

AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC.

An Overview of the Freedom of Information Act:
The Procedural Requirements

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The Basics of the Freedom of Information Act

Statutory Definition

Agencies, upon receiving requests for records which (i) reasonably describe the records sought and (ii) are made in accordance with published rules stating the time, place, fees (if any), shall make records promptly available.

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The Basics of the Freedom of Information Act (Continued)

The FOIA pertains to federal agency records that exist and can be located in agency files.

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The Starting Point:

Who May Make A FOIA Request?

- **“Any person”** – regardless of citizenship (*Why would we allow “any person?”*)
- Includes individuals, corporations, associations, state and local governments, foreign government, etc.

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The Starting Point: Continuing the “Who May Make a Request” Discussion

A Couple of Exceptions to the Rule

- Fugitives from Justice, if the requested records relate to the requester’s fugitive status.
- Foreign governments requesting information from intelligence agencies.

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The Starting Point (Cont.):

What Records are Subject to the FOIA?

What is an Agency Record?

The factors:

- **Two-part test:**
 - Created or obtained by agency
 - Under agency control when request received

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The Starting Point (Cont.):

What Records are Subject to the FOIA?
What is an Agency Record?

The factors:

- **Four factors:**
 - Creator's intent to control
 - Ability of the agency to use
 - Extent to which personnel have read/relied
 - Degree of integration into agency files

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The Starting Point (Cont.):

The "Why" Behind the Request

FOIA requesters generally do not have to justify or explain their reasons for making requests. The why is important in two circumstances:

- When expedited processing is requested
- When a fee waiver is requested

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The Starting Point (Cont.):

What is a Proper FOIA Request?

- Request for agency records submitted in writing
- Request reasonably describes records requested
- Request complies with agency's regulations for making requests

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The Starting Point (Cont.):

Receipt and Acknowledgment

- Receipt of the request starts the time clock
- If the request will take longer than ten days to process, agency must assign an individual tracking number to the request

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The Starting Point (Cont.):

Receipt and Acknowledgment

- Agencies must establish either “a telephone line or internet service that provides information about the status of a request to the person making the request using the assigned tracking number.”
- Status information to be provided includes the date of receipt and an estimated date of completion.

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The Starting Point (Cont.):

***Receipt and Acknowledgment -
The Routing Requirement***

- Agencies must “route”/“forward” misdirected requests to the proper office.
- The 20-day time period begins on the date the request is first received by the appropriate component of the agency, but in any event not later than 10 working days after the request is first received by any component of the agency that is designated in the agency’s regulations to receive requests.

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The Starting Point (Cont.):

More on the Routing Requirement

- This rule addresses the situation where a FOIA request is inadvertently addressed to a component that is designated to receive FOIA requests for the agency, but is not itself the proper component of the agency to process the request.
- The receiving/“wrong” component has 10 working days to route the request to the proper component within the agency. On the 10th day the 20-day response time period begins . . . even if the proper component has yet to receive the request.

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The Time Issues:

Time Limits for Responding to a Request

- 20 working days to respond
- In “unusual circumstances” agency may extend time limit by giving written notice to requester
- If time period is extended beyond ten working days agency must provide requester with opportunity to narrow scope of request and must make FOIA Public Liaison available, and must notify the requester of dispute resolution services

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The Time Issues (Cont.):

Time Limits for Responding to a Request

- “Unusual circumstances” defined:
 - search for/collect records from facilities separate from the office processing the request
 - search for/collect/examine a voluminous amount of separate and distinct records
 - consult with another agency or among two or more components within the agency

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The Time Issues (Cont.):

Time Limits for Responding to a Request
“Tolling”

- The number of times the agency can toll the response time is limited.
- Tolling can only occur if the request is properly made and the clock already started.

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The Time Issues (Cont.):

Time Limits for Responding to a Request
More on “Tolling”

- When a proper FOIA office receives a request, it determines whether or not the request is reasonably described and meets the other requirements for making a proper request. If necessary, the office then communicates with the Requester to resolve any issues.
- The 20-day clock begins to run upon receipt of a proper request.
- It is only after this point that the issue of tolling/stopping would even arise.

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The Time Issues (Cont.):

Time Limits for Responding to a Request
Even More on “Tolling”

- Limit to number of scenarios in which tolling allowed. Toll the 20-day clock in only two situations:
 - One time when agency waiting for general information reasonably sought from Requester.
 - Agencies allowed to toll 20-day clock as many times as necessary in order to clarify issues with a Requester regarding fee assessment. Fee-related issues often arise sequentially over the course of processing a request, and cannot always be resolved at one given point in time.

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Dealing with Fees Under the FOIA

Limits on Charging Search Fees

- Agencies are prohibited from charging certain fees if they do not meet the response time.
- The FOIA prohibits agencies from assessing search fees (or duplication fees if requester is an educational or non-commercial, scientific institution, or representative of the news media) if the agency fails to meet the 20-day response time limit, unless unusual or exceptional circumstances apply to the processing of the request, the request is greater than 5000 pages, and the agency has made a good faith attempt to allow the requester to narrow the scope.

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Dealing with Fees Under the FOIA

Limits on Charging Search Fees

Exceptions to the Rule

- If either “unusual” or “exceptional” circumstances apply to the processing of the request, the exceptions to the rule apply and agencies can assess fees as they have normally done if there are greater than 5000 pages in the request.
- The pre-existing definitions of “unusual” and “exceptional” circumstances apply to this search fee rule.

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Dealing with Fees Under the FOIA

Limits on Charging Search Fees

Exceptions to the Rule

“Unusual Circumstances” exist in three situations:

- When there is a need to search for and collect records from separate offices;
- When there is a need to search for, collect, and examine a voluminous amount of records; or
- When there is a need for consultations with another agency or among two or more components within the same agency.

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Dealing with Fees Under the FOIA

Limits on Charging Search Fees
Exceptions to the Rule

“Exceptional Circumstances”-

- The FOIA states that exceptional circumstances cannot include a “delay that results from a predictable workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.”
- In other words, exceptional circumstances exist if the agency has a backlog of pending requests and is making reasonable progress in reducing that backlog.

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Other Timing Issues -

Time Limits for Responding to a Request
“Expedited Processing”

- **Compelling need** -- imminent threat to the life or physical safety of an individual
- **Urgency to inform the public** concerning actual/alleged Federal Government activity (with respect to a request from one engaged primarily in disseminating information)
- Agencies may add other grounds for granting expedited processing

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Other Timing Issues -

Time Limits for Responding to a Request
Expedited Processing

Agencies have 10 calendar days to decide whether to grant or deny requests for expedition.

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Other Timing Issues -

Time Limits for Responding to a Request Expedited Processing

Agencies must process requests that have been granted expedition as soon as practicable.

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Other Timing Issues -

Time Limits for Responding to a Request Expedited Processing

The Standard of Review

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Finally! Processing the Request!

Initial Processing

Interpretation and Communication

- Reasonable interpretation of unclear requests
- Communication with requester
- FOIA Public Liaison
- Multi-track processing encouraged

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Searching for Responsive Records

Definition of "Search"

To review manually or by automated means, agency records for the purpose of locating those records responsive to a request.

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Searching for Responsive Records

Search

- Identify potential locations for responsive records
- Issue search instructions
- Documentation of search
- Cut-off date for search

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A Little More Discussion of Fees

	Search	Review	Duplication
Commercial Use	Yes	Yes	Yes
"Favored"	No	No	Yes (first 100 pages free)
All Others	Yes (first two hours free)	No	Yes (first 100 pages free)

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Searching for Responsive Records

Adequacy of Agency Search

- Agency must conduct search that is **“reasonably calculated to uncover all relevant documents”**
- The fact that the agency did not locate all requested records does not cast doubt on otherwise reasonable search
- Duty to search -- must make reasonable efforts to search for records in electronic form unless significant interference with the operations of agency’s automated information system

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Reviewing Responsive Information

Reviewing the Documents:

Applying the Exemptions, Segregation

- Agencies are to clearly identify the exempt information and apply the appropriate exemption beside each redaction
- Duty to reasonably segregate
 - Attorney General emphasizes agency obligation to segregate and apply foreseeable harm standard

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Reviewing Responsive Information

Reviewing the Documents:

Referrals/Consultations

Referral – When records are referred to the originating agency or agency component for FOIA review and direct response to the requester.

Consultation - When an agency obtains the opinion of another agency or agency component before responding to the requester.

Coordination – When records contain sensitive law enforcement or national security information.

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The Final Response Letter

What Information Should Appear in the Final Response Letter?

- Identification of responsive records
- Volume estimate of information withheld
- Identification of exemptions asserted
- Administrative appeal rights
- Must provide records in any form requested "if readily reproducible"

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Understanding Administrative Appeals

The Administrative Appeal

Requesters may appeal an adverse determination to the designated agency official if for example, all or part of a request is denied, or no responsive records are located.

Must give right to appeal within no less than 90 days, and the right to seek dispute resolution services from FOIA Public Liaison or OGIS. This is a new requirement from 2016 FOIA law.

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Understanding Administrative Appeals

More on Administrative Appeals

The determination on appeal must notify the requester of the right to seek judicial review.

Must notify requesters of mediation services from the Office of Government Information Services as a non-exclusive alternative to litigation.

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The Role of the Judiciary

Understanding a FOIA Lawsuit

The FOIA provides requesters with the right to challenge an agency's decision in federal court.

- *Why does a requester sue?*

Agencies have the burden of proof and must demonstrate to the court that no record has been improperly withheld.

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