

STRATEGIES AND BEST PRACTICES OF FOIA AND STATE-RELATED REQUESTS



What is FOIA and PRA?

- **FOIA** = “Freedom Of Information Act” allows the public to request information from the federal government.
- **PRA** = California’s version of the FOIA, called the “California Public Records Act,” allows the public to request information from the State.

Each State has its own version of this.

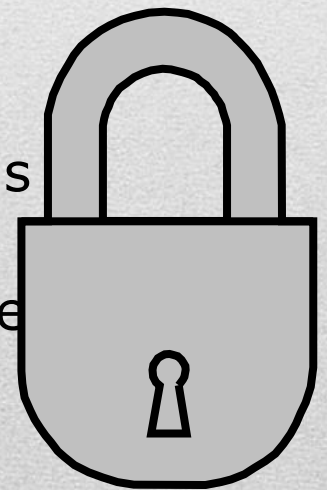


- Exclusions are mandatory
- Exemptions are discretionary
- Information that has already been made publicly available by an agency

Exclusions and Exemptions from Disclosure

Limitations on FOIA

- All Government Agencies are subject to public record requests—but NOT the legislative and judicial branches of government.
- There are exclusions (3) and 9 limited “exemptions” from disclosure based on:
 - national security,
 - personal information,
 - trade secrets,
 - financial information, or;
 - ongoing criminal investigations or investigations regarding enforcement proceedings; or
 - Records or information compiled for law enforcement purposes.



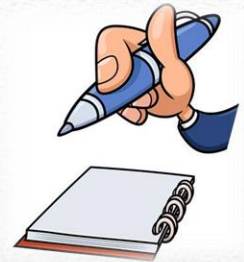
Objections and Appeals to FOIA Requests

- A person or entity that is the subject of a FOIA may have the right to object to the disclosure of information that falls under an exemption (i.e. OFLC notice of FOIA letters)
- An agency's decision to withhold information subject to a discretionary exemption must be disclosed
- Appeals are available for non-disclosure

Agencies Where FOIA May be Helpful

- **Department of Labor, Wage & Hour Division (Investigation Files, Investigation Statistics, Training and Policy Memoranda)**
- **Department of Labor, OFLC ("FOIA a FOIA)**
- **Department of Agriculture (AEWR Data Collection)**
- **USCIS (I-129 petition filing information and related policy guidance)**
- **DHS, Customs and Border Protection (Entry/Exit records that cannot be located online)**
- **OSHA (Investigation files etc.)**
- **OBIM FOIA: Border Apprehensions**

FOIA Request Drafting Strategies



- Keep the request clear and concise!
- Make the request in writing.
- Make it easy for the agency to identify what documents you want. Be as specific as possible!
- Example:

Too Broad:	Sufficiently Specific:
"Any communications between Government Agency and California Rural Legal Assistance ("CRLA")."	"Any communications between Michael Saqui, Employment Development Department ("EDD") and Jeanne Malitz, California Rural Legal Assistance ("CRLA") between January 1, 2010 to present regarding compensable travel time for H-2A workers."

Power of FOIA: Real Life Example

- We suspected that California Rural Legal Assistance (“CRLA”) was in the California Employment Development Department’s (“EDD”) ear about compensable travel time for farmworkers.
- Submitted PRA Request to EDD—kept the PRA specific—seeking communications of *specific* individuals in a *specific* time frame.
- We learned that:
 - CRLA has had an ongoing relationship with CA EDD—providing training, directives, and **their own interpretation of labor laws to directly influence EDD and their decisions.**

THINK THIS IS A CONSPIRACY THEORY? THINK AGAIN!!



Power of FOIA: Real Life Example—What We Found!

Clip from CRLA Email to EDD:

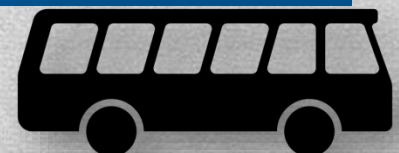
CRLA Says Travel Time From Housing To Field Is Compensable.

Illegal Transportation Provisions

Compensable Time

We agree with your conclusion that because of the restriction that the H-2A employers are placing on the time of the workers during the transportation and the control that is exercised by the employers over the workers during this time, it is not voluntary and is compensable. This construction comes from the language of IWC Order 14 as well as comparable language under IWC Orders 8 and 13. The language provides that "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (8 Cal. Code Regs § 11140(2)(G), §11080(2)(G) and § 11130(2)(G). This language has been construed by the California Supreme Court to mean that:

When an employer requires its employees to meet at designated places to take its buses to work and prohibits them from taking their own transportation, these employees are "subject to the control of an employer," and their time spent traveling on the buses is compensable as "hours worked." (Subd. 2(G).)



Power of FOIA: Real Life Example—What We Found!

Clip from Internal EDD Email:

EDD working on a response to CRLA's demand that travel time be paid.

Good afternoon [REDACTED]

[REDACTED] and I are working on the response to this CRLA inquiry. We are currently reviewing the letter and have come across a question regarding compensable time for travel time.

CRLA has asked us to request employers to pay their workers for travel time citing the Wage Order 14-2011 (G) which defines "hours worked" as the "time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." CRLA also references the case *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (<http://caselaw.findlaw.com/ca-supreme-court/1299822.html>), which indicates that, "Travel time is considered compensable work hours where the employer requires its employees to meet at a designated



Power of FOIA: Real Life Example—What We Found!

Clip from Correspondence from EDD to CRLA:
EDD Following CRLA's Directive!

CRLA's Letter to EDD

3. Illegal Transportation Provisions

A. The Job Order includes a characterization of housing to work site transportation being "voluntary" on the part of the employee. Given that H-2A employers are required to provide transportation, completely control the transportation, and could not reasonably expect H-2A workers to provide their own transportation, such time is compensable time under California law. EDD and U.S. DOL should make clear in all approved orders that certification of transportation terms is not determinative on the issue of whether such transportation is voluntary or compensable.

EDD's Response

RESPONSE: We will notify the employer that travel time is compensable.

In future applications, we will issue a Notice of Deficiency asking employers to include a travel schedule, and to indicate that transportation time is compensable per IWC 14 that states that "Hours Worked" is "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so".

Is this referring to only to IWC 14 provisions? Please provide additional information about compensable time under CA law that we can review to better support **our** position.



Lessons Learned



- You never know what you may find—ask!
- Easy to submit these and a powerful litigation tool.
- Keep your focus surgical, the more specific the better, so that the agency person looking for responsive documents can actually find what you are looking for.
- Pay attention to which agency you need to submit your request to and go to the agency website—most have specific FOIA/information request instructions and how-to guides.



Resources

- American Immigration Council Article on FOIA: PRACTICE ADVISORY (Updated February 2017)
FOIA FOR IMMIGRATION LAWYERS
- “Frequently Asked Questions,” FOIA.gov,
<https://www.foia.gov/faq.html>
- <http://www.nfoic.org/state-freedom-of-informationlaws> (The National Freedom of Information Coalition collects state FOIA laws)

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