

AMERICAN SOCIETY OF ACCESS PROFESSIONALS, INC.

Freedom of Information Act (FOIA) Procedural Overview:

Key Elements

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1

1

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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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2

2

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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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3

3

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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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4

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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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5

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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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7

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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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8

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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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9

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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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11

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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 business 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 business day response time period begins . . . even if the proper component has yet to receive the request.

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14

14

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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 business 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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17

17

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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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19

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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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20

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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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21

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Fees Under the FOIA

	<u>Search</u>	<u>Review</u>	<u>Duplication</u>
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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22

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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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23

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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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24

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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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25

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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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26

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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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27

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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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28

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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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29

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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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30

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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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31

31

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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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32

32

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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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33

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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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34

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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—Agencies need to include a foreseeable harm statement for any claimed exemptions.
- Right of requester to seek assistance from agency FOIA Public Liaison

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35

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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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36

36

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Administrative Appeals

- Requesters may appeal adverse determinations to the designated agency official
- Right to appeal within 90 days
- Right to seek dispute resolution services from FOIA Public Liaison or OGIS.

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37

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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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38

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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
- If a court rules in the requester's favor, the court may require the agency to pay the requester's attorney's fees

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39

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Office of Government Information Services

- Government office providing mediation and guidance on FOIA.
- Mediation: A voluntary and collaborative process in which a neutral third party—OGIS—works with disputing parties to discuss the issues and help them find mutually agreeable solutions to their disputes within the confines of the FOIA statute.
- Ombuds Services: OGIS answers queries about the FOIA process and provides general FOIA assistance. OGIS logs and addresses observations, complaints and suggestions on FOIA issues.
- Conciliation: OGIS assists the disputing parties by helping them open communication lines that will encourage further dialogue and clarifies any misunderstandings that may exist.
- Facilitation: OGIS continues the conciliation process by working with the disputing parties to promote communication and clarify issues.

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40

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QUESTIONS????

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41

41
