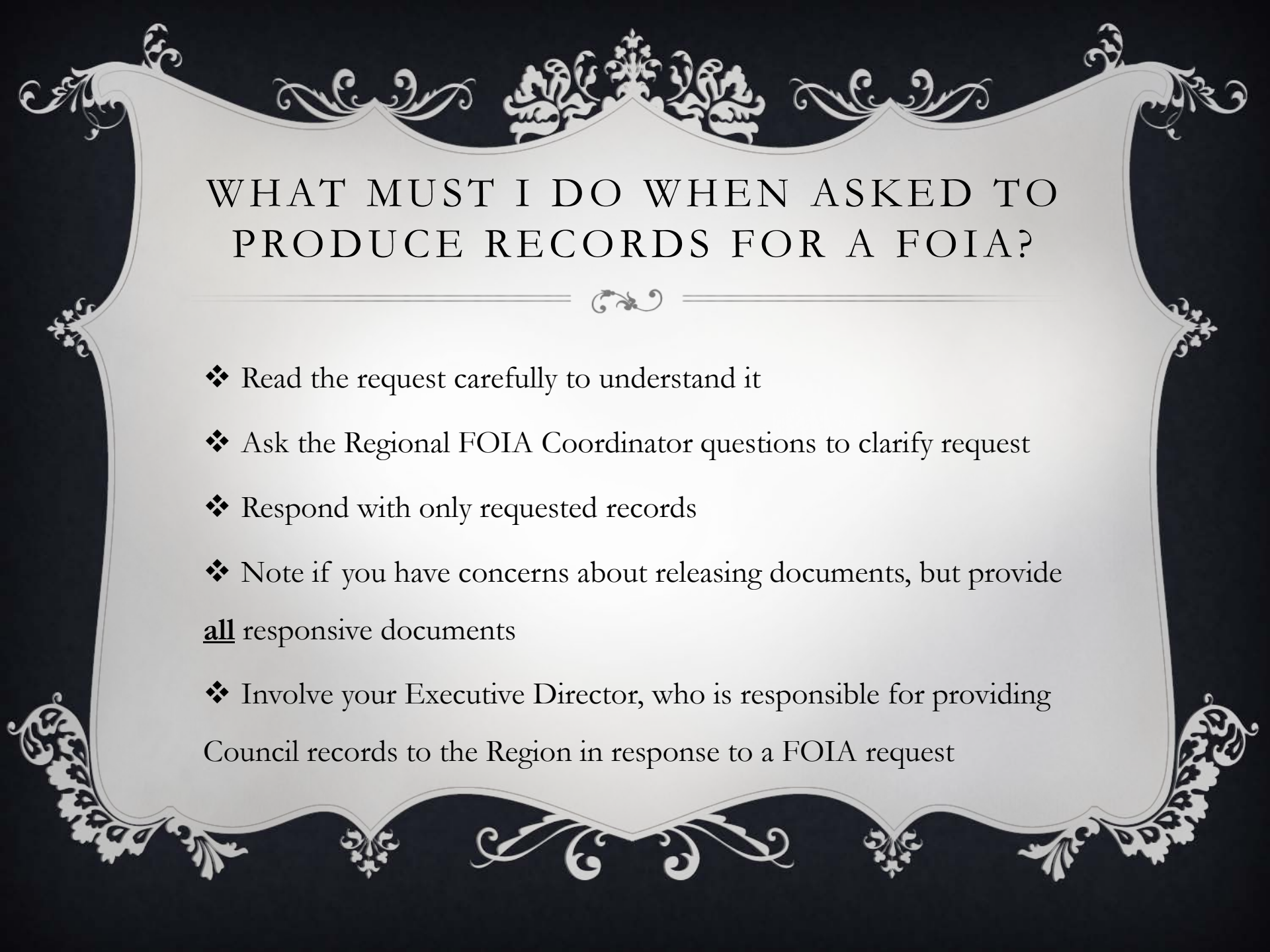
- ❖ All federal agencies are required to disclose records upon receiving a written request for them, except for those parts of records that are protected from disclosure by nine exemptions and three exclusions of the FOIA.
- ❖ Councils fall under the agency category.
- ❖ This right of access is enforceable in court.
- ❖ The federal FOIA does not provide access to records held by state or local government agencies, or by private businesses or individuals.

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TIMELINE FOR FOIA REQUESTS

- ❖ Initial response is to be made within 20 working days
excluding weekends and legal holidays

- ❖ May obtain an extra 10 days due to:
 - Unusual circumstances
 - Obtaining records from, or referring records to, other components or agencies
 - Voluminous records located




WHAT MUST I DO WHEN ASKED TO PRODUCE RECORDS FOR A FOIA?

- ❖ Read the request carefully to understand it
- ❖ Ask the Regional FOIA Coordinator questions to clarify request
- ❖ Respond with only requested records
- ❖ Note if you have concerns about releasing documents, but provide all responsive documents
- ❖ Involve your Executive Director, who is responsible for providing Council records to the Region in response to a FOIA request

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WHAT IS A RECORD UNDER FOIA

- ❖ Any agency records are those created or obtained by NOAA and are, when the request is filed, in NOAA's possession and control
- ❖ Includes off-site storage
- ❖ Agency records can be in any format like print documents, photographs, videos, maps, e-mail and electronic records

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NOAA'S FREQUENTLY USED FOIA EXEMPTIONS

- ❖ Ex. 3 – Information Specifically Exempted by Other Statutes
- ❖ Ex. 4 – Trade Secrets, Commercial or Financial Information
- ❖ Ex. 5 – Privileged Interagency or Intra-Agency Memoranda or Letters
- ❖ Ex. 6 – Personal Information Affecting and Individual's Privacy
- ❖ Ex. 7 – Investigatory Records Compiled for Law Enforcement Purposes

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FORESEEABLE HARM ANALYSIS

- ❖ Agencies must demonstrate that it reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law before withholding information
- ❖ Agencies must segregate and release nonexempt information wherever possible.



QUESTIONS?