

QUICK & DIRTY GUIDE TO THE FEDERAL FREEDOM OF INFORMATION ACT (FOIA)

I. OVERVIEW

What is it: the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, permits access to records of the federal Executive Branch unless they fall into one of nine discretionary exemptions.

Who it covers: every “agency,” “department,” “regulatory commission,” “government controlled corporation,” and “other establishment” in the executive branch of the federal government.

- Does not cover: Congress, the federal courts, private corporations, federally funded state agencies, some federal entities that don’t fit definition of “agency” (like the Smithsonian and the Corporation for Public Broadcasting), and state/local governments (but all states have their own open records laws).

What it covers: all “records” in the possession or control of a federal agency. Under the 2007 amendments, this also includes records maintained by entities outside government under a government contract. The term “records” is defined expansively to include all types of documentary information, such as papers, reports, letters, e-mail, films, computer tapes, photographs and sound recordings in any format, including electronic.

- Does not cover: physical objects that cannot be reproduced, such as water quality samples kept by the Environmental Protection Agency. Agencies are not required to create records to respond to a request.

II. FILING A REQUEST

- Requests should be directed to the agency that has the record(s) you seek; if in doubt, file with all agencies who could have the record(s). Many agencies now accept emailed FOIA requests (ex: ice-foia@dhs.gov, uscis.foia@dhs.gov).
- Agencies *should* (but almost never do) respond to your request within 20 business days (although they can extend this period by an additional 10 working days under certain circumstances).
 - Under the FOIA, a “response” is a grant or denial of the records sought – not a mere acknowledgment of receipt of the request.
 - Under the 2007 amendments to the FOIA, if an agency does not abide by the time restrictions, it cannot charge search fees to anyone (even commercial requestors), and in some circumstances, cannot charge duplication fees either.

III. WRITING A REQUEST

- A request must “reasonably describe” the records desired, which basically means it should be specific enough that a government employee familiar with the subject area can locate the records with reasonable effort, either by physically inspecting files or by searching electronic databases.
 - The more specific and narrow your request, the faster it will be processed, but the fewer records you will get.
 - FOIA officers will usually pick specific words out of your request as search terms; so if you want them to use a specific keyword as a search term, be sure to include it.
 - If you want specific locations/databases searched, be sure to say that in your request.
 - Don’t forget to include a timeframe in your request (i.e., “all records created or received from January 1, 2005 to the present”).
 - If you anticipate litigating your request, write it very broadly, but still be specific.
Example:

All records created or received from January 1, 2005 to the present related to the investigation, arrest and/or detention of approximately 24 individuals in the City of Baltimore, Maryland, in or near the 7-Eleven parking lot on or near the corner of Broadway and Lombard Streets, on or about January 23, 2007, including but not limited to any and all:

- G-123A Complaint forms;*
 - G-166C Memorandums of Investigation;*
 - Pre- and/or post-operational SPEARs;*
 - Pre- and/or post-operational A/S Notes;*
 - Pre- and/or post-operational Significant Incident Reports (“SIR”);*
 - Reports of Investigation (“ROI”);*
 - Field Operation Worksheets;*
 - Post-Investigation Reports;*
 - Agents’ notes;*
 - All other records related to the investigation, planning or execution of the arrests, or the review, evaluation and reporting of the arrests.*
- **Expedited Processing:** under certain circumstances, you can have your request expedited. If you request expedited treatment, the agency must respond to your request within 10 calendar days; if granted, your request will be moved to the front of the line. Expedited requests will sometimes be granted if you have a life-threatening need for the information; if delayed disclosure could threaten the physical safety of any individual; or if you are a

reporter or a person who is otherwise “primarily engaged in disseminating information” and your request concerns a matter of “compelling need.”

- USCIS has created a special processing track to get accelerated access to Alien Files (“A-files”) of individuals scheduled for a hearing before an Immigration Judge (IJ). To qualify for this special “Track Three” processing, you must include at least one of the following with your FOIA request (and note that you can *only* get the A-file this way):
 - Notice to Appear (Form I-862);
 - Order to Show Cause (Form I-122);
 - Notice of Referral to Immigration Judge (Form I-863); or
 - A written request of continuation of a scheduled hearing before the IJ.
- A denial of a request for expedited processing can be appealed administratively (see below) and can be litigated.

IV. FEES AND FEE WAIVERS

Fees: the FOIA permits agencies to charge reasonable fees to recover searching and duplication costs. Fees are assessed based on the status of the requestor:

1. Commercial use requesters must pay fees for document search, duplication and review;
2. Non-commercial requesters from educational or scientific institutions pay no search fees and receive 100 pages of free duplication;
3. Representatives of the news media pay no search fees and receive copies of 100 pages free;
4. All other requesters receive two hours of search time and copies of 100 pages free.

Fee waivers: a requester is entitled to a waiver or reduction of fees where “disclosure of the information 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 the commercial interest of the requester.”

- Decisions on fee waiver requests are made on a case-by-case basis, and agencies are supposed to consider the following six factors:
 1. The subject of the requested records concerns government operations/activities.
 2. Disclosure is likely to contribute to understanding of these operations/activities.
 3. Disclosure will likely result in public understanding of the subject.

4. Will significantly contribute to public understanding of gov't operations/activities.
 5. The requester has a limited commercial interest in the disclosure.
 6. The public interest in disclosure is greater than the requester's commercial interest.
- A denial of a request for a fee waiver can be appealed administratively and can be litigated.
- Under the 2007 amendments to the FOIA, if an agency does not abide by the time restrictions, it cannot charge search fees to anyone (even commercial requestors), and in some circumstances, cannot charge duplication fees either.

V. LITIGATING A FOIA REQUEST

Overview: litigating a FOIA request (or requests) is relatively straightforward and can be quite rewarding. If you litigate a request, you will certainly get more documents than if you do not. Moreover, if you “substantially prevail,” you will be awarded attorneys fees and litigations costs.

A. PROCEDURAL ISSUES

Exhaustion: before you can file suit in federal district court, you must properly exhaust. There are two types of exhaustion in FOIA cases:

- **Constructive Exhaustion**: if the agency does not “respond” to your request (which does not include a mere acknowledgment of receipt) within 20 working days (or 30 working days, if they invoked the provision of the FOIA permitting it an extra 10 days), you can go straight to court without doing anything else.
 - However, if the agency responds after the 20/30 day deadline but before you have filed suit, you have to actually exhaust.
- **Actual Exhaustion**: involves making an initial request of records, having it denied (in whole or in part), then submitting the administrative appeal (instructions for which are always included with a denial) and having the appeal denied.
 - If the agency does not respond to the administrative appeal within 20 working days, you have constructively exhausted and can file suit.

Forum: proper in the federal district court where the Plaintiff resides or has its principal place of business; the district where the agency records are located; and the District Court of the District of Columbia.

- If an organization has multiple offices and sends the request from a particular office, forum would be proper in the district where that office is.

Defendant: the agency; if documents have been “referred” to another agency, sue them both.

Service: Plaintiff must serve the U.S. Attorney in the relevant district; the U.S. Attorney General; and the agency.

Time for Answer: unlike virtually every other cause of action, in FOIA cases, the government has only 30 days to file its Answer. Unfortunately, court clerks are not always aware of this, so be sure to mention it when you submit your summonses (or else they will try to “correct” them).

B. PROSECUTING THE CASE

Overview: Generally speaking, FOIA cases are decided on a motion (usually by the Government) for summary judgment. After filing a complaint, the plaintiff will generally work out a briefing schedule with the government’s attorney. Before summary judgment, the government will usually do a “secondary search” for records responsive to the requests (which will usually turn up far more records than initially produced).

To win on summary judgment, the government must make two particular showings: first, that it carried out a “reasonable” search for responsive records; and two, that the exemptions it has claimed are proper.

Reasonable search: the search for records does not have to be perfect; instead, it must be “reasonably calculated to uncover responsive documents.” A search that does not include databases or locations that are reasonably likely to contain responsive documents is not reasonable; nor is a search that does not utilize obvious search terms or include the entire timeframe specified in the FOIA request.

- The reasonableness of the search is shown with a sworn declaration that is sufficiently specific that the court can tell whether or not the search itself was reasonable.
- The government will virtually always submit a declaration, but the first one that it submits is almost always insufficiently detailed to meet its burden. Caselaw has outlined a number of requirements for the declaration:
 1. The declarant must be the person who was personally responsible for either conducting the search or directly supervising it;
 2. The declaration must explain the search methodology used;
 3. Identify the search terms used;
 4. Describe the agency file systems searched.

- Example of insufficiently detailed description in a declaration: “The SDDO instructed the officers to search their emails.”
 - We have no idea if the officers actually did search their emails (because the declarant apparently did not directly supervise them); if they did search their emails, we have no idea what search terms they used, what time frame they searched within, what email folders they searched, whether it included deleted/sent/archived email, etc.

FOIA Exemptions: the FOIA provides 9 narrow, discretionary exemptions that fall into roughly three categories (privacy; public safety; and privileges). Each exemption has its own test, and the government must make particular showings in regards to each claimed exemption. Although judges will frequently defer to claimed exemptions, it is important to hold the government to its burdens (because although they usually can meet them, they sometimes nonetheless do not).

- In order to justify particular exemptions, the government almost always submits what’s called a *Vaughn* Index. The Index is supposed to give the judge enough information to see whether or not the exemption has been properly applied without requiring him or her to look at each individual record. If the Index is insufficiently detailed or fails to carry the government’s burden, you can request either that the judge examine the documents *in camera* or simply that the government be forced to disclose them in unredacted form.
- Caselaw has imposed three requirements on *Vaughn* indices:
 1. Index should be contained in one document, complete in itself;
 2. Index must adequately describe each withheld document or redaction;
 3. Index must state exemption and explain why it is relevant.

Exemptions:

- Personal privacy/annoyance
 - Exemption 2 (low): Internal agency rules that are of a trivial and administrative matter.
 - Exemption 4: Business information/trade secrets
 - Exemption 6: Personal privacy (balanced against public interest in disclosure)
 - Exemption 7(c): privacy of law enforcement
- Public safety
 - Exemption 1: National security information
 - Exemption 2 (high): Internal agency rules disclosure of which would risk circumvention of law or regulation.

- Exemption 7: law enforcement records
- Exemption 8: records of financial institutions
- Exemption 9: oil well data
- Privileges
 - Exemption 3: Information exempted by other statutes (examples: HIPA).
 - Exemption 5: inter- and intra-agency memorandum (deliberative process; attorney-client; and work product).

VI. FOIA REFERENCES

DOJ FOIA Reference Guide,¹ revised May 2006: www.usdoj.gov/oip/04_3.html

List of Federal Agencies' FOIA Web Sites: www.usdoj.gov/oip/other_age.htm

List of Principal FOIA Contacts at Federal Agencies: www.usdoj.gov/oip/foiacontacts.htm

Reporter's Committee for Freedom of the Press: www.rcfp.org/

- Gold-standard site on FOI law, cases, analysis, etc.
- The *Federal Open Government Guide* is particularly indispensable.
- Reading Room contains 50-state surveys on FOI and related issues, including access to police and juvenile records and electronic access to court records; taping interviews and phone conversations; etc.
- Also has great federal law resources, including guides on the First Amendment; access to the military justice system and the American Indian justice systems; and the reporter's privilege.

National Freedom of Information Coalition: www.nfoic.org

- Based at Univ. of Missouri's Journalism School; contains good information on state FOI laws, including surveys and analysis on their efficacy and compliance levels.

<http://drop.io/freedomofinformation>

- Contains links to additional reference guides; sample FOIA requests; etc.

¹ Remember that the DOJ *defends* agencies in FOIA disputes, so its Reference Guide is quite conservative.