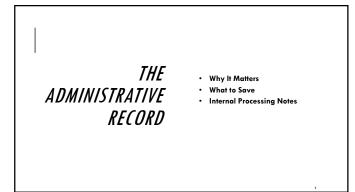


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## **DISCUSSION TOPICS**

- \* The Administrative Record
- ✤ FOIA Correspondence
- Declarations (Litigation)



## WHY KEEP A THOROUGH ADMINISTRATIVE RECORD?

• Documents the when, why, how, what, and who of the request processing

• Crucial if administrative appeal and/or litigation

• Guards against memory loss, staff departures

Provides accurate information to a potential future declarant

Especially important to document adverse determinations

4

#### WHAT TO SAVE

Ideally, everything that reflects timing, actions, and decisions

- Request
- Amendments or clarifications to the request
- Acknowledgement
- Adverse determinations
- Search details and cutoff date
- Internal and external correspondence or notes about communications with POCs, record custodians, SMEs, agency counsel, business submitters, other agencies, etc.
- Responses (interim and final)
- Records (clean/original, redlined, and redacted)

5

#### INTERNAL PROCESSING NOTES

#### Memorialize everything!

- Save copies of emails that concern the processing of a request
- Use "notes" or similar section in the FOIA case management system
  - $\hfill\square$  Administrative actions (e.g. related requests, tracking number changes)
  - $\hfill\square$   $\hfill$  Phone calls (e.g. with requester, record custodian, SME, etc.)
  - Meetings (e.g. with search component, OGC, etc.)
  - Internal decisions (e.g. determining official, NR records, etc.)
- Use text files in the request folder to include procedural notes date & action!
  Use a spreadsheet or other log to track the processing steps for a request
- 6



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What documents would you draft in processing a FOIA request from cradle to grave?

Which of these would be essential?

8

### ESSENTIAL CORRESPONDENCE

- 1. Acknowledgment
- 2. Initial Intake Determinations
  - ✓ Expedited Processing
- ✓ Fee Waivers
   ✓ Preferred Fee Category 3. Unusual Circumstances
- 4. Fee Estimates (if fees to be charged)
- 5. Response Letters

#### THE ACKNOWLEDGMENT

- 1. Tracking number
- 2. Date received
- 3. Estimated date of completion or relevant processing time (20 days, unusual circumstances)
- 4. Point of contact for status inquiries

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#### INITIAL INTAKE DETERMINATIONS

- 1. Expedited processing
- 2. Fee waiver
- 3. Preferred fee category

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# "UNUSUAL CIRCUMSTANCES" NOTIFICATION (>10 DAYS)

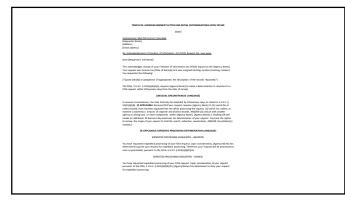
- 1. Provide requester with opportunity to **narrow scope** of request
- 2. Make  $\ensuremath{\textbf{FOIA}}$   $\ensuremath{\textbf{Public Liaison}}$  available to aid the requester, and
- 3. Notify requester of right to seek dispute resolution services from the Office of Government Information Services (OGIS).
- 4. Provide the contact information for the FOIA professional handling the request (optional)

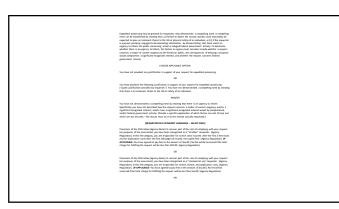
#### FEE ESTIMATES

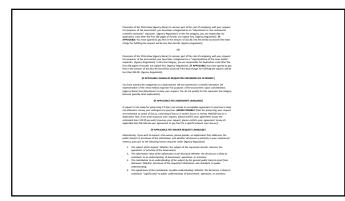
Appeals/judicial review of fee issues are based on the admin record – put it in writing!

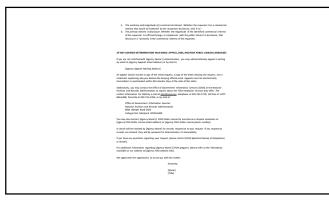
- When possible, provide a fee estimate at the outset. Otherwise, as soon as possible before a response is due.
- You can toll processing as often as necessary to clarify fee issues!
- Challenges to estimated or assessed fees or to denials of fee waivers are subject to administrative appeal.
- Exhaustion of administrative remedies is required before a fee issue is ripe for judicial review.

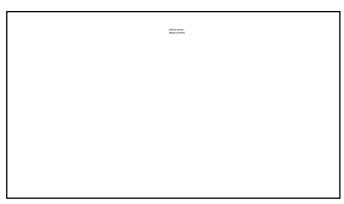
13











#### **RESPONSE LETTERS — REQUIRED**

> The determination(s) and the reasons for it

> Availability of the agency's FOIA Public Liaison

➤ Name and title of the determining official

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#### **RESPONSE LETTERS — REQUIRED (CONT'D)**

#### For adverse determinations:

- Estimate volume of records withheld
  - Redacted records must indicate the exemption applied
- > That agency considered the foreseeable harm in disclosure
- > Provide appeal rights with no less than 90 days from the date of the determination to file the appeal
- > Provide notice of the right of the requester to seek dispute resolution services from the FOIA Public Liaison or from OGIS.

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#### **RESPONSE LETTERS — OPTIONAL**

- 5
- Request description Amendment or clarification Procedural history Component that searched or where inquiry was made
- AA Composition and securities of where induity was indee Describe the search (systems, repositories, methods, parameters, cutoff dates, etc.) Address each requested item and specify the determination for each part Fea assessment FOLA Requester Service Center contact information

- AA
- FOIA Analysis contact information for questions If an interim response: That the request continues being processed Appeal rights or deferral or appeal rights information

### **RESPONSE LETTER — FOIA EXCLUSIONS**

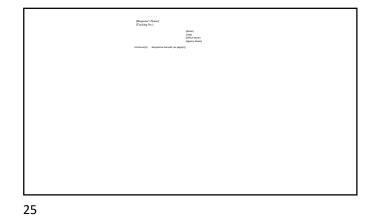
Criminal law enforcement agencies must address that the FOIA excludes the following:

- 1. Matters involving (b)(7)(A) records AND violation of criminal law AND the subject is not aware <u>AND</u> disclosure of the existence of records could reasonably be expected to interfere
- Records under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier
   For FBI: records pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1)

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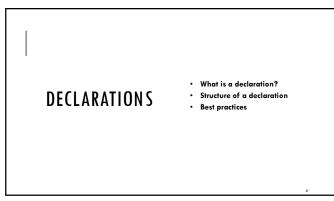
	TEMPLATE RESPONSE LETTER
	(base)
	Vasiliemuni: Mai Oli Vasilint Class Mai
	94quert/N Soud (gearstrain) (Addens) (and addens)
	Recitespone to freedom of information Art (10th) Request No. (non-second
	bear (kat Name):
	Thick the (Agency Name) response to your FOM request rearised (bate of Request), assigned tracking number (Tracking Number). You requested the following:
	["Quote (ideality) or paraphrase (if appropriate) the description of the records requested."]
	Your request was processed under the FOIA, S U.S.C. § SS2.
	16 APPLICABLE: Sull Release Language
	A cascel was conducted by (Hogean Office) Responsive records totaling (IM) pages were located. The records are being released to you in full.
	16 APPLICABLE: No Responsive Records Language
	A such was conducted by (Paggoor Office) the second regression to space regress were based. Equipations for an annual for the second regression of the second. Regression is space reaction.
	OR (when no search was needed to determine there are no recards)
	Upon inquiry, (Program Office) has indicated that (legislaurian for why no recards existsan maintained). Therefore, (Agency hame) has determined that there are no recards responsive to your request.
	IF APPLICABLE: Full Withhelding Language
	A search was conduced by (Program Office) Responsive records tracking wapapet were located. Lypon review, Rypency Name) has determined to withhold these records in full, pursuant to ROA Lamppion P, SixX-S SSID(P), a constraint below.
1	
1	
1	

	[Repeater's Name] [Tracking No.]
	5 APPLICABLE Partial Withholding Language
te te	pon mixew, [agency Name] has determined to partially within dal certain records partuality to FOA. employe(i) (# 5, U.S.C. § SUD)(M)
	[INSERT APPLICABLE EXEMPTION[5] LANGLIGG]
55	arther, [Jegency Name] considered the HORN foreseeable haves constant under \$15.6.5 (5)(8)(8)(3)(8) and desemined that disclosure would have an interest parameter by the exemptions gived.
	au were classified as a [educational OR non-commential scientific instantion OR representative of the war needs OR Commencial OR "all other () inspector for purposes of the associated, in this instance, for any bring datapase.
	you are not catclified with (Agency Harwi's) deer ministion, you may administratively appeal in writing email to (Agency Agenaic final Addens) or by mail to:
	[Agency Appeals Mailing Address]
	nappeal should include a copy of the initial request, a copy of the intern denying the equest, and a sensence equipation of why to believe denying afficial energy. Appeals must be interconcicitly sensence of proconstruct which the clusters of the start.
Au co	defoculty, pays may came the Office of Government Information Services (OGR) at the National chemics and Records Americanitons to single and the Ford Amedication services the utility. The instance universities for OddSing is early an <u>alysistem are universities</u> and another and a 2020-1916-1970; suil free at 5.477- 6.4646, Roman at 2021 Service Service (Service) and Service Service) and Service Services and Services an
	Chillon of Internet Information Services National Ancheros Herson Administration Milds Anglei Kaud-Oddi Callege Fund, Angleica 2019-5002
No. IA	au may also contact (ligency Nami's) FOIA Public Liaison for assistance or dispute involution at gency FOIA Public Liaison email address) or (ligency FOIA Public Liaison phane number).
af Jan	you have ney questions regarding this matter, please contact (IOM Specialist Name) at (Infephone) or mail).
	Sincremy,



#### OTHER KEY CORRESPONDENCE

- Request amendments or clarifications
- $\succ$  Consultations and referrals
- Submitter notices (E.O. 12600)
- ➤ Internal clearances
- Record custodian/SME emails re search parameters, agency records, sensitivities



#### WHAT IS A DECLARATION?

- A dated, written statement in support of a legal matter
- Subscribed to as true under penalty of perjury not notarized
- Establish the entire **factual record** in a FOIA case
- Crucial in FOIA litigation because FOIA cases are decided on summary judgment
- Tailored to the issue(s) being challenged (e.g. fees, search, withholdings, responsiveness, "agency record", segregation)

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#### STRUCTURE OF A DECLARATION

- Identify the declarant
- Provide administrative history/relevant correspondence
- Describe the search
- Describe withholdings, exemptions applied, and foreseeable harm
- Address segregation of non-exempt information

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# | DOJ'S BEST PRACTICES FOR A STRONG

- Based on a robust administrative record (created during processing)
- Made in good-faith
- > Non-conclusory (i.e. provides supporting evidence)
- $\succ$  Non-argumentative  $\rightarrow$  objective
- $\succ$  Clear and easy to understand
- $\succ$  Thorough  $\rightarrow$  don't assume your "audience" knows the agency's records systems or practices

