



UNITED STATES DEPARTMENT *of* JUSTICE

Freedom of Information Act Procedural Requirements



Who may make a FOIA Request?

- Generally, “any person” – regardless of citizenship.
- Includes individuals, corporations, associations, state and local governments, etc.



Who may make a FOIA Request?

The Exceptions

- Fugitives from justice, if the requested records relate to the requester's fugitive status.
- Foreign governments requesting information from intelligence agencies.



Records Subject to the FOIA

Agency Records

Two-part test:

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



Factors that Indicate “Control”:

- Intent of document’s creator,
- Agency’s ability to use document,
- Extent agency personnel have read/relied on document, and
- Degree to which document has been integrated into agency files.



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



Proper FOIA Request

- Request for agency records submitted in writing.
- Request reasonably describes records requested.
- Request complies with agency's regulations for making requests.



Is there a difference between a perfected request and a properly made request?

- Yes**
- No**



Receiving & Acknowledging Requests

- Receipt of the 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.



Time Limits for Response

Tolling – Stopping the Clock

- The number of times the agency can toll (stop the clock) the response time is limited.
- Tolling can only occur if the request is properly made and the clock already started.



Time Limits for Response

Tolling – Limits

- Agencies can toll one time when waiting for Requester to provide additional information.



Time Limits for Response

Tolling – Limits

- Agencies can toll a request as many times as necessary in order to clarify any fee-related issues with a Requester.

OIP Guidance: *New Limitations on Tolling the FOIA's Response Time*
(11/18/08)



Receiving & Acknowledging Requests

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



Receiving & Acknowledging Requests

- Status information 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)*



Do you have to provide an estimated date of completion if you aren't sure how long it will take to search for responsive records?

Yes

No



Receiving & Acknowledging Requests

Routing Requirements

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



Receiving & Acknowledging Requests

Routing Requirements

- Addresses the situation where a FOIA request is inadvertently sent to a FOIA office of a component that is not itself the proper office to process the particular request.



Receiving & Acknowledging Requests

Routing Requirements

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

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



How do you determine which offices within your agency are proper offices to receive FOIA requests?

- **Contact the agency mailroom**
- **Consult agency regulations**
- **Contact the agency OCIO**



Time Limits for Response

Basic

- 20 working days to respond.
- In “unusual circumstances” agency may extend time limit by giving written notice to requester.



Does an acknowledgement letter constitute a response?

Yes

No



Time Limits for Response

If time period is extended beyond 10 working days, agency must:

1. Provide requester with the opportunity to narrow scope of request,
2. Make its FOIA Public Liaison available, and
3. Notify the requester of the right to seek dispute resolution services from OGIS.



Time Limits for Response

Unusual Circumstances

- Search in separate offices.
- Examine voluminous records.
- Consultations with another agency or two or more agency components.



When taking the additional 10 days (30 days) to respond, do you have to satisfy *all* three unusual circumstances?

Yes

No



FOIA provides for the charging of certain fees.

Fees to be assessed differ depending on the category of the requester.

- Categories are determined by looking at the *requester* and not their representative.

FOIA also provides for a waiver of fees if statutory criterion are met.



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

With the passage of the *FOIA Improvement Act of 2016*, 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 are met.



Exception to the Fee Limitation

“Exceptional circumstances”:

- If court determines that “exceptional circumstances exist,” the agency’s failure to comply with a time limit “shall be excused for the length of time provided by the court order.” (1)



Exception to the Fee Limitation

“Unusual Circumstances”:

- When “unusual circumstances” apply, and the agency has provided “timely written notice to the requester,” the delay is “excused for an additional 10 days.” (2)



Exception to the Fee Limitation

“If the agency fails to comply with the extended time limit,” it may not charge search fees (or for requesters with preferred fee status, may not charge duplication fees), unless the last exception is met.



Exception to the Fee Limitation

Agencies can still charge fees if:

- Timely written notice of unusual circumstances is provided to the requester;
- “more than 5,000 pages are necessary to respond to the request,” and
- The agency discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request. (3)



Exception to the Fee Limitation

OIP has issued new guidance to assist agencies in understanding these prohibitions on assessing certain fees and the exceptions to these limitations.

Guidance includes a decision tree to assist agencies in the analysis of determining whether exceptions apply when operating under “unusual circumstances.”



Exception to the Fee Limitation

New fee guidance from OIP is available at:

https://www.justice.gov/oip/oip-guidance/prohibition_on_assessing_certain_fees_when_foia_time_limits_not_met



Expedited Processing

Requesters may seek expedited or 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

- Imminent threat to the life or physical safety of an individual.
- Urgency to inform the public concerning actual/alleged Federal Government activity (with respect to a request made by a person primarily engaged in disseminating information).



Expedited Processing

In addition to compelling need, agencies may add other standards for granting expedited processing, which should be outlined in agency FOIA regulations.



Expedited Processing

Agencies have 10 calendar days to decide whether to grant or deny requests for expedited processing.



Expedited Processing

Agencies must process requests that have been granted expedition as soon as practicable.



Expedited Processing

Standard of Review

Explain and detail rationale for agency decision on expedited processing to requester in writing.



Initial Processing

- Multi-track processing
- Frequent communication with requester
- FOIA Requester Service Centers & FOIA Public Liaisons

OIP Guidance: *The Importance of Good Communications with FOIA Requesters 2.0: Improving Both the Means and Content of Requester Communications (11/22/13)*



Should requests that are granted expedited processing be placed in a separate track?

Yes

No



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 any electronic formats.



Search

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



Record Collection

Search records systems (classified & unclassified) including, but not limited to:

- Offices
 - Emails
 - Paper files
 - Hard drives
- Databases
- Records in storage



Do records stored at a Federal Records Center have to be searched?

○ Yes

○ No

○ It depends



Reviewing the Documents

Exemptions and Segregation

- Agencies must identify exempt information and mark the appropriate exemption beside each redaction.



Reviewing the Documents

Exemptions and Segregation

- Department of Justice FOIA Guidelines emphasize agency obligation to segregate and apply foreseeable harm standard.
- 2016 amendments to the FOIA codify the foreseeable harm standard.

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



Reviewing the Documents

Referral – Sending records to originating agency or component for direct response to the requester.

Consultation – Obtaining the opinion of another program office before responding to the requester.

Coordination – When records contain sensitive law enforcement or national security information.

OIP Guidance: *Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest In Them (12/5/2011)*



Are agencies held accountable for the number of consultations they receive, process, those that are pending, as well as for their ten oldest consultations, in their Annual FOIA Reports?

- True**
- False**



Responding to the Requester

- Agency must provide records in any form requested “if readily reproducible” in that form.
- Agencies are encouraged to make interim responses.



Responding to the Requester

- Certain information should appear in final response letters, including:
 - Estimate of responsive records being released or withheld, and
 - Exemptions asserted.



New Additional Requirements

- Right to seek assistance from agency
FOIA Public Liaison.

- If adverse determination:
 - Right to appeal within no less 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 the mediation services offered by OGIS.



Judicial Review

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

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



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)

Assigning Tracking Numbers & Providing Status Information: <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 2.0:

<http://www.justice.gov/oip/blog/foia-guidance-0>

Good Communication with FOIA Requesters 1.0:

<http://www.justice.gov/oip/blog/foia-post-2010-oip-guidance-importance-good-communication-foia-requesters>

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, Including Affording Ninety Days to File an Administrative Appeal, and New Notification Requirement for Notices Extending FOIA's Time Limits Due to Unusual Circumstances: 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?