

FOIA Basics

What is the FOIA?

Enacted in 1966, The Freedom of Information Act (FOIA) is a federal law that establishes the public's right to obtain information from federal government agencies. The FOIA is codified at 5 U.S.C. Section 552. "Any person" can file a FOIA request, including U.S. citizens, foreign nationals, organizations, associations, and universities. In 1974, after the Watergate scandal, the Act was amended to force greater agency compliance. It was also amended in 1996 to allow for greater access to electronic information.

Who can I send a FOIA request to?

The FOIA applies to Executive Branch departments, agencies, and offices; federal regulatory agencies; and federal corporations. Congress, the federal courts, and parts of the Executive Office of the President that function solely to advise and assist the President, are NOT subject to the FOIA. Records obtainable under the FOIA include all "agency records" - such as print documents, photographs, videos, maps, e-mail and electronic records - that were created or obtained by a Federal agency and are, at the time the request is filed, in that agency's possession and control. Agencies are required by FOIA to maintain information about how to make a FOIA request, including a handbook, reference guide, indexes, and descriptions of information locator systems. The best place to get this information is on the agencies' websites. Doing research to determine the right office to send the FOIA request to within the right component of the right agency will make your FOIA efforts more productive.

What are the FOIA exemptions?

Exemption (b)(1) - National Security Information

Exemption (b)(2) - Internal Personnel Rules and Practices

- "High" (b)(2) - Substantial internal matters, disclosure would risk circumvention of a legal requirement

- "Low" (b)(2) - Internal matters that are essentially trivial in nature.

Exemption (b)(3) - Information exempt under other laws

Exemption (b)(4) - Confidential Business Information

Exemption (b)(5) - Inter or intra agency communication that is subject to deliberative process, litigation, and other privileges

Exemption (b)(6) - Personal Privacy

Exemption (b)(7) - Law Enforcement Records that implicate one of 6 enumerated concerns

Exemption (b)(8) - Financial Institutions

Exemption (b)(9) - Geological Information

How can I obtain agency records without using the FOIA?

Older material dated before the mid-1970s may be available at the National Archives and Records Administration in Washington, DC or College Park, MD, or at one of the Presidential libraries. These archives are great places to do research using readily available documents. If the documents you seek are not yet publicly available, a requester may also file a **Mandatory Declassification Review (MDR)** request rather than a Freedom of Information Act request. The laws are similar, but have some key differences.

Benefits to submitting an MDR request instead of a FOIA -

- Under mandatory declassification review, there is a two-appeal system. The first appeal is to the agency denying the records and, if the agency continues to deny records, there is an opportunity for a second appeal to the Interagency Security Classification Appeals Panel (ISCAP) for a decision.
- In its report to the president on its 2002 activities, ISCAP noted that it had reversed agency classification of information in 75 percent of the documents it reviewed. The President of the United States is empowered to overrule ISCAP decisions.

Benefits to submitting a FOIA request instead of an MDR -

FOIA requests are more appropriate if you have a large or imprecise request that covers many different kinds of classified and unclassified documents. Only classified documents are subject to MDR. FOIA covers both classified and unclassified material.

" FOI requesters appeal denials of their requests within the agency and then to court. For the duration of the processing of an MDR request, the requester loses the opportunity to argue in court for the release of the records.

" Also, under the mandatory declassification review, agencies are allotted a longer time to respond to requesters, do not have to abide by expedited review requirements and are not authorized to waive fees. Under the FOIA agencies have specific time requirements, as well as opportunities for expedited review and fee waivers.

Requesters should seek mandatory declassification review only if they have a very clear idea of the records they are seeking (for example, knowing a specific document by name), if they also know that the records are 10+ years old, and that the records are probably still classified. Otherwise a FOIA request is a requester's best bet.

What does it cost to make a FOIA request?

Agencies are authorized to charge certain fees associated with the processing of requests. Some categories of requesters cannot be charged these fees and in some cases fees can be reduced or waived.

FEE CATEGORIES

Under the FOIA, solely for fee purposes, an agency is required to determine the projected use of the records sought by the FOIA request and the type of requester asking for the documents. As the FOIA was intended to promote the public's access to information, news media organizations and educational institutions are excused from certain fees.

Fee categories for FOIA are:

1) Commercial - Companies that or people who seek information for a use or purpose that furthers commercial, trade, or profit interests, including for use in litigation. Commercial requesters are required to pay for search, review and duplication costs.

2) Educational Institution - Preschools, public or private elementary or secondary schools, and institutions of graduate higher education, undergraduate higher education, professional education, or vocational education that operate a program(s) of scholarly research. Educational requesters are required to pay duplication costs, but are entitled to the first 100 pages without charge.

3) Non-Commercial Scientific Institution - Non-commercially operated institutions that conduct scientific research not intended to promote any particular product or industry. Non-commercial requesters are required to pay duplication costs, but are entitled to the first 100 pages without charge.

4) Representative of the News Media - People who actively gather news for entities organized and operated to publish or broadcast news to the public. News Media requesters are required to pay for duplication, but are entitled to the first 100 pages without charge.

5) Other Requesters - Requesters who do not fit into any of the above categories. These requesters are persons who are not commercial, news media, scientific or educational requesters and are required to pay search costs for more than 2 hours and duplication costs for more than 100 pages.

To demonstrate that you belong in an educational, news media or non-commercial fee category, provide information about the intended professional scholarly or journalistic uses of the information you receive. List any relevant previous or pending publications, including books, articles, dissertations, publication contracts or letters of intent or interest, or similar information that shows your ability to disseminate the information you receive from the agency. State that the materials are not requested solely for a private, profit-making commercial purpose. You should request that, to the extent any fees are assessable, the agency notify you if those fees will exceed an amount you specify. For a court decision interpreting the fee provisions of the FOIA, see National Security Archive v. Department of Defense, 880 F.2d 1381 (D.C. Cir. 1989).

Actual search, review and duplication fees vary by agency. Search/Review fees can be anywhere \$8.00 to \$45.00 per hour and duplication fees can be from \$.10 to \$.35 per page. Agencies cannot require a requester to make an advance payment unless the agency estimates that the fee is likely to exceed \$250 or the requester previously failed to pay proper fees.

FEE WAIVERS

Under the FOIA it is possible to have all fees, including copying, waived by the agency if the material requested "is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester." If your request fits this statutory criterion, you should make your case for a fee waiver in your request letter as strongly as possible. Be sure to describe the scholarly, historical, or current public interest in the material requested, identify specific operations or activities of government to which the request relates, why the information will contribute to an understanding of those activities and operations, why the public in general would be interested, and why the disclosure would be significant.

What happens after I make a FOIA request?

Ideally, the agency will promptly release everything you requested. More common agency responses (and suggested actions you can take) include the following:

- You receive an acknowledgment of your request and a statement that the request has been placed in the queue and will be processed in its turn. Agencies are allowed to process requests on a first-come, first-served basis, and may also process requests in separate queues depending on their complexity. If the agency has a backlog of requests (and most do), you may

have to wait some time before you receive the materials you seek. Call or write the FOIA office to follow up on requests that have been pending for an unreasonable period of time. Get the names of specific FOIA personnel you can contact about your request. If agencies fail to meet the twenty-business day response time provided by the FOIA, you are entitled to file an administrative appeal or a lawsuit. Please keep in mind that if your request is complex and of a sensitive nature the agency will require a significant amount of time to search and review the responsive records. It can take years to get a response to a FOIA request.

- Your request for a fee waiver is acknowledged but more information is sought before the agency will begin processing the request. Sometimes the agency asks a series of questions, sometimes a multi-page questionnaire may be enclosed for you to fill out and return. The best way to avoid this response is to provide as much information as possible in your initial letter to support your request for a fee waiver.
- The agency says that no records were found in response to your request, or informs you that your request is too broad. Call or write the FOIA office and ask what additional information is needed from you to make your request more specific. Explain why you believe the agency has material responsive to your request and inquire about other places in the agency's files where relevant records might be found. If no records were found you may send an appeal questioning the agency's adequacy of search.
- Information relevant to your request is found, but the agency withholds all or part of it. The FOIA allows an agency only nine exemptions from its obligation to provide information in response to a request. The citation of these exemptions, found at 5 U.S.C. Section 552(b) and listed above, can be appealed.

How can I appeal an adverse response?

It is worthwhile to file an administrative appeal if the agency's response is unsatisfactory. Appeals can be effective to successfully challenge excessive processing delays, fee waiver denials, and the improper full or partial withholdings of responsive documents. Agency regulations governing appeals vary; take careful note of the instructions for filing an appeal in the agency's response to ensure that your appeal is timely. An appeal letter should state the grounds for appeal and reasons why the agency's response to the request was improper, request a more precise explanation of the agency's decision (if the reasons for the initial determination were unclear), and say that you expect a final ruling on the appeal within the 20-day statutory time limit. [See the [sample FOIA appeal](#) below.]

What else should I know?

Don't be discouraged if the agency is less than fully responsive to your request. Contact the agency's FOIA office to check on the status of your request and to see if additional information is needed to expedite processing or to clarify what you want. Keep copies of all your correspondence and notes of all phone calls. Always file an appeal letter if the initial response is inadequate. If the agency fails to respond satisfactorily, you may wish to seek the assistance of a member of Congress to contact the agency on your behalf. If all else fails, you have the right to go to court to force the agency to release the documents.

What unexpected problems might I encounter during the FOIA process?

(1) Delays, delays, delays - For a variety of reasons most agency FOIA offices suffer from a backlog of requests which can amount to an enormous delay for a FOIA requester. Keep

your request as targeted and concise as possible and do as much research as you can on where the documents requested could be located within the agency. Finding aids are great tools. If you have the agency's box number, file or document number, your request will be processed faster. Keep in contact with the FOIA office to make sure your request has not fallen through the cracks.

(2) Operational Files Exemption - A 1984 law allowed the CIA to exempt its operational files from the search and review requirements of the Freedom of Information Act. Similar operational files exemptions exist for the National Reconnaissance Office (NRO), the National Geospatial-Intelligence Agency (NGA) - formerly the National Imagery and Mapping Agency (NIMA) - and the National Security Agency (NSA). This allows these agencies or certain components of these agencies to exempt their working files from the search and review requirements of the Freedom of Information Act (FOIA).

(3) Glomar - Agencies can avoid a decision on the release of records if the fact of the existence of the records is in itself classifiable. In a FOIA case involving a request for records pertaining to the submarine retrieval ship the Glomar Explorer, an appeals court allowed the CIA to neither confirm nor deny the existence of the requested records. The "Glomar" response has been routinely invoked since if an agency wishes to withhold disclosing the existence or lack of existence of records.

(4) Dubious Secrecy - Although the FOIA has standardized language and there exist specific guidelines for redaction processes, there can be differences in decisions to withhold information, both between and within agencies. In the appeal process these discrepancies should be worked out, but some mistakes may follow through to a final decision. As a last resort you can always seek judicial review in court. See the National Security Archive's briefing book on Dubious Secrets <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB90/index.htm>