

AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC.

Freedom of Information Act (FOIA) Procedural Overview:

Key Elements

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Discussion Topics

- Purpose of the FOIA; Statutory Mandate; Entities Subject to the FOIA
- Who May Make A FOIA Request; The “Why” Behind the Request
- Agency Records; Proper FOIA Request
- Receipt of a FOIA Request; The Routing Requirement
- Acknowledgment; Time Limits
- Expedited Processing; Fees
- Interpretation and Communication
- Search, Review
- The Final Response Letter
- Administrative Appeals
- Judicial Review

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Purpose of the FOIA

“The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”

- NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)

A means for citizens to know *“what their Government is up to.”*

- NARA v. Favish, 541 U.S. 157, 171-72 (2004) (quoting DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)).

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Statutory Mandate *(5 U.S.C. § 552(a)(3)(A))*

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 to any person.

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Entities Subject to the FOIA

- Agencies within the Executive Branch of the federal government
- Independent regulatory agencies
- Some components within the Executive Office of the President:
 - Office of Management and Budget
 - Council on Environmental Quality
 - Office of Science and Technology
 - Office of the U.S. Trade Representative
 - Office of National Drug Control Policy

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Who May Make A FOIA Request?

- **“Any person”** – regardless of citizenship
- Includes individuals, corporations, associations, state and local governments, foreign governments, etc.

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Who May Make A FOIA Request?

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 “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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Agency Records Under the FOIA

- The FOIA pertains to federal agency records that exist and can be located in agency files.
- Any agency records can be requested, including:
 - Paper documents
 - Emails
 - Photographs
 - Audio and video recordings
 - Text messages
 - Instant messages
 - Other electronic records

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What is an Agency Record Subject to the FOIA?

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

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Agency Control Over Records

- **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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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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Receipt of FOIA Request

- FOIA requirements begin to apply when an agency receives a proper FOIA request
- Receipt of the request starts the 20-day time clock
- Exception for “routed” requests within an agency: no later than 10 days from receipt

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The Routing Requirement

- Applies when 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.
- Agencies must “route”/“forward” misdirected requests to the proper office within 10 days.
- 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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Acknowledgment

- Tracking number → If request will take longer than 10 days to process
- Status information:
 - Telephone line or internet service that provides information about the status of a request
 - Date of receipt
 - Estimated date of completion.

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Time Limits for Responding to a Request

- The 20-day clock begins to run upon receipt of a proper request.
- In “unusual circumstances” agency may extend the time limit by giving written notice to requester

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Time Limits: Extension Beyond 10 Days

- If time period is extended beyond 10 working days, agency must:
 - provide requester with opportunity to narrow scope of request,
 - make FOIA Public Liaison available, and
 - notify requester of right to seek dispute resolution services from the Office of Government Information Services (OGIS).

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Time Limits: “Unusual Circumstances”

- “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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Time Limits: Tolling

- Tolling can only occur if the request is properly made and the clock already started.
- The number of times the agency can toll the response time is limited.
 - One time when agency waiting for general information reasonably sought from Requester.
 - As many times as necessary to clarify issues with Requester regarding fee assessment.

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Time Limits: Expedited Processing

- **Compelling need:**
 - (1) **imminent threat to the life or physical safety** of an individual, or
 - (2) **urgency to inform** the public concerning actual/alleged Federal Government activity (if request is from a requester engaged primarily in disseminating information)
- Agencies may add other **regulatory grounds** for granting expedited processing

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Time Limits: Expedited Processing

- Agencies have 10 **calendar days** to decide whether to grant or deny requests for expedited processing.
- Agencies must process requests that have been granted expedited processing as soon as practicable.

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Fees Under the FOIA

	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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Limits on Charging Fees

➤ 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 circumstances** apply, and
- More than 5000 pages are necessary, and
- the agency has discussed with requester (or made 3 good faith attempts) to allow to narrow the scope. **OR**
- A court determines **exceptional circumstances** exist.

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Limits on Charging Search Fees: Unusual Circumstances

Again ...

"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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Limits on Charging Search Fees: Exceptional Circumstances

“Exceptional Circumstances” determined by a court

- 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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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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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 Records

Applying the Exemptions

- Information can only be withheld if it falls within one of nine exemptions
- Agencies are to clearly identify the deleted/redacted information and identify the appropriate exemption for each redaction

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Reviewing Responsive Records

Obligation to Reasonably Segregate

- Agency must release any reasonably segregable information after withholding of exempt portions
- Agency has burden of showing that records cannot be segregated if withholding in full

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Reviewing Responsive Records

Foreseeable Harm Standard

- Codified by FOIA Improvement Act of 2016
- Agencies “shall withhold information” under the FOIA “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”

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Reviewing Responsive Records

Referrals, Consultations, & Coordination

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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Responding to the Requester

- Agency must provide responsive records in any form requested, “if readily reproducible” in that form,
- Agencies are encouraged to make interim responses.

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Responding to the Requester

Certain information generally must appear in final response letters, including:

- Estimated page count of responsive records released or withheld, and
- Any exemptions asserted
- Right of requester to seek assistance from agency FOIA Public Liaison

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Responding to the Requester

Additional response letter requirements for adverse determinations:

- Reason(s) for denial(s),
- Right to agency administrative appeal (within no fewer than 90 days), and
- Right to seek dispute resolution services from the FOIA Public Liaison or OGIS

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Administrative Appeals

- Requesters may appeal adverse determinations to the designated agency official
- Right to appeal within no less than 90 days
- Right to seek dispute resolution services from FOIA Public Liaison or OGIS.

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Administrative Appeals: Determinations

- The action taken at the initial level can be affirmed, reversed, remanded, or a combination of those actions.
- Must notify the requester of the right to seek judicial review.
- Must notify requesters of mediation services from OGIS as a non-exclusive alternative to litigation.

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Judicial Review

- FOIA requesters have the right to challenge an agency's decision in federal court.
- Agencies have the burden of proof and must demonstrate to the court that no record has been improperly withheld.
- Requester must exhaust administrative remedies; unless, constructive exhaustion

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QUESTIONS????

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