



UNITED STATES DEPARTMENT *of* JUSTICE

Freedom of Information Act Procedural Requirements



Topics Covered

- FOIA requesters, agency records, and perfected FOIA requests
- Receiving and Acknowledging Requests
- FOIA Time Limits and Expedited Processing
- Searching, Processing, and Responding to FOIA requests
- Briefly: Fees, Consults, Referrals and Coordination, Appeals, and Judicial Review



Who are FOIA Requesters?

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



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.



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



Agency Records Subject to the FOIA

Two-part test:

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



Factors that Indicate Agency “Control”

- 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.



Perfected FOIA Request

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



Perfected FOIA Request

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



A requester makes a FOIA request to produce “all policy and procedures documents, past and present.” Is this a perfected FOIA request?

- ☐ **Yes**
- ☐ **No**



Receiving & Acknowledging Requests

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



Tolling

Tolling = Stopping the Clock

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



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*
(11/18/08)



Requester Service Center

- Agencies must establish either “a telephone line or internet service” to provide status information to requesters.

OIP Guidance: *The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons (June 12, 2018)*



Status Update Required Information

- Status update should include the date of receipt and an estimated date of completion.

OIP Guidance: *Assigning Tracking Numbers and Providing Status Information (Original – 11/18/08; Updated Guidance 7/8/14)*



A frequent requester has submitted over 100 FOIA requests to our component. Requester has asked for the status of all 100 requests. I've organized my response in a spreadsheet to include:

- request numbers**
- dates of receipt**
- estimated dates of completion**

Is there anything else I should add to my response?



Routing Misdirected Requests

- Agencies have ten (10) days to “route/forward” **misdirected** requests to the proper component office(s) **within the agency.**



Routing Misdirected Requests

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

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



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

- a) Request was sent to an office not designated to receive FOIA requests.**
- b) Request was sent to the wrong FOIA office within the same agency.**
- c) Request was sent to the wrong federal agency.**



Time Limits for Response

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



Time Limits for Response

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)*



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**



Time Limits for Response

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)*²³



Agency sends acknowledgment letter to Requester within 20 days stating that it is invoking unusual circumstances and will respond at a later date with a determination. What other information must the agency provide?

- a) Opportunity to limit scope of request**
- b) Availability of Dispute Resolution Services**
- c) Availability of FOIA Public Liaison**
- d) All of the above**



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.



FOIA Fees

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

* First 100 pages of duplication free of charge per request.

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



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)*



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.”



Expedited Processing

Compelling Need – two statutory standards:

- 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.”



Expedited Processing

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



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.”



Expedited Processing

Standard of Review

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



In the midst of the outbreak, the NYT seeks “agency leadership correspondence regarding mitigating the spread of the coronavirus/COVID-19.”

They request expedited processing, noting that they are writing a story on government action taken to protect the public.

Does this request meet the compelling need standard for EP?



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 (11/22/13)*



Search

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



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.



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)*



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



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.



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.



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.



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 and confirmation that the foreseeable harms standard was applied
- Right of requester to seek assistance from agency FOIA Public Liaison



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 FOIA Public Liaison or OGIS.



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 the Office of Government Information Services (OGIS).



Judicial Review

The FOIA provides requester 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.



New Attorney General 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



Links to OIP Guidance

Assigning Tracking Numbers & Providing Status Information: <http://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-assigning-tracking-numbers-and-providing-status-information> (original)

<http://www.justice.gov/oip/oip-guidance-1> (updated)

Routing: <http://www.justice.gov/oip/blog/foia-post-2008-oip-guidance-new-requirement-route-misdirected-foia-requests>



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>



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>



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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Questions?