

Small Plant NEWS

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Small Plant NEWS

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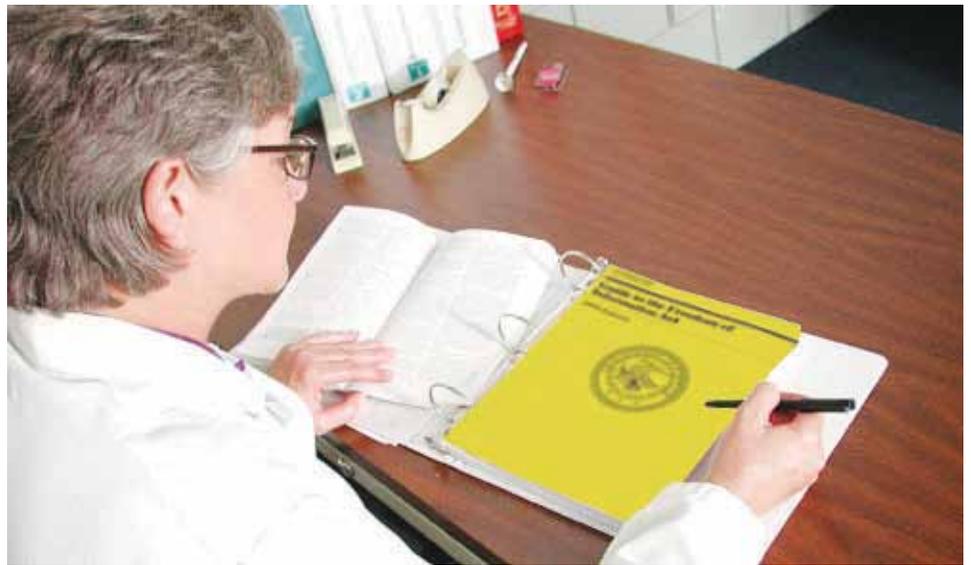
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Knowing Your Rights Under the Freedom of Information Act



By Jane Johnson, DVM

Enacted in 1966 and frequently updated, the Freedom of Information Act (FOIA), 5 United States Code § 552, is a Federal law that makes Government records available to the public. Prior to FOIA's enactment, the burden was on individuals to explain why they wanted a specific Government record. Now, the burden is on the Government to explain why specific records should not be released.

The Act does not apply to the legislative and judicial branches of the Federal Government. All States, however, have a version of the Federal FOIA incorporated into their State codes.

Requests under FOIA can be made by any individual or entity. It should be noted that requests for information made by congressional committee chairpersons are not considered requests under FOIA, and the same rules do not apply.

So how does FOIA affect you, the small plant owner or operator? The United States Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS) collects all types of records from plants that are under its regulatory jurisdiction. Any of your records kept by FSIS are subject to FOIA requests.

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For that reason, you may be concerned about what records are released to the public under FOIA. Although this concern is understandable, keep in mind that FSIS requires only information and data that are necessary to fulfill the agency's mission—ensuring that the Nation's commercial supply of meat, poultry, and processed egg products are safe, wholesome, and correctly labeled and packaged. That being said, let's see if we can allay some concerns by answering two basic questions.

1. What information is subject to release under FOIA?

All official records are subject to release under FOIA, with the exception of any information that falls under nine FOIA exemptions.

2. What information may be redacted (removed) from documents prior to release?

As mentioned, FOIA has nine legal exemptions under which Government records will not be released. Records and portions of records that fall under these nine exemptions are protected by law from disclosure and do not have to be released to the public.

Simply stated, the nine exemptions are:

1. Classified national defense and foreign relations information;
2. Internal agency rules and practices;
3. Information that is prohibited from disclosure by another law;
4. Trade secrets and other confidential business information;
5. Inter-agency or intra-agency communications that are protected by legal privileges;
6. Information involving matters of personal privacy;
7. Certain information compiled for law enforcement purposes;
8. Information relating to the supervision of financial institutions; and
9. Geological information on wells.

The most commonly cited FOIA exemptions applied by FSIS to withhold records are Exemptions 4 and 6. Exemption 4 relates directly to the type of proprietary information, such as Hazard Analysis and Critical Control Point (HACCP) and Sanitation Standard Operating Procedures (SSOP) records,

about which plant owners are often concerned.

FOIA Exemption 4 protects records that contain commercial or financial information that was obtained from a person ("person" being an individual, a partnership, or a corporation) and is privileged or confidential. The courts have held that a record qualifies for withholding if disclosure by the Government would likely harm the competitive position of the person who submitted the information. Detailed information on a company's marketing plans, profits, or costs can qualify as confidential business information. Information may also be withheld if disclosure would likely impair the Government's ability to obtain similar information in the future. Only information obtained from a person other than a Government agency qualifies under Exemption 4.

In addition, FSIS participates in a process that is generally referred to as "submitter notice," but which the agency terms "pre-release review." FSIS will provide a submitter of business information (for example, a law firm representing an FSIS-inspected plant, or plant owners themselves) an opportunity to review redacted documents prior to release under FOIA.

Every month, the agency posts its FOIA logs on the FSIS Internet Electronic Reading Room at www.fsis.usda.gov/FOIA/FSIS_Electronic_Reading_Room/index.asp. These FOIA logs show the name or names of the persons who submitted a FOIA request and the records that were requested. If you see a request for records that involves your company, you may submit a request to FSIS to review those records prior to their release. FSIS will provide a copy of the proposed record release for your review. To submit a request, you may write to FSIS' FOIA office at the address below or email your request to fsis.foia@usda.gov.

You then have an opportunity to explain why the information asked for under a FOIA request qualifies for withholding. A submitter of business information can also file suit to block disclosure under FOIA. Such lawsuits are generally referred to as "reverse" FOIA lawsuits because the Act is being used in an attempt to prevent, rather than to require, the disclosure of information. A reverse FOIA lawsuit may be filed when the submitter of business information and the Government disagree on whether the information is exempt from release.

FSIS will always do everything it can, within the law, to protect your confidential and proprietary information. For more information on FOIA, visit FSIS' Web site at www.fsis.usda.gov/FOIA/. You can also contact the FOIA office by calling (202) 720-2109 or by writing to the FSIS Freedom of Information Act Office, U.S. Department of Agriculture, Room 1140, South Building, 14th and Independence Avenue, SW, Washington, DC 20250-3700.

AMS Assumes Child Nutrition Labeling Reviews and Approvals

By Keith Payne

Small Plant News first covered child nutrition labeling in “Labeling for Child Nutrition Programs” (Vol. 2, No. 2). The existence of a USDA Child Nutrition (CN) label on a product assures schools and other Child Nutrition Program operators that the product contributes to the meal pattern requirements as printed on the label.

Since that article was published, USDA’s Agricultural Marketing Service (AMS) has assumed responsibility for the operation and management of the CN Labeling Program from the USDA Food and Nutrition Service (FNS). The transfer was made in order to provide adequate staffing and technological support for the efficient operation of the CN Labeling Program. Unlike FNS, AMS has statutory authority to charge user fees for services in support of the marketplace, which include the management of the CN Labeling Program.

AMS’ Processed Products Branch reviews labels on a first-in, first-out basis. Labels are reviewed within 10 business days of arrival. Each label application is assessed a fee of \$92 per hour, with a minimum charge of 1 hour per label. After the first hour of service, fees are assessed in 15-minute increments. Label applications that require immediate review for approval “express service” are assessed a service fee of \$184 the first hour and \$92 for each additional hour.

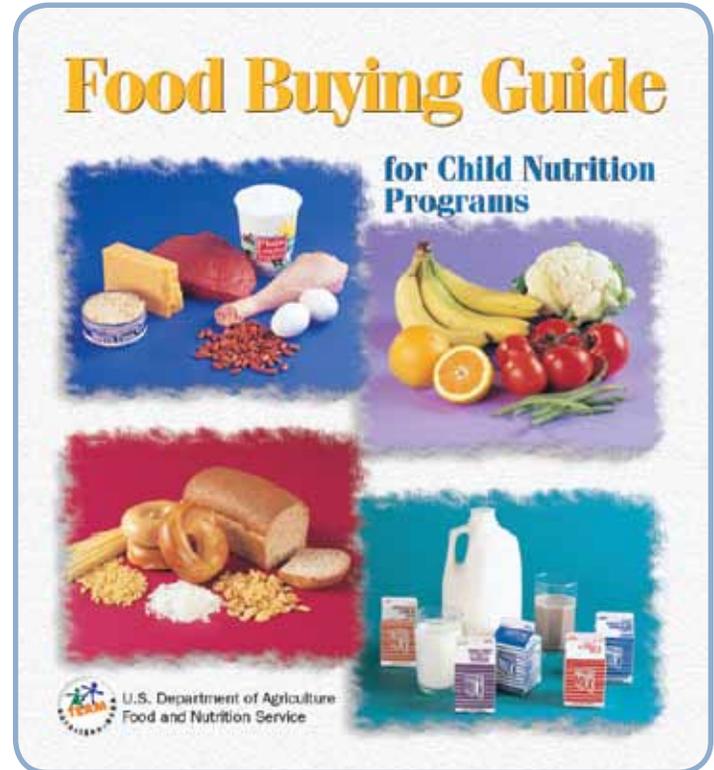
The service fee covers all AMS label review activities, including administration, communication with the applicant or their designated representative, label review, and transfer of label information to and from FSIS, as necessary.

All meat and poultry products that are CN labeled must be submitted first to AMS for approval. After approval by AMS, the labels are submitted to FSIS for review and approval.

FSIS’ label review procedures remain unchanged. No fees will be charged for label review, and the agency does not accept label applications by email.

For more information on FSIS’ labeling review procedures, contact the agency’s Labeling and Program Delivery Division at (301) 504-0878 or go to its Web site at www.fsis.usda.gov/Regulations_&_Policies/Labeling_Procedures/index.asp.

For general information on the Child Nutrition Labeling Program, you may wish to visit the FNS Web site at www.fns.usda.gov/cnd/CNlabeling/default.htm.



In addition, AMS publishes a list of plants and labels that have met the FNS quality control requirements for the CN Labeling Program, and updates it regularly. The list may be accessed at www.fns.usda.gov/cnd/CNlabeling/authorized.htm.

If you’re interested in marketing your products to the Child Nutrition Program, contact AMS for more information about the application process, prerequisite requirements, and other inquiries by calling (202) 720-9939, emailing CNLabeling@ams.usda.gov, or writing to:

Child Nutrition Labeling Program Operations
Office
USDA, AMS, FV, PPB
Stop 0247, Room 0710-S
1400 Independence Ave., SW
Washington, DC 20250

FSIS Establishes Formulas for Calculating Rates

By Jane Johnson, DVM

On April 12, 2011, FSIS published the final rule “New Formulas for Calculating the Basetime, Overtime, Holiday, and Laboratory Services Rates; Rate Changes Based on the Formulas; and Increased Fees for the Accredited Laboratory Program” in Volume 76, Number 70 of the *Federal Register*. This final rule stemmed from a proposed rule that was published on October 8, 2009. Comments were accepted for 30 days.

As stated in the rule, “FSIS is amending its regulations to establish formulas for calculating the rates that it charges meat and poultry establishments, egg products plants, and importers and exporters for providing voluntary, overtime, and holiday inspection, and identification, certification, and laboratory services. The 2011 basetime, overtime, holiday, and laboratory services rates in this final rule will be applied on the effective date.”

For future years, FSIS will use the formulas established to calculate the annual rates. FSIS will publish the rates

annually in *Federal Register* notices prior to the start of each calendar year and will apply them on the first FSIS pay period at the beginning of the calendar year. The rule took effect on May 22, 2011.

You may view the final rule on FSIS’ Web site at www.fsis.usda.gov/OPPDE/rdad/FRPubs/2006-0025F.htm.

For policy-related questions, please call FSIS’ Policy Development Division at (800) 233-3935 (6:00 a.m.-5:00 p.m. CT, Monday through Friday, except on Federal holidays) or go to <http://askfsis.custhelp.com> (any time).

For more information concerning fees, contact Mike Toner, Deputy Director, FSIS Budget Division, U.S. Department of Agriculture, Room 2159, South Building, 1400 Independence Avenue, SW., Washington, DC 20250-3700. He may also be reached by telephone at (202) 720-3367 or by fax at (202) 690-4155.

Commonly Asked Questions & Answers

Q. Can I use employee training multiple times on my Sanitation SOP records as a preventive measure to meet the requirements of 9 Code of Federal Regulations 416.15?

A. The plant may document employee training multiple times as a preventive measure on its Sanitation SOP records. If the establishment documents employee training as a preventive measure, the training should also be documented when it occurs. However, if after repeated employee training has occurred, FSIS inspectors find that the Sanitation SOP failed to prevent direct contamination or adulteration of product, employee training may not be accepted as an effective preventive measure by the agency.

Q. Do chemical sanitizers used on surfaces in direct contact with food (food contact surface) have to be approved for use in the plant?

A. Yes, although the approval is not provided by FSIS. Sanitizers used on food contact surfaces must meet the U.S. Department of Health and Human Services’ Food and Drug Administration requirements with the establishment having documentation that the sanitizer is safe for use in a food-processing environment. This documentation must be available to FSIS upon request.

Chemical sanitizers must be used according to the manufacturer’s directions. The label on the sanitizer should state that the sanitizer is safe for use on food contact surfaces.