

## A CITIZEN’S GUIDE TO USING THE FREEDOM OF INFORMATION ACT TO REQUEST GOVERNMENT RECORDS

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Transparency is a fundamental part of democracy, and necessary for any government to be accountable to its people. The Freedom of Information Act (FOIA) is the key federal law under which the public may obtain information about the activities of the federal government.<sup>1</sup>

FOIA establishes a presumption that records in the possession of agencies and departments of the executive branch of the federal government are accessible to the people. Under FOIA, a person may file a request for any agency record for any reason.<sup>2</sup> FOIA sets standards for determining which records must be disclosed and which records may be withheld by the agency. The law also provides administrative and judicial remedies for FOIA requesters who believe they have been improperly denied access to records.

The Committee on Oversight and Accountability is responsible for overseeing FOIA’s implementation. In 1977, in accordance with its mission to oversee FOIA and strengthen transparency in government, the Committee released the first edition of the *Citizen’s Guide to Using the Freedom of Information Act and the Privacy Act of 1974*.<sup>3</sup> This *Guide* has been updated to reflect all changes and amendments made to FOIA as of March 2023.

The most recent amendments to FOIA, the FOIA Improvement Act of 2016, established a presumption of openness. Under this presumption, FOIA now requires that agencies withhold information only if an “agency reasonably foresees that disclosure would harm an interest protected by an exemption” under the law, or where “disclosure is prohibited by law.”<sup>4</sup> In addition, if a full disclosure is not possible, agencies should make a partial disclosure whenever possible by taking “reasonable steps necessary to segregate and release nonexempt information.”<sup>5</sup>

The Biden-Harris Administration has taken important steps to strengthen FOIA and make government more transparent. On March 15, 2022, Attorney General Merrick Garland issued FOIA guidelines providing that “agencies are strongly encouraged to make discretionary disclosures of information where appropriate” and stating that the Department of Justice (DOJ) will not defend nondisclosure decisions that are inconsistent with FOIA or DOJ’s guidelines.<sup>6</sup>

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<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> *Id.*

<sup>3</sup> Committee on Government Operations, *A Citizen’s Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents*, 95th Cong. (1977) (H. Rept. 95-793).

<sup>4</sup> 5 U.S.C. § 552(a)(8)(A)(i). See Department of Justice, OIP Guidance: *Applying a Presumption of Openness and the Foreseeable Harm Standard* (Mar. 13, 2023) (online at [www.justice.gov/oip/oip-guidance-applying-presumption-openness-and-foreseeable-harm-standard](http://www.justice.gov/oip/oip-guidance-applying-presumption-openness-and-foreseeable-harm-standard)).

<sup>5</sup> 5 U.S.C. § 552(a)(8)(A)(ii).

<sup>6</sup> Department of Justice, *Freedom of Information Act Guidelines* (Mar. 15, 2022) (online at [www.justice.gov/ag/page/file/1483516/download](http://www.justice.gov/ag/page/file/1483516/download)).

## I. THE FREEDOM OF INFORMATION ACT

FOIA allows people to request information from the federal government. Under FOIA, a person may file a request for information from the executive branch of the federal government.<sup>7</sup> Agencies subject to FOIA include executive branch departments, agencies, and offices; federal regulatory agencies; and federal corporations.<sup>8</sup>

### A. Records That Can Be Requested Under FOIA

Most agency records may be requested under FOIA, although a number of records are available online without filing a FOIA request.<sup>9</sup> Under FOIA, any record that is in the possession and control of a federal agency—regardless of the form in which it is stored—is considered to be an agency record.<sup>10</sup>

An agency is not obligated to create a new record to comply with a FOIA request. An agency is not required to collect information it does not have or do research or analyze data for a requester. However, agencies may help a requester identify a specific document that contains the information being sought.

The law requires that each request reasonably describe the records being sought. This means that a request must be specific enough to allow a professional employee of the agency who is familiar with the subject matter to locate the record with a reasonable amount of effort. The agency's FOIA Public Liaison (FPL) is the best starting point as they will be most familiar with the records that their agency holds. The Office of Government Information Services (OGIS) is also a valuable resource for requesters who need help requesting specific records.<sup>11</sup>

Requesters should make requests as specific as possible. If a particular document is required, it should be identified precisely, preferably by author, date and title. Narrowing a request's focus may benefit the requester because the agency may be able to process the request more quickly and less expensively. Checking for information that is already publicly available may help requesters narrow a request to a specific record. A requester who cannot identify a specific record should clearly explain the goal of the request. The agency should contact the requester to clarify a request or provide the option of limiting the scope of the request.

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<sup>7</sup> The executive branch includes cabinet departments, military departments, government corporations, government-controlled corporations, other establishments in the executive branch, and independent regulatory agencies.

<sup>8</sup> FOIA additionally applies to one private company: Amtrak.

<sup>9</sup> Other key statutes allowing the public access to government information include the Privacy Act of 1974 (5 U.S.C. § 552a), Government in Sunshine Act (5 U.S.C. § 552b), and Federal Advisory Committee Act (5 U.S.C. Appendix). See Congressional Research Service, *Access to Government Information Services: An Overview* (Mar. 31, 2022) (R47058) (online at <https://crsreports.congress.gov/product/pdf/R/R47058>).

<sup>10</sup> 5 U.S.C. § 552(f)(2).

<sup>11</sup> See Office of Government Information Services, *The Office of Government Information Services* (online at [www.archives.gov/ogis](http://www.archives.gov/ogis)) (accessed Mar. 13, 2023).

## **B. Making a FOIA Request**

The first step in making a records request under FOIA is to identify the agency that has the records. A FOIA request must be addressed to a specific agency. FOIA.gov allows all government websites to be searched at once and may be able to help a requester determine which agency is likely to have responsive records and what information is already publicly available. A requester also may want to consult individual agency websites for useful FOIA information and for proactively-disclosed records. An online FOIA library or electronic reading room may already include the information a requester is seeking. Requesters who do not know which agencies would most likely have the records they seek may wish to contact OGIS for additional help.<sup>12</sup>

Most agencies accept FOIA requests in the form of a mailed letter, a facsimile (fax), an e-mail, or an online submission. FOIA.gov is the government's central website for FOIA, and users can submit requests to agencies through this website.<sup>13</sup> Many agencies also accept requests through their own online portal.

A FOIA letter should state that the request is being made pursuant to FOIA, identify the records being sought, and provide contact information for the requester. The name and contact information of the requester are required. FOIA.gov's six-step process to submit FOIA requests allows users to provide contact information, a description of the request, any additional documents relevant to the request, the category of the requester for purposes of determining applicable fees and an optional request for a fee waiver, an optional request for expedited processing, and an opportunity to review the information entered before submitting the request. The Appendix of this *Guide* contains a sample request letter. A requester should keep a copy of their request and related correspondence until the request has been resolved.

Agencies generally have 20 business days to process a FOIA request. Agencies may seek up to ten additional days to process a request. If the agency requests an extension, the agency must notify the requester and identify the "unusual circumstances" that prompted the need for additional time.<sup>14</sup> If the agency needs an extension that exceeds the ten days, it must allow the requester an opportunity to modify the request, or to arrange an alternative time frame for processing the request. The agency must also make its FOIA Public Liaison available and notify the requester of the services available at OGIS.

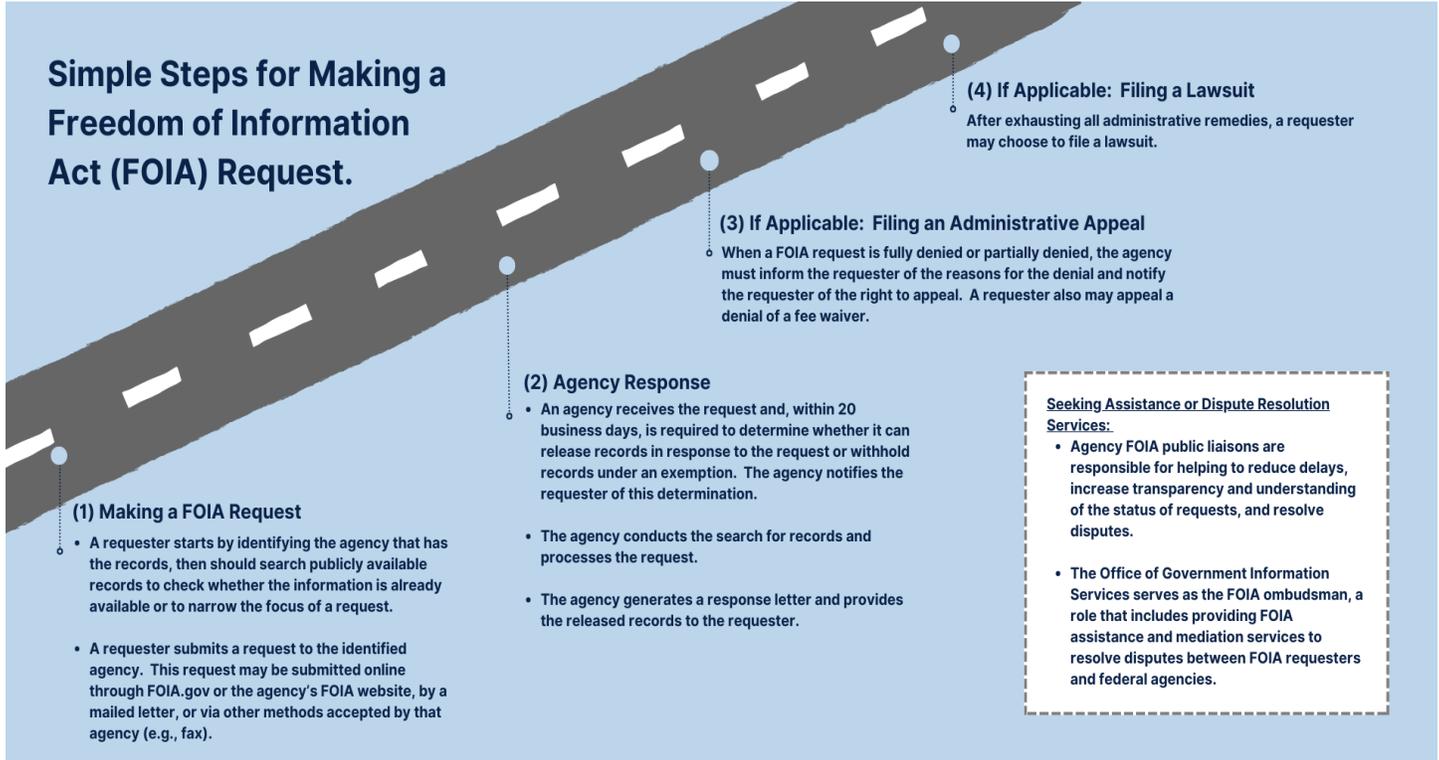
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<sup>12</sup> *Id.*

<sup>13</sup> See FOIA.gov. FOIAonline.gov also allows users to submit FOIA requests to participating agencies, as well as track the progress of an agency's response to a request, and search for information made available from other users' requests. However, FOIAonline.gov will be decommissioned on September 20, 2023.

<sup>14</sup> 5 U.S.C. § 552(6)(B).

Figure 1: Roadmap to Making a FOIA Request



### C. Fees and Fee Waivers

FOIA requesters may be required to pay fees to cover some or all of the costs of processing their requests. Each agency sets charges for document search, review, and duplication based on its own costs. The amount of these charges is listed in each agency's FOIA regulations and can be found on many agencies' FOIA websites. Each agency also sets its own threshold for minimum charges.<sup>15</sup>

Fees must be waived or reduced if disclosure of the information is determined to be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.<sup>16</sup>

There are three types of fees that may be charged to FOIA requesters. First, agencies can impose fees to recover the costs of searching for documents. Second, agencies can charge fees to recover costs related to reviewing the documents. Third, agencies may impose fees to recover the cost of copying documents.<sup>17</sup>

<sup>15</sup> Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers* (Sept. 16, 2020) (online at [www.justice.gov/oip/page/file/1206606/download](http://www.justice.gov/oip/page/file/1206606/download)).

<sup>16</sup> *Id.* at p. 21.

<sup>17</sup> *Id.* at p. 9.

Different fees apply to different requesters. There are three categories of FOIA requesters:

- representatives of the news media and educational or noncommercial scientific institutions whose purpose is scholarly or scientific research;
- commercial use requesters; and
- everyone else.<sup>18</sup>

To qualify as a member of the news media, a requester must demonstrate an ability to widely disseminate information and verify that there is no commercial interest in the requested records. A requester in this category who is not seeking records for commercial use can only be charged for reasonable standard document duplication charges. A request for information from a representative of the news media is not considered to be for commercial use if the request is made by any person or entity that gathers information, develops a distinct work, and disseminates that work to an audience.<sup>19</sup> To qualify as a member of an educational or noncommercial scientific institution, a requester must be part of an institution of higher learning, an institution of vocational education, or a scholarly research program. To qualify for this category and receive 100 pages of free duplication, the request must serve a research goal of the institution, which may include the requests of students in connection with their coursework.<sup>20</sup>

The second category of requester seeks records for commercial use. Commercial use is not defined in the law, but it generally includes profit-generating activities, such as the compilation of government information by a data broker for marketing purposes.<sup>21</sup> A commercial user can be charged reasonable standard charges for document duplication, search, and review.<sup>22</sup>

The third category of FOIA requesters includes everyone not in the first two categories, such as public interest groups, nonprofit organizations, and persons seeking information for personal use.<sup>23</sup> Charges for these requesters are limited to reasonable standard charges for document duplication and search, minus two free hours of search and 100 pages of free duplication. Agencies may not charge review costs.

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<sup>18</sup> Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers*, at p. 2 (Sept. 16, 2020) (online at [www.justice.gov/oip/page/file/1206606/download#page=2](http://www.justice.gov/oip/page/file/1206606/download#page=2)).

<sup>19</sup> *Id.* at p. 5.

<sup>20</sup> *Id.* at p. 3.

<sup>21</sup> *Id.* at p. 2.

<sup>22</sup> *Id.* at p. 9.

<sup>23</sup> Some requesters, such as public interest groups and nonprofit organizations, also could qualify as media if they plan to use FOIA to disseminate information to the public.

i. *General Fee Limitations*

For all non-commercial requesters, agencies may not charge a fee for the first two hours of search time and for the first 100 pages of documents. A non-commercial requester who limits a request to a small number of easily found records should typically not incur any fees.<sup>24</sup>

The law also prevents agencies from charging fees if the cost of collecting the fees would exceed the amount a requester would be charged. This limitation applies to all requests, including requests made for commercial purposes.<sup>25</sup>

If an agency fails to process a FOIA request within applicable time limits, search fees are waived for all requesters, and duplication fees are waived for requesters who are members of the news media or an educational or noncommercial scientific institution whose purpose is scholarly or scientific research. If unusual circumstances apply and “more than 5,000 pages are necessary to respond to the request” then (providing that timely notice is given to the requester and efforts have been made to limit the scope of the request) agencies may charge the applicable search and duplication fees. In addition, if a court determines that “exceptional circumstances” exist for the delays in complying with a time limit, then applicable search and duplication fees also may be assessed.<sup>26</sup>

ii. *How to Request a Public Interest Fee Waiver*

A requester who seeks a fee waiver should ask for a waiver in the original request letter or submission, though a request for a waiver can be made at a later time. Failing to provide enough information relating to the fee waiver or making the request at a later time can allow the agency to pause the applicable time limits to ask questions. A requester who is seeking a fee waiver should also set forth how disclosure will contribute to public understanding of the operations or activities of the government. The sample request letter in the Appendix includes optional language asking for a fee waiver. FOIA.gov’s online request tool asks requesters to indicate if they are seeking a fee waiver and allows requesters to include their justification.

Any requester may ask for a fee waiver. For example, a news reporter who is charged only duplication costs may still ask that the charges be waived because of the public benefits that would result from disclosure. A commercial user will find it more difficult to qualify for a fee waiver. A key element in qualifying for a fee waiver is the relationship of the information to public understanding of the operations or activities of government. Another important factor is the ability of the requester to convey that information to other interested members of the public. A requester is not eligible for a fee waiver solely because of an inability to pay an assessed fee.

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<sup>24</sup> *Id.* at p. 13.

<sup>25</sup> Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers*, at p. 13 (Sept. 16, 2020) (online at [www.justice.gov/oip/page/file/1206606/download#page=13](http://www.justice.gov/oip/page/file/1206606/download#page=13)).

<sup>26</sup> 5 U.S.C. § 552(a)(4)(A)(viii).

iii. *Agency Penalty for Overdue Responses*

If an agency cannot comply with time limits for responding to a request as defined in FOIA, and no unusual circumstances exist, the agency may not collect search fees for the request. In such cases, requesters who represent the news media or an educational institution and have no commercial interest in the records sought (*i.e.*, those who are not required to pay a search fee) are not subject to duplication fees.<sup>27</sup>

D. **Additional Items**

There are several additional items that a requester may include in a FOIA request but are not required. The first is a statement of the fees that the requester is willing to pay. It is common for a requester to ask to be notified in advance if the charges will exceed a fixed amount. This statement allows the requester to modify or withdraw a request if the cost may be too high. By identifying at the outset the fees a requester is willing to pay, a requester may avoid additional correspondence and delay.

Second is a request for a waiver or reduction of fees, which can be waived or reduced if disclosure of the information is in the public interest. Decisions about granting fee waivers are separate from decisions about the amount of fees that can be charged to a requester.

Third is a specification of the form or format in which the requested material is sought, such as printed or electronic form.

Fourth is whether to seek expedited request processing. Certain requests qualify for expedited processing if the requester can demonstrate a “compelling need” for a speedy response.<sup>28</sup> Pursuant to FOIA, a “compelling need” is demonstrated in two circumstances. The first circumstance occurs when failure to obtain the records within an expedited deadline poses an imminent threat to an individual’s life or physical safety.<sup>29</sup> The second category requires a request by someone “primarily engaged in disseminating information” and “urgency to inform the public concerning actual or alleged federal government activity.”<sup>30</sup> Agencies may determine in their FOIA regulations other specific cases in which they will provide expedited processing. A requester also has the right to appeal the denial of a request for expedited processing.

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<sup>27</sup> 5 U.S.C. § 552(a)(4)(A)(ii) (The FOIA definition for the term “representative of the news media” states, “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience” is a representative of the news media. “News” is defined as information about “current events or that would be of current interest to the public.” FOIA also states that “as methods of news delivery evolve ... alternative media shall be considered to be news-media entities”).

<sup>28</sup> Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Procedural Requirements*, at p. 39 (Aug. 20, 2021) (online at [www.justice.gov/oip/page/file/1199421/download#page=39](http://www.justice.gov/oip/page/file/1199421/download#page=39)).

<sup>29</sup> 5 U.S.C. § 552(a)(6)(E)(v)(I).

<sup>30</sup> 5 U.S.C. § 552(a)(6)(E)(v)(II).

## II. AGENCY RESPONSES

Under FOIA, each agency is generally required to determine within 20 days (excluding Saturdays, Sundays, and legal holidays) after the receipt of a request whether it has located responsive records, and whether the requested records will be released. Agencies usually notify the requester whether they intend to comply with the request, whether they have located any responsive records, and, if FOIA exemptions apply, whether they are claiming the records are protected from public release.

In its initial response to a FOIA request, an agency is required to provide the requester with a tracking number for any FOIA request that cannot be fulfilled within ten days. This tracking number is important to keep for reference. Many agencies have online systems that allow requesters to use their tracking numbers to check on the status of their requests. In addition, when the requester asks for an estimated date of completion, an agency is required to provide an estimated date by which the agency expects to complete work on the request.<sup>31</sup> The tracking number is also useful if filing an appeal.

If a request is denied in whole or in part, the agency must tell the requester the reasons for the denial. The agency must also inform the requester that they may seek assistance from the agency's FOIA public liaison, that there is a right to appeal any adverse determination to the head of the agency or his or her designee, that the requester has 90 days to appeal, and that the requester has the right to seek dispute-resolution services from the agency's FOIA public liaison or OGIS.<sup>32</sup>

Agencies generally process requests in the order in which they are received, though most agencies separate simple and complex requests to prevent the unnecessary delay of simple requests. Agencies will expedite the processing of certain requests.<sup>33</sup> Anyone with a pressing need for records should consult with the agency FOIA officer about how to request expedited treatment of requests. Agencies also may give requesters the opportunity to limit the scope of their requests to qualify for processing on a faster track.<sup>34</sup>

### A. Unusual Circumstances, Delays, and Remedies

FOIA permits an agency to take up to ten extra days before notifying a requester whether records will be released if the agency can claim an "unusual circumstance." An "unusual circumstance" is defined as the need to collect records from remote locations, review a large number of records, or consult with other agencies or multiple components within an agency. If the agency needs more than ten extra days, it must inform the requester that the request cannot be

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<sup>31</sup> Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Procedural Requirements* (Aug. 20, 2021) (online at [www.justice.gov/oip/page/file/1199421/download#page=1](http://www.justice.gov/oip/page/file/1199421/download#page=1)).

<sup>32</sup> 5 U.S.C. § 552(a)(6)(A).

<sup>33</sup> See Section I, D within this document.

<sup>34</sup> Department of Justice, *The Importance of Good Communication with FOIA Requesters 2.0: Improving Both the Means and the Content of Requester Communications* (Nov. 22, 2013) (online at [www.justice.gov/oip/blog/importance-good-communication-foia-requesters-20](http://www.justice.gov/oip/blog/importance-good-communication-foia-requesters-20)).

processed within the statutory time limits and the agency must provide an opportunity for the requester to limit the scope of the request so that it may be processed within statutory time limits and/or arrange with the agency a negotiated deadline for processing the request. In the event that the requester refuses to reasonably limit the scope of the request or agree upon a timeframe and then seeks judicial review, that refusal is considered as a factor in determining whether “exceptional circumstances” exist for a judicial extension of processing time.<sup>35</sup>

The 20-day response period begins on the date the request is first received by the appropriate component of the agency, but no later than ten days after any component of the agency receives the request.<sup>36</sup> The statutory time limits for responses are not always met. An agency sometimes receives an unexpectedly large number of FOIA requests at one time or has a large backlog and is unable to meet the deadlines. Checking FOIA.gov to view an agency’s average processing times may provide a requester with useful information about an agency’s timeliness.

If an agency fails to respond within the required time limits, a requester may appeal to the agency. The requester can seek dispute resolution from the FOIA public liaison or OGIS at the same time. If an agency has extended the time limit by more than ten additional days, the agency must notify the requester in writing of the right to seek dispute resolution services from OGIS. OGIS facilitates communication between agencies and requesters and mediates disputes regarding FOIA requests. OGIS’s mediation is non-binding and does not preclude a requester from litigation. A requester may utilize OGIS’s dispute resolution to resolve issues with an agency’s processing of a request without resorting to litigation but is also able to file a lawsuit in federal district court if they are unsatisfied with the outcome. OGIS is described in greater detail below, in Section III “Role of the Office of Government Information Services (OGIS),” below.<sup>37</sup>

When other remedies have been exhausted, a requester may file a lawsuit in federal district court. A judge may allow an agency additional time if the agency demonstrates that exceptional circumstances exist and that the agency is exercising due diligence in responding to the request. Exceptional circumstances do not include delays that result from predictable agency workloads, unless the agency can demonstrate that it is making reasonable progress in reducing a backlog of pending requests. Because it is costly and time consuming, litigation over delays should generally be used only as a last resort.

## **B. Reasons Access May Be Denied Under FOIA**

FOIA provides nine exemptions that agencies may apply to ensure that certain types of information are protected from public release. An agency may refuse to disclose portions of an agency record that falls within any of FOIA’s nine statutory exemptions. The exemptions protect against the disclosure of information that would harm national defense or foreign policy,

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<sup>35</sup> Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Litigation Considerations*, at p. 44 (Sept. 25, 2019) (online at [www.justice.gov/oip/page/file/1205066/download#page=44](http://www.justice.gov/oip/page/file/1205066/download#page=44)).

<sup>36</sup> Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Procedural Requirements*, at p. 36 (Aug. 20, 2021) (online at [www.justice.gov/oip/page/file/1199421/download#page=36](http://www.justice.gov/oip/page/file/1199421/download#page=36)).

<sup>37</sup> See Section III within this document.

privacy of individuals, proprietary interests of business, functioning of the government, law enforcement investigations, and other important interests.<sup>38</sup> A document that does not qualify as an “agency record” may be withheld (but nevertheless identified) because only agency records are available under FOIA. Personal notes of agency employees, for example, may be denied on this basis. Most records in the possession of an agency, however, are “agency records” within the meaning of FOIA.<sup>39</sup>

The Attorney General has instructed agencies to apply the “presumption of openness” even to records that fall under one of the nine exemptions.<sup>40</sup> If an agency determines that exempt records could be released without any resulting harm, such as endangering national security, the agency should release the records. When a record contains some information that qualifies as exempt, the entire record is not necessarily exempt, and the agency should release non-exempt information in that record, if possible. Agencies must withhold information under FOIA only when the agency “reasonably foresees that disclosure would harm an interest protected by an exemption” or if “disclosure is prohibited by law.”<sup>41</sup>

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<sup>38</sup> 5 U.S.C. § 552(b).

<sup>39</sup> Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Procedural Requirements*, at p. 11 (Aug. 20, 2021) (online at [www.justice.gov/oip/page/file/1199421/download#page=11](http://www.justice.gov/oip/page/file/1199421/download#page=11)).

<sup>40</sup> See Office of the Attorney General, *Memorandum for Heads of Executive Departments and Agencies: Freedom of Information Act Guidelines* (March 15, 2022) (online at [www.justice.gov/ag/page/file/1483516/download](http://www.justice.gov/ag/page/file/1483516/download)).

<sup>41</sup> 5 U.S.C. § 552(a)(8)(A)(i).

Figure 2: FOIA Exemptions

<b>FOIA Exemptions</b>	
<b>Exemption 1</b>	<b>Classified documents related to national defense or foreign policy.</b>
<b>Exemption 2</b>	<b>Information related solely to an agency’s internal personnel rules and practices.</b> Personnel matters subject to “a genuine and significant public interest” do not qualify under this exemption.
<b>Exemption 3</b>	<b>Information that must be withheld under other laws.</b>
<b>Exemption 4</b>	<b>Trade secrets and confidential business information.</b> Information is confidential only if it is “both customarily and actually treated as private” by the person imparting it and the entity receiving it gives “assurance that it will remain secret.”*
<b>Exemption 5</b>	<b>Internal agency communications.</b> This exemption applies to records on the process by which government decisions and policies are formulated (if the records were created less than 25 years before the date of a request), attorney-client privilege, materials prepared in anticipation of litigation, and other instances commonly recognized by case law.
<b>Exemption 6</b>	<b>Documents that implicate personal privacy interests.</b> This exemption includes personnel, medical, and other similar files, which, if released, would create a clearly unwarranted invasion into an individual’s right to privacy. Corporations and other legal persons are not covered under this exemption.
<b>Exemption 7</b>	<b>Law enforcement records.</b> Agencies may withhold certain records to protect the law enforcement process from interference if the records fall within one of six “sub-exemptions,” if the information could: <ul style="list-style-type: none"> <li>• 7(A) interfere with law enforcement proceedings;</li> <li>• 7(B) deprive a person of a right to a fair trial or impartial adjudication;</li> <li>• 7(C) constitute an unwarranted violation of personal privacy;</li> <li>• 7(D) reveal the identity of a confidential source;</li> <li>• 7(E) reveal techniques and procedures for law enforcement investigations or prosecutions;</li> <li>• 7(F) endanger the life or physical safety of an individual.</li> </ul>
<b>Exemption 8</b>	<b>Records related to financial institutions.</b> This exemption covers information that is related to the reports prepared by or for agencies that are charged with supervising banks, such as the Federal Reserve.
<b>Exemption 9</b>	<b>Geological and geophysical information and data.</b>

\* *Food Marketing Institute v. Argus Leader Media*, 588 U.S. \_\_\_, 139 S. Ct. 2356 (2019).

### **C. FOIA Exclusions**

FOIA provides agencies limited authority to respond to a request without confirming the existence of requested records, thereby excluding them from disclosure. Ordinarily, any proper request must receive an answer stating whether there is any responsive information—even if the requested information is exempt from disclosure—or a blanket refusal to confirm or deny whether it exists.

In three narrow circumstances, federal law enforcement agencies are permitted to exclude certain records from FOIA if publicly acknowledging even the existence of the records could cause harm to law enforcement or national security interests:

- Records whose release could interfere with an ongoing criminal law enforcement investigation when the subject of the investigation may be unaware it is pending;
- Records that could identify a criminal law enforcement agency's informant; and
- Records maintained by the Federal Bureau of Investigation that relate to foreign intelligence, counterintelligence, or international terrorism.<sup>42</sup>

If these records are requested, the agency may respond that there are no records responsive to the request because exclusions allow them to treat any existing records as falling outside the scope of FOIA. These exclusions do not broaden the authority of any agency to withhold documents from the public.<sup>43</sup> It is important to recognize the significant distinction between the result of an agency employing a record exclusion and the situation in which an agency expressly neither confirms nor denies the existence of records responsive to a request.

### **D. Denial and Administrative Appeal Procedures**

Whenever a FOIA request is denied, the agency must inform the requester of the reasons for the denial and notify the requester of the right to appeal the denial to the head of the agency. Reasons to request an appeal include:

- A denial of a request for a document;
- A denial of a request for a fee waiver;
- To contest the type or amount of fees charged;
- Any other type of adverse records-release determination, which may include an agency's refusal to release records because it claims the request inadequately described the documents sought or an agency's claim that it could not locate requested records;

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<sup>42</sup> 5 U.S.C. § 552(c)(1).

<sup>43</sup> 5 U.S.C. § 552(d).

- An adverse determination because the agency failed to conduct an adequate search for the documents that were requested;
- A desire to receive the part of a request that was denied in a partially granted and partially denied request;
- To challenge the adequacy of the agency’s search for records.<sup>44</sup>

The appeal to the head of the agency is known as an administrative appeal. A lawyer can be helpful but is not necessary to file an appeal. Appeals to the head of the agency can result in the disclosure of some records that had previously been withheld. There is no charge for filing an administrative appeal.

Agencies may publish specific procedures for the filing and handling of administrative appeals in their FOIA regulations. An appeal generally is filed by mailing, emailing, or faxing a letter following the instructions provided in the agency’s final determination letter. Some agencies provide the ability to submit an appeal online. The requester should identify the FOIA request that is being appealed by referencing the assigned tracking number for the request and the name and contact information of the requester.<sup>45</sup>

In their appeal letter, a requester should include arguments as to why they disagree with the agency’s initial determination. A requester may include any facts or arguments supporting the case for reversing the initial decision. An appeal, however, does not have to contain any arguments at all. FOIA presumes access, and agencies must justify why records should not be released. It is sufficient to state that the agency’s initial decision is being appealed. The Appendix includes a sample appeal letter.

FOIA requires an agency to allow at least 90 days for a requester to file an administrative appeal of a FOIA denial.

FOIA requires an agency to decide an appeal within 20 days (excluding Saturdays, Sundays, and legal holidays) from receipt. It is possible, in certain cases, for an agency to extend the time limit by an additional ten days. Once the time period has elapsed, a requester may consider the appeal as denied and may choose to proceed with a challenge in federal district court. Requesters should consider both the need to access the requested records and the costs associated with litigation in federal district court.<sup>46</sup>

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<sup>44</sup> Office of Information Policy, Department of Justice, *OIP Guidance: Adjudicating Administrative Appeals Under the FOIA* (Feb. 14, 2019) (online at [www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20Under%20the%20FOIA](http://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20Under%20the%20FOIA)). If an agency has agreed to disclose some but not all requested documents, filing an appeal does not affect the release of the documents for the part of the request that was granted.

<sup>45</sup> *Id.*

<sup>46</sup> Courts expect requesters to “exhaust administrative remedies” by filing an administrative appeal prior to bringing a case in federal district court. While an agency’s failure to comply with statutory time limits may be treated as an “exhaustion of administrative remedies,” the courts have not been sympathetic to requesters who have

### III. ROLE OF THE OFFICE OF GOVERNMENT INFORMATION SERVICES (OGIS)

In the OPEN Government Act of 2007, Congress created OGIS within the National Archives and Records Administration. The office serves as the federal government's FOIA ombudsman and is required by statute to:

- Provide mediation services to resolve disputes between FOIA requesters and federal agencies;
- Review the policies and procedures of administrative agencies under FOIA;
- Review agency compliance with FOIA;
- Identify procedures and methods for improving compliance under FOIA; and
- Recommend policy changes to Congress and the President to improve the administration of FOIA.<sup>47</sup>

OGIS provides a variety of online resources to requesters and can serve to facilitate communication between a requester and an agency in certain cases. Prior to filing a FOIA request, a requester may choose to access OGIS's "Requester Best Practices" web page, which provides tips on how to prepare a FOIA request and work with agency FOIA professionals to receive the records sought.<sup>48</sup> If a requester has not received the records sought and believes that the agency does not understand the request or is not responding to the request appropriately, the requester may contact OGIS for assistance at any point during the FOIA process. A requester does not need an attorney to seek assistance from OGIS and assistance from OGIS is provided free of charge. OGIS provides these services to federal agencies as well.

Requesters or agencies seeking OGIS assistance on a pending or processed FOIA request should provide the office with the following information when possible:

- A name and contact information;
- A description of the issue or the assistance sought;

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not submitted an administrative appeal, have submitted an appeal immediately after the agency's statutory time limit expired, or have filed an appeal late. Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Litigation Considerations*, at p. 34 (Sept. 25, 2019) (online at [www.justice.gov/oip/page/file/1205066/download#page=34](http://www.justice.gov/oip/page/file/1205066/download#page=34)).

<sup>47</sup> 5 U.S.C. § 552(h)(2)-(4).

<sup>48</sup> Office of Government Information Services, *Requester Best Practices: Filing a FOIA Request* (online at [www.archives.gov/ogis/resources/filing-a-foia-request](http://www.archives.gov/ogis/resources/filing-a-foia-request)) (accessed Mar. 10, 2023).

- The name of the department or agency involved;
- Copies of any letters or other materials exchanged with that agency, including the tracking number of the FOIA request or appeal; and
- A completed privacy consent statement.<sup>49</sup>

OGIS may facilitate communication between a FOIA requester and an agency or schedule more structured, non-binding mediation services—but only in those cases where both the agency and the requester agree to such services. Requesting OGIS assistance does not impact a requester’s right to challenge a FOIA determination in court.

#### IV. FILING A FOIA LAWSUIT

A requester has the right to file an action in federal district court when an agency fails to respond to an initial request or an appeal within the statutory time period or denies a request or an administrative appeal. A requester can file a FOIA lawsuit in the federal district court for the district where the requester lives. The requester can also file suit in the district where the documents are located or in the District of Columbia. When a requester goes to court, the burden of justifying the withholding of documents is on the government. This burden is a distinct advantage for the requester.<sup>50</sup>

Requesters are sometimes successful when they go to court, but the results vary considerably.<sup>51</sup> Some requesters who file FOIA lawsuits find that an agency will disclose some documents previously withheld rather than litigate its decision in court.

Some requesters seek the assistance of an attorney to file a FOIA lawsuit, but legal counsel is not required when filing in federal district court. A requester who is represented by counsel and who substantially prevails in court may be awarded reasonable attorney’s fees and litigation costs reasonably incurred.<sup>52</sup> Under FOIA, if an agency changes its position during the course of litigation, such as deciding to release the records being sought by the requester, the requester may be eligible for reimbursement of reasonable attorney’s fees and litigation costs.<sup>53</sup>

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<sup>49</sup> Office of Government Information Services, *Request OGIS Assistance* (online at [www.archives.gov/ogis/mediation-program/request-assistance](http://www.archives.gov/ogis/mediation-program/request-assistance)) (accessed Mar. 13, 2023).

<sup>50</sup> Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Litigation Considerations*, at p. 60 (Sept. 25, 2019) (online at [www.justice.gov/oip/page/file/1205066/download#page=60](http://www.justice.gov/oip/page/file/1205066/download#page=60)).

<sup>51</sup> A listing of Freedom of Information Act court decisions is available from the Department of Justice’s Office of Information Policy (online at [www.justice.gov/oip/court-decisions-overview](http://www.justice.gov/oip/court-decisions-overview)).

<sup>52</sup> Department of Justice, *Department of Justice Guide to the Freedom of Information Act: Attorney Fees* (Oct. 14, 2022) (online at [www.justice.gov/oip/page/file/1207216/download](http://www.justice.gov/oip/page/file/1207216/download)).

<sup>53</sup> *Id.* at p. 7.

## V. CONCLUSION

The FOIA statute commits federal departments and agencies to uphold the principles of open government and accountability. The Biden-Harris Administration has demonstrated its commitment to advancing these goals through the Attorney General's directive to federal departments and agencies to continue efforts to remove barriers to requesting and accessing government records.<sup>54</sup> By promoting transparency, FOIA ensures a more effective and efficient government of the people, by the people, and for the people.

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<sup>54</sup> Department of Justice, *Freedom of Information Act Guidelines* (Mar. 15, 2022) (online at [www.justice.gov/ag/page/file/1483516/download](http://www.justice.gov/ag/page/file/1483516/download)).

## APPENDIX

### Sample Request and Appeal Letter

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#### A. FREEDOM OF INFORMATION ACT REQUEST LETTER

[Agency Head (or Freedom of Information Act Officer)]  
[Name of Agency]  
[Address of Agency]  
[City, State] [Zip Code]

Re: Freedom of Information Act Request

Dear [Agency Head (or Freedom of Information Act Officer)]:

This letter is a request under the Freedom of Information Act.

I request that a copy of the following documents [or documents containing the following information] be provided to me: [identify the documents or information as specifically as possible].

To help determine my status for purposes of assessing the applicability of any fees, you should know that I am [insert a suitable description of the requester and the purpose of the request].

**[Sample requester descriptions]:**

- A representative of the **news media** affiliated with [newspaper, magazine, television station, blog, etc.], and this request is made as part of news gathering and not for a commercial use.
- Affiliated with an **educational or noncommercial scientific institution**, and this request is made for a scholarly or scientific purpose and not for a commercial use.
- **An individual** seeking information for personal use and not for a commercial use.
- Affiliated with a **private corporation** and am seeking information for use in the company's business.

[Optional] I am willing to pay fees for this request up to a maximum of \$\_\_. If you estimate that the fees will exceed this limit, please inform me first.

[Optional] I request a waiver of all fees for this request. Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest. [Include specific details, including how the requested information will be disseminated for public benefit.]

[Optional] I request that the information I seek be provided in electronic format.

[Optional] I ask that my request receive expedited processing because \_\_\_\_\_. [Include specific details concerning your “compelling need,” such as being someone “primarily engaged in disseminating information” and specifics concerning your “urgency to inform the public concerning actual or alleged federal government activity.”]

[Optional] I also am including an e-mail address and telephone number so that I can be contacted to discuss any aspect of my request.

Thank you for your consideration of this request.

Sincerely,

[Name]  
[Address]  
[City, State] [Zip Code]  
[Telephone number]  
[E-mail address]

## B. FREEDOM OF INFORMATION ACT APPEAL LETTER

[Agency Head (or Freedom of Information Act Appeal Officer)]  
[Name of Agency]  
[Address of Agency]  
[City, State] [Zip Code]

Re: Freedom of Information Act Appeal

Dear [Agency Head (or Freedom of Information Act Appeal Officer)]:

This letter is an appeal under the Freedom of Information Act.

On [date], I requested documents under the Freedom of Information Act. My request was assigned the following tracking number: \_\_\_\_\_. On [date], I received a response to my request in a [letter/e-mail] from [name of official]. I am appealing the denial of my request.

[Optional] I [enclose/attach] a copy of that response.

[Optional] The documents that were withheld must be disclosed under FOIA because [provide details you would want an agency head or appeal officer to consider when deciding your appeal].

[Optional] I appeal the decision to deny my request for a waiver of fees. I believe that I am entitled to a waiver of fees. Disclosure of the documents I requested is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest. [Provide details.]

[Optional] I appeal the decision to require me to pay review costs for this request. I am not seeking the documents for a commercial use. [Provide details.]

[Optional] I appeal the decision to require me to pay [search and/or review] charges for this request. I am a representative of the news media seeking information as part of news gathering and not for commercial use.

[Optional] I appeal the decision to require me to pay [search and/or review] charges for this request. I am a representative of an educational institution seeking information for a scholarly purpose.

[Optional] I appeal the decision to require me to accept the information I seek in a paper or hardcopy format. I requested this information, which the agency maintains in an electronic format, in an electronic format.

[Optional] I appeal the adequacy of the agency's search for records.

[Optional] I appeal the agency's no records response or its "neither confirm nor deny" response.

[Optional] I also am including an e-mail address and telephone number so that I can be contacted to discuss any aspect of my appeal.

Thank you for your consideration of this appeal.

Sincerely,

[Name]  
[Address]  
[City, State] [Zip Code]  
[Telephone number]  
[E-mail address]