



United States Department of Justice
Office of Information Policy

**An Overview of the
Freedom of Information Act
Procedures**

FREEDOM OF INFORMATION ACT PROCEDURAL OVERVIEW

ADDITIONAL RESOURCES

DOJ FOIA Guide, 2009 Edition

FOIA Counselor Hotline - (202) 514-3642

DOJ Website - www.justice.gov

OMB - Fees - (202) 395-6466

FOIA Post



The Freedom of Information Act

The Freedom of Information Act generally provides that *any person* has a right, enforceable in court, to obtain *access to federal agency records*, except to the extent that such records (or portions of them) are protectable from public disclosure by one of *nine exemptions* or by one of *three special law enforcement record exclusions*.

Understanding FOIA

Sources for guidance in applying the FOIA

- Statute itself
- Agency Regulations
- Judicial Opinions
- Government FOIA policies (OIP)
- President Obama's FOIA Memorandum of January 21, 2009
- Attorney General Holder's FOIA Guidelines

BASIC STRUCTURE

- **Subsection (a)** – The FOIA Disclosure Provisions
- **Subsection (b)** – The FOIA Exemptions
- **Subsection (c)** – The Law Enforcement Exclusions
- **Subsection (d)** – FOIA & Congressional Access
- **Subsection (e)** – FOIA Annual Report Req.



BASIC STRUCTURE

THREE FORMS OF ACCESS

FOIA's "Automatic Disclosure Provisions"

§ (a)(1) – publish in the Federal Register: agency organization, mission/functions, rules of procedure and general policy statements

§ (a)(2) – make available for public inspection and copying: (1) final opinions, (2) administrative staff manuals, (3) specific policy statements affecting the public, and (4) records that are the subject of frequent requests.

THREE FORMS OF ACCESS (cont...)

(a)(2) “Proactive Disclosures”



- **President’s message: “take affirmative steps to make information public” without waiting for requests and “use modern technology to inform citizens” about government activities.**
- **FOIA “hot topics” -- records which have become or are likely to become the subject of subsequent requests shall be added to the FOIA reading room.**

Third Form of Access

ACCESS REQUESTS



- § (a)(3) – an agency, upon request, which reasonably describes the records sought, shall make its records promptly available, unless exempt/excluded

Which Agencies Are Subject to the FOIA?

SUBJECT TO THE FOIA -

All agencies within the executive branch of the federal government, including the Executive Office of the President and independent regulatory agencies

NOT SUBJECT TO THE FOIA –

- State governments, municipalities, the courts, Congress, and private citizens or corporations.
- Offices within the Executive Office of the President whose functions are limited entirely to advising and assisting the President.

Who May Make a FOIA Request?

- “**Any person**” – regardless of citizenship
- Includes individuals, corporations, associations, state and local governments, foreign governments, etc.



Who May Make a FOIA Request?

The Exceptions

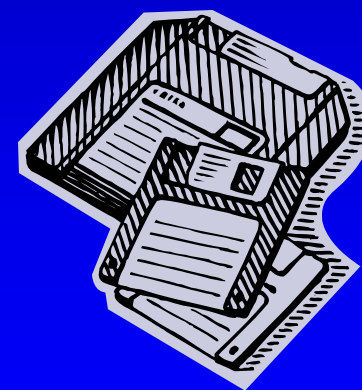
- Fugitives from Justice
- Foreign governments requesting information from intelligence agencies

Exchange of Information Outside of FOIA:

- Federal agencies
- Congress – when acting through its Committees

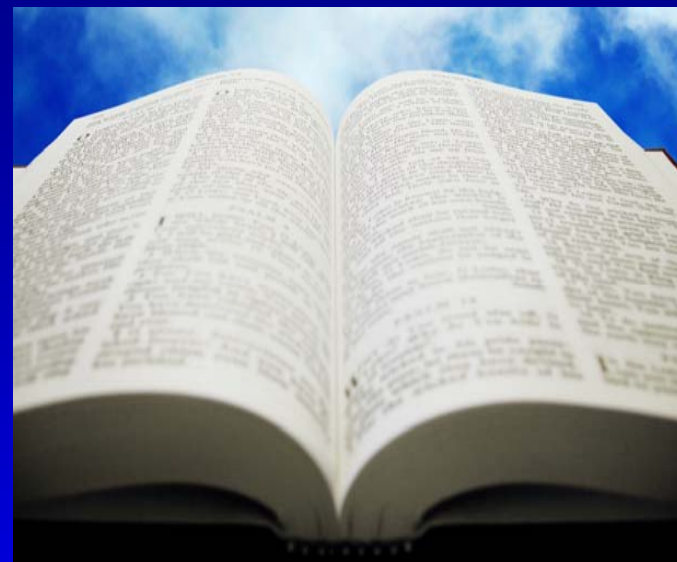
What records are subject to the FOIA?

- The rule: **Agency Records** – Those either created or obtained by an agency, and those under agency control at the time of the FOIA request.
- Very broad: Includes paper documents, tapes, photos and electronic records generally in the possession and control of an agency



What records are subject to the FOIA?

- Some Rules
 - Does not include tangible objects
 - Must provide records in any form requested if “readily reproducible”
 - Must make reasonable efforts to search for records in electronic form
 - Not personal records



What records are subject to the FOIA? Agency Records



- The factors: **R.E.A.D.**
 - **R**ecord creator's intent to control
 - **E**xtent to which personnel have read/relied
 - **A**bility of the agency to use
 - **D**egree of integration

What records are subject to the FOIA?

- Agencies are not required to answer questions posed as FOIA requests;
- Agencies are not required to create records or compile information in response to a request;
- Add explanatory materials to any records disclosed;
- Records - Not information
- Disclosure/Non-disclosure (not viewing)
- Format choice – must provide record in any form requested, if record is readily reproducible in that form

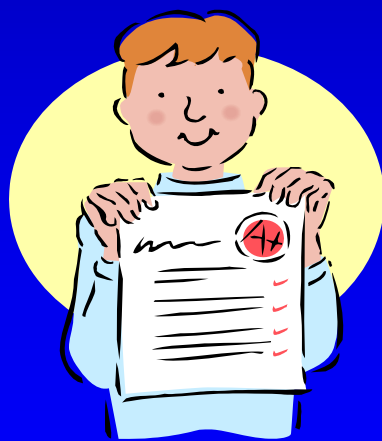
The “why” behind the request

- FOIA requesters generally do not have to justify or explain their reasons for making requests. The why is important in two circumstances:
 - Expedited Requests
 - Fee Waivers



What Responsibilities Does the Requester Have?

- Submit a request in writing for agency records
- Reasonably describe the requested records
- Follow agency regulations for making requests



Let's Get Started!



What Happens During Each Stage of Processing?

The Administrative Process

- Receive Request
- Interpret the Request
- Send Acknowledgment
- Search for Responsive Records
- Review Located Records
- Assess Fees/Fee Categories
- Redact Exempt Information
- Respond to the Request
- Advise of Administrative Appeal Process



Stage 1: Receipt & Acknowledgment

- Receipt starts the time clock
- Acknowledgment letter required - keeps the requester aware of the status
- Request must be assigned a tracking number – status should be known
- Agencies must establish either a location on your website or phone number so that requesters may inquire about the status of their request(s).



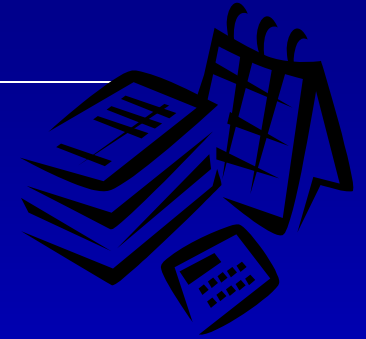
Routing Requirement

- Agencies must “route”/ “forward” misdirected requests to the proper office.
- The 20-day time period begins on the date the request is first received by the appropriate component of the agency, but in any event not later than 10 working days after the request is first received by any component of the agency that is designated in the agency’s regulations to receive requests.

Routing Requirement

- This new rule addresses the situation where a FOIA request is mistakenly addressed to a component that is designated to receive FOIA requests for the agency, but is not itself the proper component of the agency to process the request.
- The receiving/ “wrong” component has 10 working days to route the request to the proper component within the agency. On the 10th day the 20-day response time period begins . . . whether or not the proper component has received it yet.

TIME LIMITS FOR RESPONDING TO A REQUEST



- * 20 working days to respond
- * One time extension of up to 10 working days for the following unusual circumstances:
 - search for/collect records from facilities separate from the office processing the request
 - search for/collect/examine a voluminous amount of separate and distinct records
 - consult with another agency/component

Tolling

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

Tolling

- When a proper FOIA office receives a request, it determines whether or not the request is reasonably described and meets the other requirements for making a proper request. If necessary, the office then communicates with Requester to resolve any issues.
- The 20-day clock begins to run upon receipt of a proper request.
- It is only after this point that the issue of tolling/stopping would even arise.

Tolling

- Limit to number of times tolling allowed
Toll the 20-day clock in only two situations:
 - *One* time when the agency is waiting for general information it has reasonably requested from Requester.
 - Agencies are allowed to toll the 20-day clock as many times as necessary in order to clarify any issues with Requester regarding fee assessment. Fee-related issues often arise sequentially over the course of processing a request, and cannot always be resolved at one given point in time.
- In either case, tolling ends (clock re-started) when the agency receives a response from Requester.

Limits on Charging Search Fees

- Agencies are prohibited from charging certain fees if they do not meet the response time.
- The FOIA prohibits agencies from assessing search fees (or duplication fees if requester is an educational or non-commercial, scientific institution, or representative of the news media) if the agency fails to meet the 20-day response time limit, unless unusual or exceptional circumstances apply to the processing of the request.

Exceptions to the Rule

- If either “unusual” or “exceptional” circumstances apply to the processing of the request, the exceptions to the rule apply and agencies can assess fees as they have normally done.
- The pre-existing definitions of “unusual” and “exceptional” circumstances apply to this new search fee rule.

“Unusual Circumstances” exist in three situations

- When there is a need to search for and collect records from separate offices;
- When there is a need to search for, collect, and examine a voluminous amount of records; or
- When there is a need for consultations with another agency or among two or more components with the same agency.

“Exceptional Circumstances”

- The FOIA states that exceptional circumstances cannot include a “delay that results from a predictable workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.”
- In other words, exceptional circumstances exist if the agency has a backlog of pending requests and is making reasonable progress in reducing that backlog.

TIME LIMITS (cont...)



- Communication with requester
- FOIA Public Liaison
- Multi-track processing required

TIME LIMITS (cont...)

EXPEDITED PROCESSING

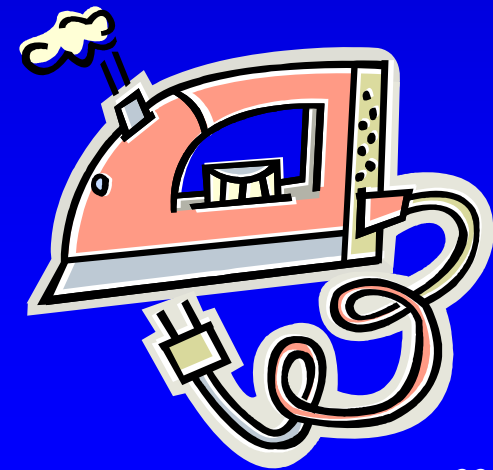
- Compelling need -- imminent threat to the life or physical safety of an individual
- Urgency to inform the public concerning actual/alleged Federal Government activity (with respect to a request from one engaged primarily in disseminating information)
- Agencies may add other grounds for granting expedited processing

Stage 2: Ironing out the details

Initial Processing Stage

– Interpretation, Search & Fees

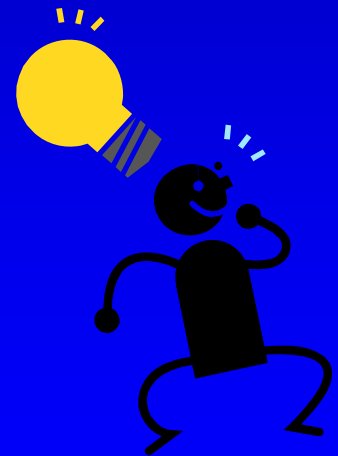
- Reasonable interpretation of unclear requests
- Identify potential locations for responsive records
- Issue search instructions
- Documentation of search
- Cut-off date for search



Stage 2: Ironing out the details

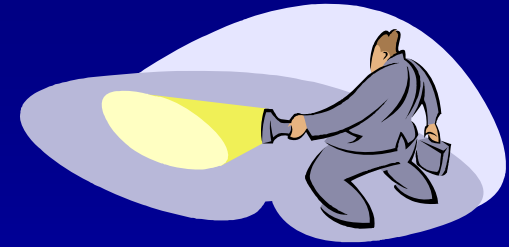
Understand the scope of the request

- Interpretation of time frame and types of documents
- Calling the requester
- Reasonable interpretation of unclear requests



Stage 3: Search

Adequacy of Agency Search



- Agency search must be **reasonably described to uncover all relevant documents**
- The fact that the agency did not locate all requested records does not cast doubt on otherwise reasonable search
- Duty to search – must make reasonable efforts to search for records in electronic form unless significant interference with the operations of agency's automated information system

Stage 4: Reviewing the Documents Applying the Exemptions

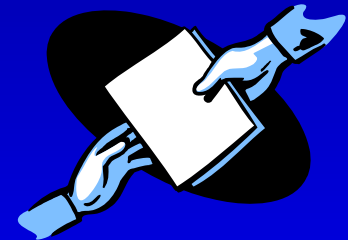
- Exemptions are discussed in detail in another lecture
- Agencies are to clearly identify the exempt information and apply the appropriate exemption beside each redaction
- Duty to reasonably segregate
 - Attorney General emphasizes agency obligation to segregate and apply foreseeable harm standard



Stage 4: Reviewing the Documents

Referrals/Consultations

Referral – When records are referred to the originating agency or agency component for FOIA review and direct response to the requester.



Consultation – When an agency obtains the opinion of another agency or agency component before responding to the requester.

FOIA FEES



- Agency may charge reasonable direct costs
- FOIA Reform Act and OMB regulations established a uniform schedule of fees

Three Types of FOIA Fees

- Search Fees
- Review Fees
- Duplication Fees



Three Types of Requesters

1. Commercial Requesters
2. Educational/Noncommercial Scientific Requesters/Representatives of the News Media
3. “All Others”

Miscellaneous Fee Issues

- Threshold Amount
- Advance Payment
- Pre-payment
- Special Services
- Aggregation
- Unsuccessful Searches

FEE WAIVERS

- Fees may be waived/reduced if:
 - Disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations/activities of the government, and
 - It is not primarily in the commercial interest of the requester

FEE WAIVERS (cont...)

- Based on releasable information
- Consider whether information already in public domain
- Ascertain whether requester can disseminate information
- Standard of Review

Stage 5: Respond to Requester

What Information Should Appear in the Final Response Letter?

- Identification of responsive records
- Volume estimate of information withheld
- Identification of exemptions asserted
- Administrative appeal rights



Stage 6: Administrative Appeal Stage

- Requesters may appeal an adverse determination to the designated agency official if for example, all or part of a request is denied, or no responsive records are located.
- The agency's administrative appeal authority will review the initial action taken on the request and can direct that further actions be taken.



Administrative Appeal Stage

- The determination on appeal must notify the requester of his right to seek judicial review.
- As a matter of good administrative practice, appeal determination letters should also advise requesters of the mediation services offered by the Office of Government Information Services.

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.