

Pitfalls of the Perfected Request

Reasonableness, like beauty, is in the eye of the beholder. During this session, you will learn more about the standards for perfecting a FOIA request and red flags that may indicate the requester is on a fishing expedition. You will also learn best practices for maintaining a positive relationship with a requester and strategies for negotiating with requesters if it turns out that what seemed like a reasonable search is much more complicated than expected.

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Before you even look at the topic

Check to see:

- Is it a duplicate?
- Are records already released?
- Are records on the FOIA library?
- Are records on the agency website?

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What is a perfected FOIA request?

Records are reasonably described

Regulation requirements are met

"Perfected" request -- a FOIA request for records which:

- reasonably describes the records sought,
- has been received by the FOIA office of the agency or agency component in possession of the records, and
- there is no remaining question about the payment of applicable fees.

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What are agency records?

For FOIA purposes (different than records management)

As a result of the 1996 amendments to the FOIA, Congress included a definition of the term "records" in the FOIA, defining it as including "any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format."

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Tests to determine if agency records

In *DOJ v. Tax Analysts*, the Supreme Court articulated a two-part test for determining when a "record" constitutes an "agency record" under the FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.

The "agency record" analysis typically hinges upon whether an agency has "control" over a record. The D.C. Circuit has identified four factors to consider when evaluating agency "control" of a record: "(1) the intent of the document's creator to retain or relinquish control over the record; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record systems or files."

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Agency vs. personal records

In a similar vein, "agency records" are distinguishable from "personal records" – records that might be physically maintained by agency employees at the agency, but that are not subject to the FOIA. In determining whether a record is a "personal record," the D.C. Circuit has held that an agency should examine "the totality of the circumstances surrounding the creation, maintenance, and use" of the record.

Factors relevant to this inquiry include, among others, (1) the purpose for which the document was created; (2) the degree of integration of the record into the agency's filing system; and (3) the extent to which the record's author or other employees used the record to conduct agency business.

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Fee factors to consider

What is their fee category?

- Did they provide enough information to determine it?
- Who is media?
- Who is educational and non-commercial scientific?
- What is commercial use?

Will fees apply?

- Can the request be processed within the deadlines?
- Are more than 5,000 pages necessary to respond to the request?
 - Have you made at least 3 good-faith attempts to negotiate the scope?

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Quiz – are these perfected?

Can a reasonable search be done to locate records responsive to these request, as written?
Every email with the word “vaccine” from the head of the vaccine research center.

All records related to the Department’s review of any threat posed by any social media platform, software application, or other technology products or services that are designed, developed, manufactured, or supplied by persons that are owned or controlled by, or subject to the jurisdiction of a foreign adversary

Any and all electronic communication, including email, sent by communications professionals with the keywords “press,” “2023,” and “bad.”

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Typical challenges to processing a request

Technology

Fishing expedition

Unwilling to negotiate

Volume of records, particularly electronic records

Limited understanding of FOIA

Discontentment and aggression toward you and/or your agency

Litigation

Added burden of organizing multiple cases from same requester

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Potential strategies for dealing with a large request

Aggregate or disaggregate the request?

- Aggregate – the topic is extremely similar, the redactions are consistent, easier to pull all at once
- Disaggregate – are there “quick hits?”

Sample of records?

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Keyword requests

Identify words that will lead to negative hits

Recommend strings of words

Use your Boolean connectors

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Negotiating tips

1. Writing vs. picking up the phone

2. Be comfortable delivering bad news – let the requester know it will take some time for the request to come up in your queue and be honest about the amount of work it will take to process the volume of records sought.

3. Take status requests as an opportunity to discuss and narrow the scope.

4. Do not be afraid to ask for additional information to target the search.

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Providing estimated completion dates

Be realistic

Emphasize it's an estimate

Welcome them to follow up once estimate has passed

Share that delays are also a part of the litigation process – if your estimate is within two to three months, filing a suit may further delay access

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Tips for narrowing a request on a potentially sensitive topic

Review the types of requests the requester has made at your agency

Double-check with supervisors before you determine what you want to share to negotiate. Second opinions are important.

Take your time and provide the best answer

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The requester won't negotiate: now what?

Focus on a reasonable search – task offices **most likely** to have records and suggest reasonable key words

After search completed, make sure records are responsive (don't rely on IT search alone)

If the search returns junk, reach out to the requester to talk about the kinds of records that are coming up or send them a small sample to see if they are the kinds of records they want the agency to expend resources processing

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Best practices

Remember you do not have to answer questions or create records

Don't take it personally, even if the requester is being mean

Don't send a still interested letter just because the case has been around forever – follow DOJ guidance!

Don't oil the squeaky wheel – take care of the people waiting patiently in line

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Scenarios

Perfect? What can you do in each of these scenarios...

Requests for every email from a list of 50 employees on a list of 30 different key words

Requester keeps sending separate requests, now totaling 150 cases, on related topics.

Any and all records related to XYZ Significant Event

Request asking how many times employees have been fired and/or disciplined for XYZ reason

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