

Freedom of Information Act Procedural Requirements



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Topics Covered

- FOIA Requesters, Agency Records Subject to the FOIA, and Perfected FOIA Requests
- Receiving and Acknowledging Requests and Communication with Requesters
- FOIA Time Limits and Expedited Processing
- Searching, Processing, and Responding to FOIA Requests
- Briefly: Fees, Consults, Referrals and Coordination, Appeals, and Judicial Review



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Who are FOIA Requesters?

- Generally, “any person” – regardless of citizenship status can make a request
- “Any person” includes individuals, corporations, associations, state and local governments, etc.



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Who are FOIA Requesters?

Exceptions to the “any person” standard

- Fugitives from justice, if the requested records concern the requester’s fugitive status
- Foreign governments requesting records from intelligence agencies



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FOIA requesters generally do not have to justify or explain their reasons for making requests – *the “why” behind the request.*



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Agency Records Subject to the FOIA

Two-part test:

1. Created or obtained by agency
AND
2. Under agency control when agency receives request



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Agency Records Subject to the FOIA

- Burka “Control” Factors
 - Intent of document’s creator,
 - Agency’s ability to use document,
 - Extent to which agency personnel have read/relied on document, and
 - Degree to which document has been integrated into agency files
- Totality of the Circumstances



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Agency Records Subject to the FOIA

- Types of records generally not considered “Agency Records”
 - Congressional Records
 - Personal Records, including personal e-mails and texts



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Perfected FOIA Requests

- Request must be submitted in writing
- Request must reasonably describe requested records
- Request must comply with agency's regulations for making requests



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Perfected FOIA Requests

- If too broad or lacks specificity, seek clarification
- If asking a question, not a FOIA request
- Agency not required to create records

OIP Guidance: *Good Communication with FOIA Requesters 1.0 & 2.0*



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Perfected FOIA Requests

These are two distinct, often conflated concepts that impact whether a request is reasonably described and whether a search can be conducted:

- Vague Words and Descriptions
- Unreasonably Burdensome Search

While these concepts should be distinctly understood, both are a form of a 'not reasonably described' request and should be closed as such.



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Knowledge Check

Which of these FOIA requests is perfected?

- a) Request for “all policy and procedures documents, past and present.”
- b) Request for “any and all records...mentioning” Nelson Mandela.



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Receiving and Acknowledging Requests

- Agency receipt of a perfected request starts the response time clock.
- If the request will take longer than ten days to process, the agency must assign an individual tracking number to the request.



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Tolling

Tolling = Stopping the Clock

- The number of times that an agency can toll the response time is limited.
- Tolling can only occur if the request is perfected and the time clock has already started.



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Tolling

An agency can toll:

- One time to have requester provide additional non-fee related information
- As many times as necessary to resolve any fee-related issues

OIP Guidance: New Limitations on Tolling the FOIA's Response Time (November 18, 2008)



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Communication with Requesters

- Department of Justice FOIA Guidelines stress that agencies should:
 - “Work with requesters in a spirit of cooperation”
 - Ensure prompt communication with requesters
 - Work actively to remove barriers to access and to help them understand the FOIA process and the nature of your records



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Communication with Requesters

- Requester Service Center (RSC) will discuss:
 - Publicly Available Information
 - Types of Records Maintained by the Agency and Request Formulation
 - Track Placement and Processing Times
 - Fees
 - Status Updates/Estimated Dates of Completion



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Communication with Requesters

- FOIA Public Liaison (PL) (Supervisory Official) identified by agency to:
 - Reduce Delays
 - Increase transparency and understanding of request status
 - Resolve Disputes
 - Assisting in Narrowing Requests When “Unusual Circumstances” Exist



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Communication with Requesters

- Agencies are required to provide status updates, including the date of receipt and an estimated date of completion, when asked.
- Maintain updated contact info for RSC and PL
- Agencies are encouraged to proactively communicate with requesters.

OIP Guidance: *Assigning Tracking Numbers and Providing Status Information for Requests (Updated Guidance) (July 8, 2014)*



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Knowledge Check

A frequent requester has submitted over 100 FOIA requests to your component. Requester has asked for the status of all 100 requests. Are you required to provide estimated dates of completion for all of them?



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Routing Misdirected Requests

- Agencies have ten (10) days to “route/forward” misdirected requests to the proper component office(s) within the agency.
- Inform requester of routing (request was routed to the proper component)



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Routing Misdirected Requests

- If the misdirected request is not received by the proper agency component office(s) within 10 days, the 20-day statutory time clock still begins on day 10.

OIP Guidance: New Requirement to Route Misdirected FOIA Requests (11/18/08)



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Knowledge Check

Must an agency route the FOIA request in the following scenarios (yes or no)?

Request was sent to an office not designated to receive FOIA requests.

Request was sent to the wrong FOIA office within the same agency.

Request was sent to the wrong federal agency.



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Time Limits for Responses

- An agency has twenty (20) working days to respond to a perfected FOIA request.
- In “unusual circumstances,” an agency may extend time limit by ten (10) working days by giving timely written notice to requester.



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Time Limits for Responses

Unusual Circumstances apply if agency needs to do one or more of the following:

- Search separate offices
- Examine voluminous records
- Consult with another agency or two or more agency components

OIP Guidance: New Notification Requirement for Notices Extending FOIA's Time Limits Due to Unusual Circumstances (July 18, 2016)



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Knowledge Check

Which of the unusual circumstances should the agency invoke for this request?

Communications regarding proposals to drill and/or explore for oil in all or part of the coastal plain of the Arctic National Wildlife Refuge from January 1, 2001 through the present.

The agency determined that this request covered an extremely broad range of documents and that were located in multiple offices:

- a) Search separate office
- b) Examine voluminous records
- c) Two or more components
- d) All of the above



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Time Limits for Responses

If time is extended beyond ten working days, agency must also do the following in writing:

- Provide opportunity to narrow scope,
- Make its FOIA Public Liaison available, and
- Notify of right to seek dispute resolution services from the Office of Government Information Services (OGIS)

OIP Guidance: Implementation Checklist and Sample Language for OIP Guidance on Notices Extending the FOIA's Time Limits Due to Unusual Circumstances (July 18, 2016)



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FOIA Fees

- Types of fees an agency can charge depend on the requester's fee category.
- Categories are determined by looking at the requester, not a designated representative.
- Fees can also be waived if statutory criteria are met by requester.



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FOIA Fees

	<i>Search</i>	<i>Review</i>	<i>Duplication</i>
Commercial Use	✓	✓	✓
Institutions/Media			✓*
All Others	✓**		✓*

* First 100 pages of duplication (or equivalent) free of charge per request.

** The first two hours of search free of charge per request.



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Limitations on Assessing Fees

- When an agency fails to comply with any time limit for responding to a request, there are limitations on its ability to assess certain fees unless one of three exceptions defined in the statute are met.

OIP Guidance: Prohibition on Assessing Certain Fees When the FOIA's Time Limits Are Not Met (October 19, 2016)



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Expedited Processing

Requesters may seek expedited (faster) processing of their request by the agency.

Agency regulations must provide for expedited processing when requesters can show a “compelling need.”



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Expedited Processing

Compelling Need

- Imminent threat to the life or physical safety of an individual; or
- Urgency to inform the public concerning actual/alleged Federal Government activity, if requester is “primarily engaged in disseminating information.”



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Expedited Processing

In addition to the “compelling need” standard, agencies may add other standards for granting expedited processing, as outlined in agency FOIA regulations.



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Expedited Processing

- Agencies have ten (10) calendar days to decide whether to grant or deny expedited processing.
- Agencies must process requests that have been granted expedition “as soon as practicable.”



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Expedited Processing

Standard of Review

- Agencies must explain to the requester in writing the rationale for their decision on expedited processing.

OIP Guidance: Ensuring Timely Determinations on Requests for Expedited Processing (December 23, 2014)



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Knowledge Check

Non-profit organization dedicated to using the legal system to improve the lives and promote the interests of animals requests records concerning medical inspection of tiger named Tony. Requester asks for expedited processing arguing that failure to grant EP request could reasonably be expected to pose an imminent threat to Tony's life and physical safety.

Does this request meet the compelling need standard for EP?



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Multi-Track Processing

- Determine request track based on amount of work to be done or time needed (or both)
- Efficient processing ☒ process requests in each track on first-in, first-out basis
- Good communication throughout is key

OIP Guidance: The Importance of Good Communications with FOIA Requesters 2.0: Improving Both the Means and Content of Requester Communications (November 22, 2013)



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Search

- Identify potential locations for responsive records
- Issue search instructions
- Document record search (terms used, custodians and systems searched)
- Cut-off date for search



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Adequacy of Search

- Agency must conduct a reasonable search, one “reasonably calculated to uncover all relevant documents.”
- Agency must make reasonable efforts to search for records in multiple formats, including electronic formats.



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Reviewing the Documents

Exemptions and Segregation

- Identify exempt information and mark exemption beside each withholding
- Obligation to segregate and apply foreseeable harm standard

OIP Guidance: Segregating and Marking Documents for Release in Accordance with the OPEN Government Act (10/23/08)



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Knowledge Check

An agency declined to conduct a line-by-line review of records for segregability and foreseeable harm analysis because the agency determined that the review would take a long time and, after redacting certain material, the records would not contain information which was useful to the requester.

Is this permissible?



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Referral, Consultation, Coordination

Referral

- If document(s) originates with another agency/office, send document(s) to originating agency or component for direct response to the requester.
- Inform the requester



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Referral, Consultation, Coordination

Consultation

- If document(s) originates with your agency/office, but contains equity of another agency/office, seek opinion of agency/office before responding.



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Referral, Consultation, Coordination

Coordination

- If document(s) contain sensitive law enforcement or national security information of another agency/office, discuss privacy and national security harms before referring or responding.

OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest In Them (December 5, 2011)



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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

- All response letters granting the request in full must include:
 - Estimated page count of responsive records released, and
 - Right of requester to seek assistance from agency FOIA Public Liaison



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Responding to the Requester

- Any adverse determination must include:
- Reason(s) for denial(s),
- Right to agency administrative appeal (within no fewer than 90 days), and
- Right to seek dispute resolution services from FOIA Public Liaison or OGIS
- Estimated page count of responsive records released and withheld, if applicable, and
- Any exemptions asserted and confirmation that the foreseeable harm standard was applied



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Administrative Appeals

- The determination on appeal must notify the requester of the right to seek judicial review.
- Appeal determination letters should also advise requesters of mediation services offered by OGIS.

OIP Guidance: Adjudicating Administrative Appeals Under the FOIA
(February 14, 2019) 14, 2019)



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Judicial Review

The FOIA provides requesters with the right to challenge an agency's response in federal court.

Agencies have the burden of proof and must demonstrate to the court that no record has been improperly withheld.



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Department of Justice's FOIA Guidelines

- “Work with requesters in a spirit of cooperation”
- Work actively to remove barriers to access and to help them understand the FOIA process and the nature of your records
- Ensure prompt communication with requesters
- When making disclosure determinations, confirm that you have applied the foreseeable harm standard



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Links to OIP Guidance

- Assigning Tracking Numbers and Providing Status Information for Requests: <http://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-assigning-tracking-numbers-and-providing-status-information> (original from 2008)
- <http://www.justice.gov/oip/oip-guidance-1> (updated in 2014)
- Routing: <http://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-new-requirement-route-misdirected-foia-requests>



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Links to OIP Guidance

- Tolling: <http://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-new-limitations-tolling-foias-response-time>
- Limitations on Assessing Fees: <http://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-new-limitations-assessing-fees>
- Timely Determinations on Requests of Expedited Processing: <http://www.justice.gov/oip/oip-guidance-5>



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Links to OIP Guidance

- Good Communication with FOIA Requesters:
<http://www.justice.gov/oip/blog/foia-post-2010-oip-guidance-importance-good-communication-foia-requesters> (original)
- <http://www.justice.gov/oip/blog/foia-guidance-0> (updated)
- Segregating and Marking Documents: <http://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-segregating-and-marking-documents-release-accordance-open>



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Links to OIP Guidance

- Guidance on the New Requirements for FOIA Response Letters, etc. (updated by OIP after the FOIA Improvement Act of 2016):
https://www.justice.gov/oip/oip-guidance/new_requirements_for_FOIA_response_letters_from_FOIA_improvement_act_of_2016
- Prohibition Assessing Certain Fees When the FOIA's Time Limits Are Not Met: https://www.justice.gov/oip/oip-guidance/prohibition_on_assessing_certain_fees_when_foia_time_limits_not_met



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Links to OIP Guidance

- OIP Guidance: Adjudicating Administrative Appeals Under the FOIA <https://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20under%20the%20FOIA>
- Department of Justice's FOIA Guidelines <https://www.justice.gov/ag/page/file/1483516/download>



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Questions?



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