



UNITED STATES DEPARTMENT *of* JUSTICE

Administrative Appeals



What is a FOIA administrative appeal?

A process by which an agency takes a second, fresh look at the initial determination made on a FOIA request.



Why do we have a FOIA administrative appeals process?

“The exhaustion requirement also allows the top managers of an agency to correct mistakes made at lower levels and thereby obviates unnecessary judicial review.”

Oglesby v. Dep't of the Army, 920 F. 2d 57, 61 (D.C. Cir. 1990)



Appeal Procedures in FOIA Regulations

Although not required under the FOIA, agencies should include appeal procedures in FOIA regulations to ensure that both agency personnel and requesters understand how and where to make their appeal and what to expect from the appeal process.



Are requesters required to file an administrative appeal before filing a FOIA lawsuit?

- A. Yes
- B. No
- C. It depends



Correct answer:

C. It depends, based on actual exhaustion or constructive exhaustion



Actual Exhaustion

After making a proper FOIA request and receiving a response, the requester generally must file an administrative appeal prior to filing a lawsuit in federal court.



Constructive Exhaustion

- When the agency fails to respond within the statutory time limit, the requester is generally excused from the requirement to file an administrative appeal prior to seeking relief in the court.
- Once the agency provides a response, the exhaustion requirement resumes and the requester must file an administrative appeal.
See *Oglesby v. Dep't of the Army*, 920 F. 2d 57, 61 (D.C. Cir. 1990)



Timeline for filing a FOIA administrative appeal

The FOIA Improvement Act of 2016 requires agencies to afford requesters 90 days from the date of an adverse determination to file an appeal.



What is an adverse determination?

Examples from DOJ FOIA Regulations:

- The requested record is exempt, in whole or in part;
- The request does not reasonably describe the records sought;
- The information requested is not a record subject to the FOIA;
- The requested record does not exist, cannot be located, or has been destroyed;



What is an adverse determination?

Examples from DOJ FOIA Regulations:

- The requested record is not readily reproducible in the form or format sought by the requester;
- Denials involving fees or fee waiver matters;
- Denials of requests for expedited processing.



Timeline for responding to a FOIA administrative appeal

Absent “unusual circumstances,” the FOIA provides that agencies should make a determination with respect to an appeal within 20 working-days of its receipt by the agency.



Offering the Option to Appeal Interim Responses

Agencies may consider offering the requester the opportunity to appeal each interim release, rather than waiting until all releases are made and appealing once.



Offering the Option to Appeal Interim Responses

Even if the requester does not appeal each interim response, after the final determination, the requester should have 90 days to file an appeal on any aspect of that request.



Responsibility for Appeals involving Consultations or Coordinations

The agency that received the request and provided the initial response, should review the records on appeal.

On appeal, the appeals analyst, as necessary, may consult or coordinate with any agency that has equity in the records.



When the FOIA was first enacted into law, did requesters have a right to file an administrative appeal?

A. Yes

B. No



Correct answer:

B. No



Interestingly, the original FOIA as enacted in 1966 did not contain a provision allowing for appeals. It only mentioned the right to file suit in U.S. District Court.

The 1974 FOIA amendments mentioned for the first time the right of a FOIA requester to administratively appeal an agency's FOIA determination.



Fast Forward - a few interesting statistics about appeals (FY '17):

Agency	Requests Received	Appeals Received	% of Requests Appealed
DHS	366,036	5,386	1.4%
DOJ	82,088	3,192	3.8%



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Remaining 14 Depts.	574,588	9,344	1.6%



In what specific ways does a robust appeal process improve the agency's decision-making process?



Answer:

1. It improves the overall quality of agency decision-making.



How?

1. By correcting legal mistakes
2. By encouraging greater consistency in agency determinations
3. By facilitating additional communication with requesters
 - a. Requesters often clarify or narrow their requests on appeal
 - b. Agency can explain/clarify its earlier decision



Answer:

1. It improves the overall quality of agency decision-making.
2. It improves the efficiency of agency decision-making.



How?

The “feedback” loop – discussing best practices will ensure greater consistency in future processing.



How does the appeal process help the requester?

A. From the requesters perspective, it is a much cheaper, simpler means of challenging the agency's initial decision.



How does the appeal process help the requester?

B. From the requester's perspective, an administrative appeal provides a second review of the handling of the request.



Specific tips for facilitating a robust appeal process



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- 5. Consider creating a centralized appeal office.**



Specific tips for facilitating a robust appeal process

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2. Improve timeliness in responding to appeals
3. Maintain trained, skilled professionals to handle appeals
4. Ensure independence from the initial denial authority
5. Consider creating a centralized appeal office
- 6. For fee waiver & expedited processing decisions, ensure there is a complete, clear administrative record.**



Effective Appeals Management Practices

- Triage Appeals Based on Complexity and Expedited Processing
- Triage Appeals based on Subject Matter Expertise
- Regular training of appeals analysts
- Oversight and active management of the appeals caseload



Resources

New OIP Guidance on Administrative Appeals

<https://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20under%20the%20FOIA>

Guidance for Agency FOIA Regulations

<https://www.justice.gov/oip/oip-guidance/guidance-agency-foia-regulations>

Template for Agency FOIA Regulations

<https://www.justice.gov/oip/template-agency-foia-regulations#Appeals>