

DEPARTMENT OF THE TREASURY
DISCLOSURE SERVICES



FREEDOM OF INFORMATION ACT
HANDBOOK

The Freedom of Information Act Handbook

U.S. Department of the Treasury

**The Freedom of Information
Act Handbook**

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1. INTRODUCTION

The Freedom of Information Act (FOIA) establishes a right of public access to Treasury Department records. Upon receipt of a request for Treasury records, those records must be disclosed unless they are protected by at least one of the nine categories of exempt information contained in the FOIA. Both the FOIA and Treasury regulations contain rules and procedures that must be followed. This handbook will guide you through the process, from receiving the requester's letter to the administrative appeal stage.

Treasury's FOIA regulations are at 31 C.F.R. Part 1, Subpart A. The regulations and other information can be found on the Treasury Internet web site at www.treas.gov/foia.

Your questions may be directed to your bureau's disclosure office (on the list at the end of this chapter) or the Departmental Disclosure Office at 202/622-0930.

Policy

The Department's policy is to implement the FOIA uniformly and consistently and to provide maximum allowable disclosure of records. Anyone can request access to Department of the Treasury records, and if the requester follows the rules for making a FOIA request, the records will be disclosed unless they are appropriately protected from disclosure by one or more of nine exemptions or by one of the three law enforcement record exclusions contained in the FOIA statute.

Background

The Freedom of Information Act established a presumption that records of the Executive Branch of the United States Government are accessible to the people. This was not always the policy regarding Federal information disclosure. Before the FOIA in 1966, the burden was on the individual to establish a right to examine Government records.

With the passage of the FOIA, the burden of proof shifted from the individual to the government. Those seeking information are no longer required to show a need for information. Instead, the "need to know" standard has now been replaced by a "right to know" standard. The government now has to justify the withholding of requested records.

The FOIA sets standards for determining which records must be made available for public inspection and which records can be withheld from disclosure. The law also provides administrative and judicial remedies for those denied access to records. Above all, the statute requires federal agencies to provide the fullest possible disclosure of information to the public.

At the end of this chapter is a Memorandum for Heads of All Federal Departments and Agencies from the Attorney General regarding the Administration's commitment to the Freedom of Information Act.

Role of the Departmental Disclosure Office

The Departmental Disclosure Office, known as Disclosure Services, has both an operations function and a policy office. Disclosure Services manages the FOIA program in the Departmental Offices (DO) which is the name for Treasury headquarters. Requests for DO records are received, assessed, assigned, and tracked in Disclosure Services. Disclosure Services also establishes and communicates disclosure policy for all of Treasury through regulations, directives and handbooks. The office provides policy, procedural and technical guidance to Treasury employees; has oversight and reporting responsibilities for the Department; and provides FOIA-related training.

Responsible officials shall:

1. Determine -
 - (a) Whether to grant or deny requests for access to records;
 - (b) Whether to grant or deny requests for fee waivers; and
 - (c) A requester's category for fee purposes;
2. notify the requester of determinations(s) made pursuant to 4.d.(1);
3. Determine costs incurred by the Department to process the request and the viability of charging fees to the requester;
4. Ensure that requests are processed in accordance with the Department's disclosure regulations at 31 C.F.R. Part 1;
5. Compile and provide data for the Annual FOIA Report;
- and 6. Retrieve records retired to the Federal Records Center if they are needed in processing a request.

Appeal Authorities shall upon receipt of a FOIA administrative appeal either affirm or reverse an initial determination that:

1. denies access to a record or a portion thereof;
2. denies a request for a fee waiver
3. pertains to a requester's category;
4. advises that no responsive records are located; or
5. denies a request for expedited processing.

FOIA Contacts shall:

1. Designate a responsible official to respond to each FOIA request assigned pursuant to paragraph - 4.c.(10):
2. ensure consistency and completeness of a Departmental response when assigned;
3. coordinate pursuant to paragraph 4.c.(13);
4. determine with appropriate program officials, which records in response to FOIA requests have become or are likely to become the subject of repeated

Requests for the same records and ensure that these records are placed in the electronic reading room of the bureau's Web site and coordinate with the bureau Web masters and records management officers regarding the disposal of records removed from the electronic reading room.

THE DEPARTMENT OF THE TREASURY
BUREAU FOIA/PA OFFICES

Departmental Offices

Disclosure Services
Ph: 202/622-0930
Fax: 202/622-3895
Address: FOIA Request
Department of the Treasury
1571
Washington, DC 20220

Alcohol and Tobacco Tax and Trade Bureau

Ph: 202/927-2400
Fax: 202/927-8525
Address: Disclosure Services
Street, NW, 2nd Floor
20220

Bureau of Engraving & Printing

Ph: 202/874-2582
Fax: 202/874-5274
Address: FOIA Office, Rm. 646-PD
Streets, SW
Washington, DC 20228

Comptroller of the Currency

Ph: 202/874-4700
Fax: 202/874-5274
Address: Disclosure (FOIA) Office
Washington, DC 20219

*Financial Management Service
Tax*

Ph: 202/874-6837
Fax: 202/874-7184
Address: Disclosure Branch
SW
Washington, DC 20227

Financial Crimes Enforcement Network

Fax: 703/905-3684
Address: FOIA Request
P.O. Box 39
Vienna, VA 22183

Internal Revenue Service

Ph: 202/622-6250
Fax: 202/622-5165
Address: FOIA Request
Headquarters Disclosure Office
1111 Constitution Ave., NW, Rm.
Washington, DC 20224

United States Mint

Ph: 202/772-7322
Fax: 202/756-6153
Address: FOIA Request 1310 G
801 9th Street, NW Washington, DC
Washington, DC 20220

Bureau of the Public Debt

Ph: 304/480-7928
Fax: 304/480-7722
Address: FOIA Request 14th & C
200 Third Street, Rm. 211
Parkersburg, WV 26101

Office of Thrift Supervision

Ph: 202/906-7965
Fax: 202/906-6353
Address: FOIA Branch
1700 G Street, NW
Washington, DC 20552

Treasury Inspector General for

Administration (TIGTA)

Ph: 202/927-7044
Fax: 202/622-3339 401 14th Street,
Address: FOIA Request
1125 15th Street, NW, Suite 700
Washington, DC 20005

(FinCEN) Phone: 703/905-5034

Presidential Documents

Title 3—

Memorandum of January 21, 2009

The President

Freedom of Information Act

Memorandum for the Heads of Executive Departments and Agencies

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, “sunlight is said to be the best of disinfectants.” In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the *Federal Register*.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



Office of the Attorney General

Washington, D.C. 20530

March 19, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:  THE ATTORNEY GENERAL

SUBJECT: The Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, reflects our nation's fundamental commitment to open government. This memorandum is meant to underscore that commitment and to ensure that it is realized in practice.

A Presumption of Openness

As President Obama instructed in his January 21 FOIA Memorandum, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." This presumption has two important implications.

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. But as the President stated in his memorandum, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Pursuant to the President's directive that I issue new FOIA guidelines, I hereby rescind the Attorney General's FOIA Memorandum of October 12, 2001, which stated that the Department of Justice would defend decisions to withhold records "unless they lack a sound

legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”

Instead, the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.

FOIA Is Everyone's Responsibility

Application of the proper disclosure standard is only one part of ensuring transparency. Open government requires not just a presumption of disclosure but also an effective system for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA.

I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government. In recent reports to the Attorney General, agencies have noted that competing agency priorities and insufficient technological support have hindered their ability to implement fully the FOIA Improvement Plans that they prepared pursuant to Executive Order 13392 of December 14, 2005. To improve FOIA performance, agencies must address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests.

Improving FOIA performance requires the active participation of agency Chief FOIA Officers. Each agency is required by law to designate a senior official at the Assistant Secretary level or its equivalent who has direct responsibility for ensuring that the agency efficiently and appropriately complies with the FOIA. That official must recommend adjustments to agency practices, personnel, and funding as may be necessary.

Equally important, of course, are the FOIA professionals in the agency who directly interact with FOIA requesters and are responsible for the day-to-day implementation of the Act. I ask that you transmit this memorandum to all such personnel. Those professionals deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests. FOIA professionals should be mindful of their obligation to work “in a spirit of cooperation” with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the “new era of open Government” that the President has proclaimed.

Working Proactively and Promptly

Open government requires agencies to work proactively and respond to requests promptly. The President's memorandum instructs agencies to "use modern technology to inform citizens what is known and done by their Government." Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs. When information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency. Long delays should not be viewed as an inevitable and insurmountable consequence of high demand.

In that regard, I would like to remind you of a new requirement that went into effect on December 31, 2008, pursuant to Section 7 of the OPEN Government Act of 2007, Pub. L. No. 110-175. For all requests filed on or after that date, agencies must assign an individualized tracking number to requests that will take longer than ten days to process, and provide that tracking number to the requester. In addition, agencies must establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number, including the date on which the agency received the request and an estimated date on which the agency will complete action on the request. Further information on these requirements is available on the Department of Justice's website at www.usdoj.gov/oip/foiapost/2008foiapost30.htm.

Agency Chief FOIA Officers should review all aspects of their agencies' FOIA administration, with particular focus on the concerns highlighted in this memorandum, and report to the Department of Justice each year on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies. The Department of Justice's Office of Information Policy (OIP) will offer specific guidance on the content and timing of such reports.

I encourage agencies to take advantage of Department of Justice FOIA resources. OIP will provide training and additional guidance on implementing these guidelines. In addition, agencies should feel free to consult with OIP when making difficult FOIA decisions. With regard to specific FOIA litigation, agencies should consult with the relevant Civil Division, Tax Division, or U.S. Attorney's Office lawyer assigned to the case.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees, agents, or any other person.



January 28, 2009
TG-04

Treasury Announces New Policy To Increase Transparency in Financial Stability Program

Secretary Geithner Meets with Outside Experts to Discuss Oversight of Troubled Assets Relief Program and Efforts to Increase Transparency and Accountability

Washington, DC – Building on President Barack Obama and Secretary Tim Geithner's commitment to increase transparency and accountability in the Troubled Assets Relief Program (TARP), the U.S. Department of the Treasury today announced a new policy of posting investment contracts for future completed transactions to the Department's website within five to 10 business days.

For contracts already completed, documents will be posted on a rolling basis, beginning today with the first nine contracts completed under the Capital Purchase Program (CPP), as well as contracts for transactions closed under the Systemically Significant Failing Institutions (SSFI) program, the Targeted Investment Program (TIP) and the Automotive Industry Financing Program (AIFP). Treasury will work in the coming weeks to make public all copies of existing investment agreements.

Confidential and proprietary information will be redacted from the publicly posted documents at the request of the individual institutions.

"In the coming weeks, we will unveil a series of reforms to help stabilize the nation's financial system and get credit flowing again to families and businesses. Included in those reforms will be a commitment to increase transparency and oversight," said Secretary Geithner. "Today, we are taking a step toward increased transparency by committing to place all of our TARP investment agreements on the Internet so that taxpayers can see how their money is being spent and the terms these institutions must agree to before we invest taxpayer money."

As part of his efforts to reform the TARP, Secretary Geithner today met with individuals charged with providing outside oversight of the program to review efforts taken to date to improve transparency and accountability. Participants included Gene Dodaro, Acting Comptroller General of the Government Accountability Office; Neil Barofsky, TARP Special Inspector General; and

Congressional Oversight Panel members Elizabeth Warren, Damon Silvers, Richard Neiman, Rep. Jeb Hensarling and Sen. John Sununu.

Treasury posted the following contracts today to <http://www.treas.gov/initiatives/eesa/agreements/index.shtml>:

Capital Purchase Program

Bank of America
The Goldman Sachs Group
Morgan Stanley
Citigroup
JPMorgan Chase
Wells Fargo & Co.
Bank of New York Mellon
State Street
Merrill Lynch

Targeted Investment Program

Citigroup

Systematically Significant Failing Institutions

AIG

Automotive Industry Financing Program

GM
GMAC
Chrysler

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2. UNDERSTANDING THE REQUEST

Who can request records under the FOIA?

Any person can make a request for Treasury Department records – individuals, foreign citizens, partnerships, corporations, associations, foreign, state or local governments. Exceptions to this rule are Federal agencies, fugitives and, as a result of the Intelligence Authorization Act of 2003, foreign government or international governmental organizations or their representatives. Requesters are treated equally under the FOIA; however, in certain instances distinctions are made in order to determine fee category, fee waiver requests, and requests for expedited processing.

Before a FOIA request can be processed, it must:

1. Be made in writing and signed by the requester.
2. State that it is made pursuant to the FOIA or Treasury disclosure regulations.
3. Include information that will enable the processing office to determine the fee category of the user.
4. Be addressed to the bureau that maintains the record. In order for a request to be properly received by the Department, the request must be received in the appropriate bureau's disclosure office.
5. Reasonably describe the records.
6. Give the address where the determination letter is to be sent.
7. State whether or not the requester wishes to inspect the records or have a copy made without first inspecting them.
8. Include a firm agreement from the requester to pay fees for search, duplication or review, as appropriate. In the absence of a firm agreement to pay, the requester may submit a request for a waiver or reduction of fees, along with justification of how such a waiver request meets the criteria for a waiver or reduction of fees found in the statute at 5 U.S.C. §552(a)(4)(A)(iii). See Chapter 5 under the "Fee Waivers" section.

Reasonable description of records

What is considered a "reasonable description of records?" Generally, requests for records must describe the records in reasonably sufficient detail to enable an employee familiar with the subject to locate the records. The description should include the name,

subject matter, date or timeframe, location of the records, the Treasury unit maintaining the records, if known, along with any other information which would help an employee clearly identify the requested records.

Determining scope of request or getting it clarified

It's beneficial to you as well as the requester to accurately interpret the request. When in doubt, you are encouraged to call the requester to get clarification of the scope of the request in terms of time period or volume of records. Oftentimes, a requester will ask for all records in whatever format on a particular subject because he doesn't want to take a chance on records he truly wants being left out. A request for "all records" on a subject often results in more records than the requester wants, so it's sometimes beneficial for you and the requester to discuss the amount of responsive records and confirm that the requester does, in fact, want them all or prefers to narrow the scope of the request. This is beneficial to you in that it will reduce the time and effort to process the records, and is beneficial to the requester in that it will most likely reduce fees in addition to reducing the time it will take to produce the records.

If the scope of the request is modified as a result of your conversation with the requester, ask the requester to send the modified request in writing.

First-party requests

If the requester is asking for records about himself, he must provide a copy of his driver's license or other form of identification bearing his signature. Alternatively, a notarized statement swearing or affirming the requester's identity may be provided. A third option is for the requester to provide a signed and dated statement that he understands the penalties provided in 5 U.S.C. 552a(i)(3) for requesting access to records under false pretenses and the statement is subscribed by him as true and correct under penalty of perjury pursuant to 28 U.S.C. §1746.

Third-party requests

If an individual requests records pertaining to another person, authorization from that other (third party) person must be provided. A common example of this type of request is an attorney requesting records on behalf of a client. The client must provide authorization for Treasury Department records pertaining to him to be released to his attorney (the requester). The authorization must include verification of the third party's identity by providing a copy of his driver's license bearing his signature or a signed and dated statement that he understands the penalties provided in 5 U.S.C. 552a(i)(3) for requesting access to records under false pretenses, and the statement is subscribed by him as true and correct under penalty of perjury pursuant to 28 U.S.C. §1746.

What the FOIA does not require

The FOIA does not require agencies to answer questions or interrogatories; analyze and/or interpret documents for a requester; create records; conduct research; initiate investigations; or provide statutes, regulations, publications or other documents that are otherwise made available to the public.

The 30-day rule

If a requester does not respond within 30 days to a communication from the bureau to amend the request so that it's in conformance with regulations, the request file can be considered closed. The requester should be advised of this rule.

3. ASSIGNING THE REQUEST

First-in, first-out policy

Upon receipt of a FOIA request in the proper disclosure office, the request will be routed to the appropriate responsible official for processing. Requests are to be processed on a “first-in, first-out” basis; however, bureaus may establish more than one “track” to accommodate differences in amount of effort and/or time involved in processing requests. For example, requests that will require considerably less time and effort than others can be placed in a first-in, first-out queue that’s separate from a queue of more burdensome requests.

Expedited processing

Requests for expedited processing will be considered according to Treasury’s disclosure regulations at 31 C.F.R. 1.5(e) and your bureau’s implementing procedures. If a request for expedited processing has been granted, the responsible official should process the request as soon as practicable. Denials of expedited processing requests require a memorandum to the administrative file and a notice of denial to the requester within 10 calendar days with appeal rights!

Departmental Offices

For Departmental Offices, Disclosure Services will assign requests to the appropriate program office or Treasury bureau having custody of the requested records.

Other Treasury Bureaus

Treasury bureaus will assign requests received directly according to their respective procedures.

Misdirected requests

If Disclosure Services assigns a request to an incorrect DO program office or bureau, the receiving office will notify Disclosure Services immediately and return the request for reassignment to the correct office.

According to the OPEN Government Act, when a request is received by any component of the agency designated to receive requests there is 10 days in which to route it to the appropriate component.

4. DETERMINING THE USER CATEGORY

Upon receipt of a FOIA request, the requester's fee category must be determined so that appropriate fees can be charged. A fee category is determined based on the projected use of the records. Where there is reasonable cause to doubt the use to which a requester will put the records sought, or where the use is not clear from the request itself, you should seek additional clarification before designating the request to a specific category. The request should indicate whether the requester is a commercial-use requester, an educational institution, non-commercial scientific institution, representative of the news media, or "all other" requester subject to the fee provisions described in 31 CFR 1.7. These categories of requesters are defined as follows:

Commercial use request. This refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

Educational institution. This refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. This category does not include requesters wanting records for use in meeting individual academic research or study requirements.

Non-commercial scientific institution. This refers to an institution that is not operated on a "commercial" basis and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

Representative of the news media. This refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication though not actually employed by one. A publication contract would be the clearest proof, but you may also look to the past publication record of a requester in making this determination.

All other requesters. Requesters not fitting into any of the above categories will belong to a group called "all other" requesters.

5. FEES AND FEE WAIVERS

Fees for processing requests

FOIA and Privacy Act requests from individuals for records about themselves will be processed under the fee provisions of the Privacy Act, which authorizes fees for duplication only, excluding charges for the first 100 pages.

Fees to be charged under the FOIA will vary, depending upon the fee category applied to the request. The search, duplication, and review services for which fees are charged are defined as follows:

Search. All time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Searches may be done manually or by computer using existing programming. Reasonable efforts have to be made to search for records in electronic form or format. However, no search is required if such efforts would significantly interfere with the operation of an automated information system.

Duplication. Process of making a copy of a document in order to respond to a FOIA request. Such copies can take the form of paper copy, microfilm, audio-visual materials, or machine readable documentation [e.g., magnetic tape or disk], among others. Note: only the cost of records forwarded to the requester may be billed as duplication.

Review- the process of examining records located in response to a commercial use request:

Determine whether any portion of any record located is permitted to be withheld.

It also includes processing any records for disclosure; e.g., doing all that is necessary to excise them and otherwise prepare them for release. Please note that the costs of mandatory predisclosure notification to businesses and your evaluation of their responses for the purpose of determining applicability of exemptions can also be included in the review fees charged to the requester.

Review time does not include time spent resolving general legal or policy issues regarding the applicability of particular exemptions or reviewing on appeal exemptions that already are applied.

Fees are charged in the following instances:

1. To recover costs of copying records by photocopy at a fixed rate per page (20 cents per page for up to size 8-1/2" x 14"). Actual costs are charged for copying computer tapes, photographs, or other non-standard records.
2. Searches for other than electronic records.
Search charges are calculated by using the salary rate of the employee(s) making the search (basic pay plus 16 percent). Or, bureaus may establish an average rate for the range of grades typically involved in a search. Transportation of personnel and records necessary to the search shall be charged at actual cost. (See 31 CFR 1.7(g)(2)(i).)

3. Searches for electronic records. Actual direct cost of the search, including computer search time, runs, and the operator's salary, will be charged. The fee for computer printouts will be actual costs. (See 31 CFR 1.7(g)(2)(ii).)
4. For review of records. Commercial use requesters are charged for review of records at the salary rate (basic pay plus 16 percent) of the employee(s) making the review. Or, bureaus may establish an average rate for the range of grades typically involved in the review of records.
5. For other services. Other services and materials requested which are not covered by this part nor required by the FOIA are chargeable at actual cost. This includes, but is not limited to:
 - Certifying that records are true copies;
 - Sending records by special methods such as express mail, etc.

Different fees apply to different categories of requesters. The following chart shows the services which are provided free of charge and the services which are chargeable for the different requester categories:
etc.

CATEGORY	FREEBIES	CHARGEABLE FEES
Commercial	NONE	Search, review,
<i>Educational Institution review</i>	<i>Search, 100</i>	<i>duplication Duplication over</i>
<i>Non-commercial scientific institution</i>	<i>pages Search, review 100 pages</i>	<i>100 pages Duplication over 100 pages</i>
<i>News Media review,</i>	<i>Search, 100</i>	<i>Duplication over</i>
All Other Requesters review,	<i>pages 2 hours search, all 100</i>	<i>100 pages Search, duplication over 100</i>

Italicized indicates identical fee treatment.)

pages

Limitations on fees and special considerations:

1. Fees should not be charged if the cost of collecting the fee would exceed the amount collected. This limitation applies to all requests, even those for commercial use.
2. Inspection of documents. Fees for all services provided will be charged whenever a bureau must make copies available to the requester for inspection. No fee will be charged for monitoring a requester's inspection of records.
3. Search time may be charged even if no records are located, or if located records are denied.
4. Each bureau sets its own threshold for minimum charges.
5. Aggregating requests. When it is believed that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the bureau may aggregate these requests and charge accordingly.
6. Bureaus may request prepayment of fees, even if less than \$250, after a request has been processed and before documents are released.

Has the requester set an upper limit on what he/she is willing to pay? Requesters have the option of deciding how much they are willing to pay for requested information, but it should not be less than \$25. Unless, the requester submitted a fee waiver, if so, there is no fee imperfection.

Will advance payment be necessary? If a request for access to records is anticipated to generate fees of \$250 or more, payment of the estimated fees must be obtained prior to performing such work in the case of requesters with no history of payment.

The estimate of anticipated fees must be reliable and must be based upon a realistic and factual appraisal of costs. The basis for estimating fees is to be documented in the case history, and a breakdown of the fees (i.e., by number of hours and hourly rate for search and review time, and number of pages for duplication) is provided to the requester.

The requester should be informed:

1. Of the extent to which the estimate represents search costs, copying, or review costs.
2. That additional fees may become due if the actual search, review or number of copies exceed the estimate;
3. That a refund may be made if the actual search, review or number of copies is less than the estimate.

Search fees are not refundable if a search is performed but does not result in the location or release of records.

In cases where the requester has a history of prompt payment, the requester may be advised of the likely cost, and satisfactory assurance of full payment is obtained from the requester.

Does the requester have a history of non-payment? If a requester has previously failed to pay a fee within 30 days of the date of the billing, the requester shall be required to pay the full amount owed plus any applicable interest before a new request is processed. In addition, payment of estimated costs, regardless of the amount involved, will be requested prior to performing any services beyond the minimal effort necessary to reasonably estimate costs.

Bureaus should maintain records adequate to permit them to recognize persons having a history of nonpayment. This may involve receiving a monthly or quarterly listing from the bureau's accounting office of all "over 30 days receivables." Or, records may consist of entries on correspondence controls, case logs or other records as may be considered practical and convenient. The reasons for requesting payment prior to performing services must be documented.

Whenever interest is charged, it should be assessed from the 31st day following the day on which billing was sent. Interest will be at the rate prescribed in 31 U.S.C. 3717. In an effort to encourage payment, the provisions of the Debt Collection Act of 1982 should be applied. This includes using administrative offset pursuant to 31 CFR Part 5, disclosure to consumer reporting agencies, and the services of collection agencies. What measures are used will depend upon the amount owed and what threshold has been set for determining what amounts will be collected.

In cases involving anticipated fees that exceed \$250 or subsequent requests from nonpaying requesters, the administrative time limits prescribed in the FOIA (see Chapter 12, "Time Limits and Time Extensions") will begin only after bureaus have received the fee payments described.

Form of payment shall be made by check or money order payable to the "Treasury of the United States" (or to the bureau which processed the request).

Who sends out the bill?

Billing for Departmental Offices is done by Disclosure Services based on information provided in Part IV of the FOIA Action Form. Bureaus bill according to their own procedures.

Fee waivers

If a requester desires a waiver of fees, this must be done in writing. Fee waivers are not automatically granted. Fees may be waived or reduced if disclosure of the information is in the public interest because it is likely to contribute significantly to the public's understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

Determinations about fees charged are separate and apart from determinations about the eligibility for fee waivers. For example, a news reporter will be charged for duplication fees after the first 100 pages, but may ask that these fees be waived. Duplication fees, therefore, are the only fees to be considered.

Before considering the fee waiver request, decide which fee category the request fits into (see Chapter 4).

When a request is received for disclosure of records that would be primarily in the commercial interest of the requester, you are not required to consider a request for a waiver or reduction of fees based upon the assertion that disclosure would be in the public interest.

A requester is not eligible for a fee waiver solely because of indigence.

The decision whether to grant or deny a request for fee waiver or reduction has to be in writing to the requester. When making a determination to deny a fee waiver or reduction, the responsible official should prepare a memo to the file establishing the basis for the decision. Should the requester appeal the denial and/or file suit, it is especially important that documentation be available to support the determination made.

At the end of this chapter is the full text of a memo issued to all Federal agencies from the Department of Justice. The memo provides fee waiver guidance and gives a basis for evaluating a fee waiver request. The guidance will help you determine whether to grant or deny a request for fee waiver, or reduce fees.

Appeals of denials of requests for waiver or reduction of fees

Appeals of denials of requests for waiver or reduction of fees will be decided by the official authorized to decide appeals from denials of access to records. The requester may also appeal when there has been an adverse determination of the requester's fee category. Appeals should be addressed in writing to the official listed in the appropriate Appendix to the disclosure regulations (31 CFR Part 1) within 35 days of the denial of the initial request for waiver or reduction of fees, or an adverse determination on the requester's category. The appeal will be decided promptly. The official who processed the initial request for a fee waiver should not be involved in the appeal process other than to provide the initial decision file to the appellate official.

6. SEARCHING FOR RESPONSIVE RECORDS

Conduct an adequate search

You are required to make reasonable efforts to locate records responsive to a FOIA request, including page-by-page or line-by-line identification of material within records. All files likely to contain responsive records must be searched, including electronic records such as hard drives, disks, and databases. However, you are not required to reorganize a filing system to respond to a request nor to search every record in your office to locate responsive records.

Cut-off date

The date the search is commenced is the date considered as the cut-off date for responsive records. Records created or obtained after that date are not responsive to the request. You are not required to honor a request that asks for continuing production of records Interpret "to the present" as the date which the search commenced.

Agency vs. personal records

In determining the "personal record" status of a record, you should examine the circumstances surrounding the creation, maintenance, and use of the record. Relevant factors include the purpose for which the record was created, the degree of integration of the record into the bureau's filing system, and the extent to which the record's author or other employees used the record to conduct bureau business.

Providing records in the format requested

You must provide the records in the format requested (i.e., paper, diskette, CD-ROM, etc.) if they are reproducible in that format. Agencies are to make reasonable efforts to maintain records in forms or formats that are reproducible for purposes of the FOIA.

Computer search for electronic records

Electronic records are subject to the FOIA. Information and data stored on your hard drive and on disks is subject to a FOIA request. So, also, are e-mail messages.

A search may involve retrieving data from a database using existing programming. You are not required to write a new program in order to respond to a request. However, a test of reasonableness should be applied. If extracting the requested information requires a modification of existing programming, and the effort spent in making the modification is minimal, you should do what you need to do to retrieve the responsive records. On the other hand, if retrieval of the information requested would cause a great deal of reprogramming or new programming, you are not required to do this.

Retrieve records from the Washington National Records Center

Records that have been retired to the Washington National Records Center must be retrieved if they are the subject of a FOIA request. Treasury records that have been accepted by the National Archives and Records Administration (NARA) for storage are generally considered the property of NARA.

When no responsive records are found

If no records are found after an adequate search, then the requester is advised of the right to appeal. Appeal rights are provided because a no-records response is considered an adverse determination (see *Oglesby v. Department of the Army* [920 F.2d 57 D.C. Cir 1990]). Even if no responsive records are found, a requester may be charged applicable search fees, depending upon the user category. Please see page 40 for an example of language on drafting appeal rights.

Consider “Glomar” application

To neither confirm nor deny the existence of records is called a “Glomar” response.

This response can be used only when the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information. It’s most commonly used to protect the existence or non-existence of Exemption 1 and Exemption 7(C) material. (See Chapter 7 regarding exemptions.) However, only through consistent application of the “Glomar” response, regardless of whether responsive records do actually exist, can the privacy of individuals who are in fact mentioned in law enforcement records be protected. For further information regarding using a “Glomar” response, see the Department of Justice FOIA UPDATE, Vol. VII, No. 1, Winter 1986. (Articles from FOIA UPDATE are available at the Department of Justice web site at www.usdoj.gov/oip/foi-upd.htm.)

Multiple-track processing

Offices may maintain different processing tracks (though not required) based upon the amount of work or time (or both) involved in processing requests. Requests for voluminous records may be in one processing track, for example, and simple requests (few records, similar request just processed) may be in a fast track. You also may provide a requester with an opportunity to limit the scope of the request in order to qualify for processing under a fast track.

7. APPLYING THE FOIA EXEMPTIONS

Treasury’s policy is to provide maximum allowable disclosure of agency records upon request by any individual.

The FOIA requires that virtually every record in the possession of a Federal agency be made available to the public, unless the record or any portion of it is exempt from disclosure. The nine exemptions of FOIA ordinarily provide the only basis for withholding information. Records that meet the exemption criteria may be withheld from public disclosure, and need not be published in the Federal Register, be made available in the reading room, or be provided in response to a FOIA request.

The Department of Justice¹ recognizes the continued agency practice of considering whether to make “discretionary disclosures” of information that is exempt under the Act, while at the same time emphasizing that agencies should do so only upon “full and deliberate consideration” of all interests involved. It reminds agencies “to carefully consider the protection of all [applicable] values and interests when making disclosure determinations under the FOIA.” For further discussion of discretionary disclosures, see www.usdoj.gov/oip/discretionary.htm.

The “reasonably segregable” requirement

If a record contains both disclosable and protected information, any disclosable portion of that record that is “reasonably segregable” (releasable) from the rest of the record must be released to the requester. Courts look closely at an agency’s decision process regarding what portions, if any, of a record are released. However, if disclosable material is so intertwined with exempt material that disclosure would leave only essentially meaningless words and phrases, or if editing out the protected portions would be so extensive as to effectively result in the creation of a new record, the entire record can be withheld.

Here’s a “quick list” of FOIA exempt categories, followed by a more detailed explanation of how each exemption can be used:

- (1) Material properly classified for national security purposes pursuant to Executive Order.
- (2) Limited kinds of purely internal matters.
- (3) Matters exempt from disclosure by other statutes.
- (4) Trade secrets or commercial or financial information obtained from a person and privileged or confidential.

¹ The Department of Justice is responsible for coordinating and implementing policy development and compliance government-wide for the Freedom of Information Act.

- (5) Internal agency communications that represent the pre-decisional process; attorney work product; or attorney-client records.
- (6) Information that would be a clearly unwarranted invasion of personal privacy.
- (7) Law enforcement records to the extent that one of six specific harms would result from disclosure.
- (8) Bank examiner records.
- (9) Oil well and similar information.

The following types of records may be withheld from disclosure in whole or in part unless otherwise prescribed by law: (For additional information about using exemptions, see www.usdoj.gov/oip/foi-act.htm.)

Exemption (b)(1) protects matters “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” This exemption applies to those records properly and currently classified in the interest of national security or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations. The executive order currently in effect is Executive Order 12958, as amended, and the provisions of that executive order must be applied in making determinations on classifications and declassifications of records.

An agency’s classification judgment is generally upheld in the courts. However, when the same information has been leaked to the press or otherwise made available to members of the public, it has been held that information is not considered in the public domain unless it has been the subject of an official disclosure [See *Simmons v. Dept. of Justice*, Civil No. H-84-1381 (D. Md. Aug. 21, 1985), *aff’d*, 796 F. 2d 709 (4th Cir 1986)].

Classified information will not be released under the FOIA even to a requester of “unquestioned loyalty.” In a case decided in 1990, a Government employee with a current Top Secret security clearance was denied access to classified records pertaining to himself because exemption 1 protects information from disclosure based on the nature of the material, not on the nature of the requester.

The requirement of the Act to release information that is reasonably segregable (releasable) applies in cases involving classified information as well as cases involving non-classified information.

For example, just because a document is classified doesn’t qualify it for automatic withholding. A non-classified portion must be disclosed unless it is otherwise exempt from disclosure.

In camera affidavits have sometimes been submitted in the courts when disclosure in a public affidavit would in itself confirm or deny the existence of the records, thereby posing a threat to national security. To neither confirm nor deny the existence of records in a response has come to be known as a “Glomar” denial [See *Phillippi vs. CIA*, Civil No. 75-1265 (D.D.C. Dec. 1, 1975), rev’d, 546 F. 2nd 1009 (D.C. Cir. 1976) on remand (D.D.C. June 9, 1980), aff’d, 655 F. 2d 1325 (D.C. Cir. 1981)]. The “Glomar” denial has also been incorporated in E.O. 12958.

Exemption (b)(2) of the FOIA exempts from mandatory disclosure records “related solely to the internal personnel rules and practices of an agency.” This exemption has been interpreted to encompass two distinct categories of information:

1. Internal matters of a trivial nature (“low 2”), and
2. More substantial matters that would hinder the effective performance of a significant Function of the Department or allow circumvention of a statute or agency regulation (“high 2”).

For a long time, confusion existed concerning the intended coverage of exemption 2. The D.C. Circuit Court in 1983 came up with the following test for exemption 2 coverage: First, the material withheld should fall within the terms of the statutory language as a personnel rule or internal practice of the agency. Then, if the material relates to trivial administrative matters of **no genuine public interest**, exemption would be automatic under the statute. If withholding frustrates legitimate public interest, however, the material should be released unless the government can show that disclosure would risk circumvention of lawful agency regulation.

As a result of *Schwanner v. Department of the Air Force*, 898 F.2d 793 (D.C. Cir. 1990), agencies may no longer, as a practical matter, apply exemption (b)(2) at the administrative level to withhold lists of Government employees and their office addresses.

Examples of “high 2” relate to those operating rules, guidelines, and manuals for Department personnel involved in investigations, inspections, auditing, or examining areas that remain privileged in order for the bureau to fulfill a legal requirement.

Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, advancement, or promotion, are also examples of “high 2.” “Crediting plans,” records used to evaluate the credentials of Federal job applicants may also be withheld under exemption (b) (2). Disclosure of the plans would compromise the selection process since future unscrupulous applicants would have an unfair competitive advantage. Also considered “high 2” are vulnerability assessments like the computer security plans that Federal agencies are required to prepare.

Law enforcement materials protected under exemption (b)(2) may also be protected under Exemption (b)(7)(E).

Exemption (b)(3) of the FOIA exempts records concerning matters that are “specifically exempted from disclosure by statute [other than FOIA], provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.” Examples of these statutes are: Disclosure of tax returns and tax return information, 26 U.S.C. 6103; and Federal Rules of Criminal Procedure, Rule 6(e).

A Federal statute falls within the exemption’s coverage if it satisfies either one of the requirements. Generally, exemption (b)(3) is triggered by the actual words in the statute. Therefore, Federal Rules of procedure, Executive Orders, or regulations are not considered (b)(3) statutes.

However, when a Federal rule of procedure is modified and thereby specifically enacted into law by Congress, it may qualify under the exemption. This applies to Rule 32 of the Federal Rules of Criminal Procedure which relates to the disclosure of presentence reports and to Rule 6(e) of the Federal Rules of Criminal Procedure relating to Grand Jury information.

Some statutes meet both parts of exemption (b)(3) subparts, such as 8 U.S.C. 1202(f) which pertains to the issuance or refusal of visas and permits to enter the U.S., while others fail to meet either part, such as 18 U.S.C. 1905, the Trade Secrets Act, and 17 U.S.C. 101-810, concerning copyrights.

The Supreme Court has held that Section 6103 of the Internal Revenue Code satisfies subpart (B) of exemption 3. Courts of appeals have further reasoned that 6103 is a subpart (A) statute to the extent that a person is not entitled to access tax returns or return information of other taxpayers. Pursuant to 6103(b)(2), individuals are not entitled to obtain tax return information even regarding themselves if it is determined that release would impair enforcement by the IRS. Section 6103 applies only to tax return information obtained by Treasury, and not to such information maintained by other agencies which was obtained by means other than through the provisions of the Internal Revenue Code.

While the issue of whether a treaty can qualify as a statute under exemption (b)(3) has not yet been ruled on in any FOIA case, there is a sound policy basis for concluding that a treaty can be protected under (b)(3).

The National Defense Authorization Act for FY 97, 41 U.S.C. 253(b), provides blanket protection for proposals of unsuccessful bidders that are submitted in response to a solicitation for a competitive proposal. The proposal is also protected from disclosure if it is not set forth or incorporated by reference in the final contract.

The Privacy Act of 1974, 5 U.S.C. 552a, is not a (b) (3) statute. The Privacy Act was amended to specifically address this issue (Public Law 98-477, effective 10/15/84).

Exemption (b)(4) of the FOIA protects “trade secrets and commercial or financial information obtained from a person that is privileged or confidential.”

This exemption is intended to protect the interests of both Government and submitters of information. It encourages submitters to voluntarily furnish useful commercial or financial information to the Government, and it provides the Government with an assurance that such information will be reliable. It also safeguards submitters of business information from the competitive disadvantages that could result from disclosure.

The exemption covers two broad categories:

- (1) Trade secrets; and
- (2) Information which is commercial or financial, and obtained from a person, and privileged or confidential.

The overwhelming bulk of exemption (b)(4) cases focuses on whether the withheld information falls within the second category (commercial or financial, obtained from a person, and privileged or confidential).

“Obtained from a person” refers to a wide range of entities, including corporations, state governments, and foreign governments, but does not apply to information obtained from the Federal Government. (Federal Government information that needs to be protected can possibly be withheld under exemption (b) (5).)

Examples of records protected by exemption (b) (4) are:

Commercial or financial information received in connection with loans, bids, contracts or proposals, as well as trade secrets, inventions, discoveries, sales statistics, research data, technical designs, customer and supplier lists, profit and loss data, overhead and operating costs, and information regarding financial condition. Personal financial information is also included.

Commercial or financial matter is “confidential” if it meets any one of a three-part test:

1. Impairs the Government’s ability to obtain necessary information in the future; or
2. Causes substantial harm to the competitive position of the person from whom the information was obtained. Actual competition need not be demonstrated. Only evidence of competition and the likelihood of substantial competitive injury is all that needs to be shown; or
3. Whether disclosure of the information will harm an “identifiable” private or governmental interest which the Congress sought to protect by enacting exemption (b) (4).

The “intrinsic commercial value” of business-related records or information obtained by the Government may be protected under exemption (b)(4) of FOIA.

Formulae, designs, drawings, research data or other such information can be significant, not as records in general, but as items of valuable property. Written work can be sold like any other commodity in the marketplace, bringing to its private owner the economic benefit of his/her proprietary interest. Given the nature of the information, some businesses, rather than keeping the information secret, prefer to sell or license the information to others for large sums of money.

Exemption (b)(4) is designed to preserve private proprietary interests by ensuring that, through the FOIA process, the normal operations of the marketplace are not disrupted. The exemption is intended to protect information that would not customarily be released to the public by the person from whom it was obtained. The person that owns marketable records does not customarily release them to the public without receiving payment of their market value. The release of such information under FOIA would diminish the value of marketable records, since it is often cheaper to pay the cost associated with a FOIA request than the cost of obtaining the information through the market place.

If the Department can show that the loss of market value of “intrinsically valuable” information is likely to be substantial in nature, the material should be withheld under (b)(4). However, if the Department can determine that no substantial market value loss is threatened, there is no justification for nondisclosure.

The “mosaic” approach is the concept of protecting information the disclosure of which would not in and of itself cause harm, but which would be harmful when combined with information already available to the requester.

Numerous types of competitive injury have been identified by the courts as properly causing harm by disclosure, such as disclosure of: Assets, profits, losses, market shares; data describing a company’s workforce which would reveal labor costs, profit margins, competitive vulnerability; a company’s selling prices, purchase activity and freight charges; technical and commercial data, names of consultants and subcontractors, performance, cost and equipment information; currently unannounced and future products, proprietary technical information, pricing strategy and subcontractor information.

Mundane information about submitter’s operations, general description of a manufacturing process with no details, or disclosures that would cause “customer or employee disgruntlement” have been determined not to qualify as causing substantial harm.

Exemption (b)(5) encompasses “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” This includes internal advice, recommendations, and subjective evaluations, as opposed to factual matters contained in records that pertain to the decision-making process of an agency, whether within or among agencies (as “agency” is defined in 5 U.S.C. 552(e)) or within the Department.

The three primary privileges incorporated in exemption (b)(5) are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.

Three purposes constitute the basis for the **deliberative process privilege**: (1) to encourage open, frank discussions between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. Examples include:

1. The nonfactual portions of staff papers, including after-action reports and situation reports that contain staff evaluations, advice, opinions, or suggestions;
2. Advice, suggestions, or evaluations prepared on behalf of the Department by individual consultants or boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations;
3. The nonfactual portions of evaluations by a bureau or by personnel of contractors;
4. Information of a speculative nature, tentative, or evaluative nature, or such matters as proposed plans to purchase, lease, or otherwise acquire and dispose of facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate Government functions;
5. Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interests.

If any intra- or inter-agency record or reasonably segregable [releasable] portion of a record would be made available routinely through the "discovery process" in the course of litigation with the agency, then it should not be withheld from the general public even though discovery had not been sought in actual litigation. "Discovery" is the process by which litigants obtain information from each other that is relevant to the issues in a trial or hearing. The record or document need not be made available under this section if the information hypothetically would only be made available through the discovery process by special order of the court based on the particular needs of the litigant, and balanced against the interests of the agency in maintaining its confidentiality.

Intra- or inter-agency memoranda or letters that are factual, or reasonably segregable portions that are factual, are routinely made available through "discovery" and shall be made available to a requester, unless the factual material is:

1. Otherwise exempt from release; or
2. Inextricably intertwined with the exempt information; or
3. So fragmented as to be uninformative.

A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

Also incorporated into exemption (b)(5) is the **attorney work-product privilege**, which protects documents and other memoranda prepared by an attorney in contemplation of litigation. Its purpose is to protect the adversary trial process by insulating the attorney's preparation from scrutiny. Litigation need never have actually commenced, so long as specific claims have been identified which make litigation probable. Rule 26(b)(3) of the Federal Rules of Civil Procedure allows the privilege to be used to protect documents prepared "by or for another party or by or for that other party's representative." The work-product privilege has been held to persist where the information has been shared with a party holding a common interest with the agency, even where it has become the basis for a final agency decision.

Attorney client privilege concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. vs. Department of Air Force*, 566 F. 2d at 242 (D.C.Cir. 1977). It is not limited to litigation and includes protection for facts provided by the client as well as the attorney's opinions.

Exemption (b)(5) also applies to trade secret or confidential research, development or commercial information generated by the Government itself in the process leading up to the awarding of a contract. It expires once the contract is awarded or after an offer has been withdrawn. Early release of this information could put the government at a competitive disadvantage in the contract process. Other examples of this type of material would include: realty appraisal for property to be sold by the Government; background documents used to calculate its bid in a contracting out procedure; inter-agency cost estimates used in evaluating construction proposals; reports prepared by expert witnesses.

If a prior release of information ordinarily protectable under exemption (b)(5) has been made by an agency such as disclosure to the subject of the record, under a protective order in an administrative proceeding, or in the course of criminal discovery, the agency's authority to later withhold the document is not diminished.

Exemption (b)(6) exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Examples of files containing personal information similar to that contained in personnel and medical files are:

1. Those compiled to evaluate or determine the suitability of candidates for employment and the eligibility of individuals for security clearances, or for access to particularly sensitive classified information;
2. Files containing reports, records, and other materials pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

The information must be identifiable to a specific individual and not merely pertain to an individual.

In determining whether the release of information would result in a “clearly unwarranted invasion of personal privacy,” consideration should be given to the Supreme Court’s decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 199 S.Ct. 1468 (1989). (See the Department of Justice’s FOIA UPDATE, Spring 1989.)

Corporate and business information can’t be protected under exemption (b)(6), unless the information pertains to a small business where the individual and his/her business is identical. Then, depending on the information, exemption (b)(6) may be applicable.

Generally, privacy rights do not extend to a deceased person. But sensitive or graphic personal details about the circumstances of a person’s death may be withheld to protect the privacy interests of surviving family members.

Public figures do not lose all rights of privacy, but they are diminished. Disclosure of sensitive personal information has been found to be appropriate only where exceptional interests mitigate in favor of disclosure. Examples: Federal employees found guilty of accepting bribes, misuse of government vehicles, and misconduct of government employees.

The Supreme Court has limited the concept of public interest under the FOIA to the “core purpose” for which Congress enacted the FOIA: To shed light on an agency’s performance of its statutory duties. Information that does not directly reveal the operations or activities of the Federal government falls outside the ambit of the public interest that the FOIA was enacted to serve. This public interest standard must be weighed against the threat to privacy. Put another way, it must be determined which is the greater result of disclosure: the harm to personal privacy or the benefit to the public.

Intimate details about an individual’s life are usually protected, such as marital status, legitimacy of children, medical condition, welfare payments, family fights, and reputation.

Generally, civilian Federal employees' names, present and past position titles, grades, salaries, and duty stations, as well as position descriptions are releasable. Military personnel are given greater privacy protection overseas because of threats of terrorism. Even favorable information, such as details of an employee's outstanding performance evaluation, can be protected on the basis that it may embarrass an individual or cause jealousy among co-workers. Also, release of such information reveals by omission the identities of those who did not receive high ratings, creating an invasion of their privacy.

When the request is from a third party concerning another individual and the records are of a particularly sensitive nature (such as information from the Employee Assistance Program files), it may be necessary to use the "Glomar" response; you would neither confirm nor deny the existence or nonexistence of records because to do so would in itself be an invasion of privacy. To be successful, the Glomar response would have to be used for all requests about individuals, whether or not information pertaining to them existed. Appeal rights are provided to the requester when the Glomar response is used.

In some instances, deletion of identifying information may not provide enough privacy protection when the requester may already know some information about the principals involved. This may happen when there is a small group of co-workers, or when information that has been previously publicized combined with other facts and circumstances could identify individuals. In these instances, the material would not be disclosed.

Exemption (b)(7) of the FOIA exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

- A. could reasonably be expected to interfere with enforcement proceedings;
- B. would deprive a person of a right to a fair trial or an impartial adjudication;
- C. could reasonably be expected to constitute an unwarranted invasion of personal privacy;
- D. could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;
- E. would disclose techniques and procedures for law enforcement investigations or prosecutions,
or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
- F. could reasonably be expected to endanger the life or physical safety of any individual."

An item of information originally compiled by an agency for a law enforcement purpose does not lose exemption (7) protection merely because it is maintained in or recompiled into a non-law enforcement record. Conversely, any information may qualify for exemption (7) protection if it is later used for a valid law enforcement purpose. Therefore, what is contained in the record and the reason information is compiled will determine whether exemption (7) applies, rather than the overall character of the record in which the information appears.

Exemption (b)(7)(A) protects records or information compiled for law enforcement purposes, but only to the extent that release of such records or information could reasonably be expected to interfere with enforcement proceedings. (Note: This protection applies only to a specific law enforcement proceeding which could be harmed by disclosure.)

Not only does the law enforcement proceeding have to be pending or anticipated, but release of the information could be expected to cause some specific harm. Exemption (7)(A) can be invoked when release could hinder an agency's ability to control or shape investigations; would enable targets of investigations to avoid detection or suppress or fabricate evidence; or would prematurely reveal evidence or strategy in the Government's case.

“Interference with enforcement proceedings” does not have to be shown on a document-by-document basis. “Generic” categories of records can be used in withholding of law enforcement records as long as you can explain how the release of each category could interfere with enforcement proceedings. But, you still need to review each document to determine in which category, if any, it belongs.

Exemption (7)(A) protection is not usually granted when the person being investigated already has the information in question.

Related to exemption (7)(A) is a separate provision in the FOIA called the “(c)(1) exclusion.”

See Chapter 10 for information about exclusions.

Exemption (b)(7)(B) is aimed at preventing prejudicial pre-trial publicity that could impair a court proceeding and is rarely used, mainly because the use of exemption (7)(A) protects the interests of the defendants to the prosecution as well.

Exemption (b)(7)(C) provides protection for personal information in law enforcement records similar to exemption (6). However, there is a lower burden of proof required to justify withholding, and the protection has been strengthened by a change in the risk of harm standard from “would” to “could” reasonably be expected to constitute an unwarranted invasion of personal privacy.

The omission of the word “clearly” in (7)(C) recognizes that law enforcement records are by nature more invasive of privacy than “personnel and medical files and similar files.” When the balancing test is applied (privacy interest vs. public interest), considerably more weight is given to the privacy interest in a law enforcement record since the mere mention of a person's name in the context of a law enforcement investigation carries a negative connotation.

The identities of law enforcement personnel are generally withheld under (7)(C), since identification of such personnel could subject them to harassment and annoyance in carrying out their duties.

Names of witnesses, their home and business addresses and telephone numbers can be protected under (7)(C).

Most agencies with criminal law enforcement responsibilities respond to FOIA requests for records about other individuals by refusing to confirm or deny the existence of such records (“Glomar”) to protect the privacy of those being investigated or mentioned in investigatory files.

Exemption (b)(7)(D) provides protection for information compiled for law enforcement purposes which could reasonably be expected to disclose the identity of a confidential source, and, in the case of a record or information compiled by a criminal law enforcement agency conducting a lawful national security intelligence investigation, exemption (7)(D) protects information furnished by a confidential source. A confidential source can be a state, local or foreign agency or authority or any private institution which furnished information on a confidential basis. Note that the first clause of this exemption focuses on the identity of the confidential source, and not on the information provided. However, this exemption protects both the identity of the informer and information which might reasonably be found to lead to disclosure of such identity.

“Source” includes a wide variety of individuals and institutions, such as crime victims, citizens providing unsolicited allegations of misconduct, citizens responding to inquiries from law enforcement agencies, employees providing information about their employers, prisoners, mental healthcare facilities, medical personnel, commercial or financial institutions, state and local law enforcement agencies, and foreign law enforcement agencies. However, neither Federal law enforcement agencies nor Federal employees when acting in their official capacities should receive “confidential source” protection.

Not all information received from sources in the course of criminal investigations is automatically entitled to confidentiality. Source confidentiality must be determined on a case-by-case basis. “Confidentiality” means that the information was provided in confidence or in trust, with the assurance that it would not be disclosed to others.

Informants’ identities are protected whenever they have provided information under either an express promise of confidentiality or under circumstances from which such an assurance could be reasonably inferred. When using the exemption for “implied confidentiality,” two factors must be applied: The nature of the crime and the source’s relation to it.

Exemption (7)(D)’s protection for sources and the information they have provided is in no way diminished when the case is closed. Additionally, unlike (7)(C), the safeguards of (7)(D) remain undiminished by the death of the source.

See also Chapter 10 for information about the (c)(2) exclusion.

Exemption (b)(7)(E) protects law enforcement information which would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. It protects techniques or procedures that may not already be well known. In some cases, however, law enforcement techniques that are commonly known can be protected when combined with other aspects of the investigation. In some cases it is possible to mention the technique without disclosing the details, such as references to audit criteria, IRS's discriminant function scores which have been used to select returns for audit, computer programs used to detect anti-dumping law violations, and methods and techniques used to relocate protected witnesses. In these situations, the general nature of the technique is released, while protecting the details.

Law enforcement manuals meet the requirements for withholding under (7)(E) to the extent that they consist of or reflect law enforcement techniques and procedures that are confidential.

Any "law enforcement guideline" is also protected in exemption (7)(E), as long as it "could reasonably be expected to risk circumvention of the law."

Note that since exemption (7)(E) protects only a governmental interest, it is well suited for discretionary disclosure when disclosure can be made without "foreseeable harm."

Exemption (b)(7)(F) permits the withholding of law enforcement information that, if disclosed, could reasonably be expected to endanger the life or physical safety of any individual. This exemption is broader than exemption (7)(C) because there's no balancing for withholding required. This should be applied by law enforcement agencies when there is any reasonable likelihood that disclosure could cause any physical harm to anyone.

Exemption (7)(F) protects names and identifying information of Federal employees and third persons who may be unknown to the requester in connection with particular law enforcement matters. This withholding may be necessary to protect such persons from possible harm by a requester who has threatened them in the past. The protection remains applicable even after a law enforcement officer has retired.

Exemption (b)(8) relates to those records contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of any agency responsible for regulation or supervision of financial institutions.

The purpose of exemption (b)(8) is to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability. For this reason, bank examination reports prepared by Federal bank examiners have been withheld in their entirety. In addition, material that relates to these reports, examination findings, any follow-ups, etc., have also been determined exempt from release. In *Gregory v. FDIC*, 631 F.2d 896 (D.C. Cir. 1980), the court decided that exemption (b)(8) provided "absolute protection" for examination-related documents.

State bank examination reports are also exempt from disclosure under Exemption (b)(8). Records pertaining to insolvent banks are also protected.

An entire examination report is protectable and need not be segregated to provide portions unrelated to the financial state of the institution.

Exemption (b)(9) relates to records containing geological and geophysical information and data concerning wells (including maps). This exemption applies only to “well information of a technical or scientific nature.”

Additional guidance

For additional guidance on the appropriate application of FOIA exemptions, refer to the Freedom of Information Act Guide and Privacy Act Overview, and the Freedom of Information Case List. Both publications are prepared by the Department of Justice’s Office of Information and Privacy and can be accessed at http://www.usdoj.gov/04foia/04_7.html. Also, questions relating to the disclosure of specific records may be discussed with your legal counsel.

8. REVIEWING THE RECORDS FOR DISCLOSURE

Redacting the records

The word “redact” is often used in the FOIA business to refer to removing information from a document because the information cannot be disclosed. Here are some tips about how to go about the process of redacting information.

Before you analyze records for disclosure determinations, make yourself a work copy. Do not use originals. Also, do not re-key documents to exclude information. You may want to do a two-step review. First, read through the records (copies of originals), and perhaps bracket with pencil or red pen the information you think is non-releasable, and determine which exemption(s) apply. Reviewers and the signing official will need to see the marked-up version to be able to consider the intended deletions. Then, make a copy of the marked-up version and delete the non-releasable information. If automated redaction software is not available to you, be sure to manually obliterate the information to be deleted either by cutting out (with a razor tool), blacking out (with heavy magic marker) or using white tape. It’s critical to ensure that information needing to be protected from disclosure is, in fact, removed from the document. A notation is made of the exemption relied on at the redacted portion of the record. This allows the requester to correlate the FOIA exemptions with the words or lines that have been deleted. Then make a copy of the records.

The copy is sent to the requester.

A note about posting electronically redacted records: When posting electronic records to your bureau website, do not post the records directly. First, print a copy then scan the records, then post them. If you don’t go through the “print then scan” process, it’s possible that the redacted portions will be able to be restored by a web site user.

Reasonably segregable portions

Although portions of some records may be denied, the remaining portions must be released to the requester when the meaning is not distorted by deletion of the denied portions and when it can be reasonably assumed that a skillful and knowledgeable person could not reconstruct the excised information.

When non-exempt material is so inextricably intertwined with exempt information that disclosure of it would leave only essentially meaningless words, the entire record can be withheld.

Indicate amount deleted

The amount of information deleted on released material must be indicated on the released record and, if technically feasible, at the place where the deletion is made. This requirement is usually met through use of administrative markings on redacted records. For complex electronic records, the FOIA gives special deference to an agency’s determination as to technical

feasibility. In other words, use electronic markings to show the locations of electronic record deletions equivalent to the markings that show deletions on paper records -- to the extent that it is electronically practicable to do so.

Indicate amount withheld in full

When an entire record is withheld, you have to tell the requester approximately how much has been denied. Just use common sense in advising requesters how much information is being denied. The estimate will usually take the form of number of pages, or for large-volume requests, the estimate can be in terms of boxes, file drawers, or even linear feet. For withheld electronic records, you could use kilobytes, megabytes, an electronic "word count" or a conventional record equivalent (standard document pages), whichever would be most effective in communicating the volume withheld.

9. CONSIDER BUSINESS SUBMITTER RIGHTS

Executive Order 12,600 lays out procedures for notifying those who submit business information to the federal government when that information becomes the subject of a FOIA request. The Executive Order is based upon the principle that business submitters are entitled to such notification and an opportunity to object to disclosure before an agency makes a disclosure determination.

The text of the Executive Order can be found at the end of this chapter, as well as a one-page summary of the procedural requirements. The Department of the Treasury has implemented the Executive Order in its regulations at 31 C.F.R. 1.6 ("Business Information") Sample letters 1, 2, and 3 are also provided for use in drafting the required notifications. Upon receipt of a FOIA request that seeks business information provided to the Treasury, the official to whom the FOIA request has been assigned must promptly notify the business submitter, in writing, of the receipt of a FOIA request whenever:

1. the records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or
2. the agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm (Refer to Sample Letter # 1.).

The submitter notice letter must:

Inform the submitter that he/she has 10 working days within which to provide a detailed statement of any objections to disclosure. The submitter should further be advised to clearly identify the information for which an exemption (or exemptions) is asserted; give the particular grounds supporting such an exemption; and if Exemption 4 is asserted, describe how disclosure would likely cause substantial competitive harm or, for voluntarily submitted information, explain how it customarily treats that information). Additionally, the notice must either describe the business information requested, or enclose copies of the records containing the business information requested, or enclose copies of the records containing the business information. You may also include a copy of the FOIA request, so long as any personal information is redacted, e.g., requester's home address and telephone number. The above referenced submitter notice requirements do not apply if Treasury determines that the information should not be disclosed, the information lawfully has been published or otherwise made available to the public, or disclosure of the information is required by law.

At the same time that submitter notice is provided to the business submitter, you should notify the FOIA requester in writing of the following (refer to Sample Letter #2):

1. That notice has been granted to the business submitter; and
2. That additional time may be required to process the request.
3. Invite the requester to a voluntary extension of time, if necessary, and
4. Advise the requester that he/she may seek judicial review, if the response deadline has passed.

If Treasury decides that the disclosure of business information is warranted notwithstanding the submitter's objections, it must send to the submitter a written notice of its intent to disclose that must include:

1. Reasons the submitter's objections were not sustained;
2. A description or copies of the business information to be disclosed;
3. The proposed disclosure date, which may not be less than 10 working days of mailing the notice of intent to disclose letter; and
4. A statement that if the business submitter files a motion for injunctive relief in federal court, to advise your office immediately.

Note that if a business submitter files a "reverse" FOIA lawsuit, which seeks to prevent the disclosure of any of the records, the court will make a decision based solely upon the administrative record (i.e. the written correspondence between the agency and the submitter). Accordingly, it is critically important that your notice of intent to disclose letter be comprehensive and clearly set forth the agency's analysis and rationale for its decision. The submitter is not entitled to an administrative appeal of the agency's decision.

You must promptly notify the business submitter if the requester brings suit seeking to compel disclosure of business information. Similarly, you should promptly notify the FOIA requester if the submitter files a "reverse" FOIA lawsuit.

EXEMPTION 4

This exemption is intended to protect the interests of both the federal government and submitters of business information. It encourages submitters to voluntarily furnish useful business information to the government and it provides the government with an assurance that such information will be reliable.

It also safeguards submitters of business information from the competitive disadvantage that could result from disclosure.

Exemption 4 covers two categories of records - (1) trade secrets and (2) information which is commercial or financial, obtained from a person and privileged or confidential.

A "trade secret" is a secret, commercially valuable plan, formula, process, or device that is used for the making preparing, compounding, or processing of trade commodities and is the end product of either innovation or substantial effort.

The vast majority of Exemption 4 cases focuses on whether the withheld information falls within the second category (commercial or financial information, obtained from a person, and privileged or confidential).

The terms "commercial" and "financial" should be given their ordinary meanings. Records are "commercial" so long as the submitter has a "commercial interest" in the information.

"Obtained from a person" refers to an individual as well as a wide range of entities, including corporations, state governments, and foreign governments, but it generally does not apply to information generated by the federal government (such information may meet the "commercial" privilege of Exemption 5).

The term "privileged" in Exemption 4 refers to civil discovery privileges, such as the deliberative process, attorney-client, and attorney work-product privileges. There is scant case law addressing this aspect of Exemption 4.

Whether commercial or financial information is "confidential" generally depends upon how the government obtained the information. If the information was voluntarily submitted, then it will be considered "confidential" if the submitter "customarily" does not disclose such information to the public. See *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 878 (D.C. Cir 1992). If the information was required to be submitted, on the other hand, it will be considered confidential if disclosure would likely: 1. impair the Government's ability to obtain necessary information in the future ("impairment prong"); or 2. cause substantial competitive harm to the competitive position of the person from whom the information was obtained ("competitive harm" prong). Actual competition need not be demonstrated. Only evidence of competition and the likelihood of substantial competitive injury need be shown; or 3. harm to an "identifiable" private or governmental interest which the Congress sought to protect by enacting Exemption 4, such as the effectiveness of an agency program ("third prong"). See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The overwhelming number of Exemption 4 cases concern the "competitive harm" prong of the National Parks test for confidentiality. Competitive harm determinations are made on a case-by-case basis, and their focus is limited to harms flowing from affirmative use of information by competitors. In making competitive harm determinations, agencies typically must solicit and consider views of the business submitter. (See "Consider Business Rights," below). Mundane information about submitter's operations, general descriptions of a manufacturing process with no details, or disclosures that would cause "customer or employee disgruntlement" have been determined not to qualify as competitive harm. Nor will the disclosure of information that is already in the public domain likely cause substantial competitive harm.

Numerous types of competitive injury have been identified by the courts, including the harms caused generally by disclosure of a company's assets, profits, losses, market share, data describing a company's workforce that would reveal labor costs, profit margins, competitive vulnerability, a company's selling prices, purchase activity, freight charges, technical and commercial data, names of consultants and subcontractors and performance costs and equipment information; currently unannounced and future products, proprietary technical information, pricing strategy and subcontractor information.

Materials such as formulae, designs, drawings, research data, may be significant not as records, but as items of valuable property. Such an "intrinsically valuable" item of written work can be sold like any other commodity in the marketplace, bringing to its private owner the economic benefit of his/her proprietary interest.

If the Department can show the loss of market value resulting from a FOIA disclosure would be substantial, Exemption 4 (third prong) should be invoked to prevent it.

Unless otherwise authorized by law, the Trade Secrets Act, 18 U.S.C. 1905, prohibits federal employees from releasing any information that falls within the scope of Exemption 4.

10. THE EXCLUSIONS

Whenever a request is made which involves access to records described in 5 U.S.C. 552(b)(7)(A), and:

1. The investigation or proceeding involves a possible violation of criminal law; and
2. There is a reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings; the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of the FOIA.

This is known as the **(c)(1) exclusion**.

In certain situations the very fact of an investigation's existence is in itself a disclosure, especially in a case where a carefully worded FOIA request may be used to find out if the subject of the request is being investigated. If exemption (7)(A) were cited, it would alert the subject of the fact of investigation.

The "(c)(1) exclusion" protects the existence of records of ongoing investigations or proceedings. The records must be of the type that could be withheld in their entirety and must relate to the investigation of possible violation of criminal law. Records relating to civil law enforcement will not qualify for this exclusion.

The agency must have reason to believe that the subject is unaware of an investigation on him or her, and this exclusion will apply only during the time that these circumstances exist. Once the target of the investigation becomes aware of the investigation, this exclusion may no longer be used. Use of this exclusion means that, as far as the FOIA requester is concerned, these records do not exist. The requester will be advised that no records responsive to the FOIA request exist. When the excluded records are part of a number of other records responsive to the request, the request will be handled as a presumably routine request, with the other responsive requests processed as though they were the only ones in existence.

Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of the FOIA unless the informant's status as an informant has been officially confirmed. This treatment is known as the **(c)(2) exclusion**.

As with exemption (7)(A), invoking exemption (7)(D) in response to a FOIA request could indicate to a requester that a particular person is a confidential source. For example, if all members of an organized crime group request information about themselves, using Exemption (7)(D) could indicate a named individual as a confidential source. The (c)(2) exclusion is intended to remove this risk.

This (c)(2) exclusion should be used carefully, since stating that “records do not exist that are responsive to your request” could also be a tip-off to an individual having a known record of federal prosecutions. The individual making the request would recognize that the request was given special treatment and become suspicious. In these cases all information that would ordinarily be released to a first-party requester should be provided with the exception of the confidential source information.

Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation (FBI) pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in exemption (b)(1), the FBI may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of the FOIA. This is known as the (c)(3) exclusion). Sometimes the very fact that the FBI does or does not hold any records on a specific person can itself be a sensitive fact, classifiable under E.O. 12958, and protectable under FOIA exemption (b)(1). Citing the exemption or a “no records” response can jeopardize sensitive activities. **Note that exclusion (c)(3) can be used only by the FBI.**

Any reply invoking the provisions of any of the exclusions should be carefully reviewed to assure appropriate application of the exclusions. The “excluded” records should be carefully identified and segregated from other records that are being processed. Uniform procedures should be prepared in advance to handle administrative appeals that seek review of a possibility that an exclusion was employed in a given case. There is no requirement to advise requesters of appeal rights when an exclusion has been used. However, requesters who specifically ask if an exclusion was used should be advised that it is the agency’s policy to neither confirm nor deny that an exclusion was used.

11. CONSULTING AND REFERRAL OF DOCUMENTS

When a request is received for a record created by your office that includes information originated by or of substantial interest to another bureau or agency, the record is referred to the originating bureau or agency for a recommendation on whether to release or withhold the information. You are not to release the information without prior consultation with the originator. You, however, have the responsibility for responding to the requester. A recommendation from the originating bureau or agency not to release information should be accompanied by the exemption(s) to be asserted.

Requested records that were originated by another bureau or agency are referred to the originator for determining whether or not the records will be disclosed, and the originating bureau or agency will respond directly to the requester. The requester is informed of the referral. Keep in mind, however, that when such referrals are made, Treasury still retains responsibility of defending the referral action if the request proceeds to litigation.

Upon receipt of a referral of Treasury records from another agency, the referral should be handled on a “first-in, first-out” basis but this should be done according to the date of the request’s initial receipt at the referring agency. This is to avoid placing the requester at an unfair timing disadvantage.

Sample referral letters are at the end of this chapter.

Classified records that must be referred to another bureau or agency should be handled in accordance with the instructions contained in 31 CFR Part 2, for handling and safeguarding of classified national security information.

A request may involve records pertaining to more than one DO office or more than one bureau of the Department. At the discretion of the Departmental Disclosure Office, the response may be coordinated by the DDO. Or, the primary responsibility for the coordinated response may be determined based on the office or bureau having major interest or by the office having the most records.

Records retired to the Federal Records Center are still the responsibility of the originating office, and they must be retrieved when they are or may be responsive to the request.

Bureaus receiving referred requests will answer them in accordance with the time limits established by FOIA and the regulations.

When the request is for a record not in the possession or control of any bureau of the Department of the Treasury, the requester will be notified accordingly and the request returned to the requester.

White House records

At the end of this chapter is a copy of a Department of Justice memorandum explaining the procedure used for White House records. Questions about these procedures should be directed to the Department of Justice, Office of Information and Privacy, at 202/514-3642.

12. TIME LIMITS AND TIME EXTENSIONS

Twenty (20)-day limit for responding.

The initial determination to release or deny a record will be made and the decision reported to the requester within 20 work days after the receipt of the request by the responsible official.

Every effort must be made to meet the 20-day statutory response deadline.

Unusual circumstances

The FOIA allows a time extension by written notice to the requester in unusual circumstances.

Those circumstances are:

1. The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
2. The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
3. The need for consultation, which shall be conducted with all practical speed, with another bureau or agency having substantial interest in the determination of the request or among two or more bureaus or agencies having substantial subject matter interest therein.

In the above “unusual circumstances,” you must give the requester an opportunity to limit the scope of the request so that it may be processed within the 20-day time limit, or an opportunity to arrange with you an alternative time frame for processing the request or a modified request.

Voluntary extension of time

If it's not possible to locate and review the records within 20 work days because of reasons other than “unusual circumstances” as defined above, a letter should be sent to the requester inviting the requester to agree to a voluntary extension of time. The request for more time should not exceed 30 days, unless exceptional circumstances require a longer period.

Expedited processing

Requesters may ask for expedited processing of their request when they can demonstrate a compelling need. “Compelling need” means:

1. That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
2. With respect to a request made by a person primarily engaged in disseminating information,
urgency to inform the public concerning actual or alleged Federal Government activity.

The demonstration of compelling need must be supported by a statement certified by the requester to be true and correct to the best of his or her knowledge and belief. The statement should be in the form prescribed by 28 U.S.C. 1746, “I declare under penalty of perjury that the foregoing is true and correct. Executed on [date].”

The standard of “urgency to inform” requires that the records requested pertain to a matter of current exigency to the American public and that delaying a response to a request for records would compromise a significant recognized interest to and throughout the American general public. The requester must adequately explain the matter or activity and why the records sought are necessary to be provided on an expedited basis.

Upon receipt by the appropriate bureau official, a determination as to whether to grant or deny a request for expedited processing must be made, and the requester notified, within 10 calendar days of the date of the request. However, the Department has at least 5 days from the date of receipt of the request to issue such determination. The decision to grant or deny a request for expedited processing may be made solely on the information contained in the initial letter requesting expedited treatment.

If the request for expedited processing is granted, the request should be placed in front of any existing request queue and should be processed as soon as practicable.

If the requester chooses to appeal a denial of expedited processing, he or she must do so within 10 calendar days of the date of the denial. The appeal determination must be made by the bureau and the requester notified within 10 work days from the date of receipt of the appeal.

Multiple tracks

You may establish different processing tracks based upon the amount of work or time (or both) involved in processing requests. For example, requests for voluminous records may be in one processing track; and simple requests (for few records, or for similar, just-processed requests) may be in a “fast” track. You may provide a requester with an opportunity to limit the scope of the request in order to qualify for processing under the “fast” track.

13. WRITING THE RESPONSE

You will find sample response letters at the end of this chapter. Each letter represents one of four standard findings that are normally made in response to a FOIA request. Below is a brief description of each finding.

No records found

If no records are located, tell the requester that a search was conducted and no responsive records were found. Appeal rights are cited because a no-records response is considered an adverse determination. This determination is a result of the judicial decision in *Oglesby v. Department of the Army*, 920 F.2d 57 (D.C. Cir 1990). Appeal rights for a no-records response may be given as follows:

Should you choose to appeal this response, you must do so within 35 days from the date of this letter. Your appeal must be in writing, signed by you and should be addressed to:

[Give bureau address]

The deciding official on your appeal will be [see your bureau's appendix to the FOIA regulations at 31 CFR Part 1, Subpart A, for the title of the appropriate appeal official].

See sample of "No Records Response" at end of this chapter.

Full release of records

If a full grant of access is made, tell the requester that he/she is granted full access to the records located. No appeal rights are given. See sample of "Full Release" letter at end of this chapter.

Partial release of records

If a partial grant of access is made, tell the requester that access is being granted to part of the responsive records. Advise the requester regarding the types of records withheld and the FOIA exemption(s) claimed for withholding. All exemptions that are applicable must be cited so that the administrative record is complete. Exemptions should be cited in full. Appeal rights are given, as well as the title of the official who will make the appeal determination. A copy of the redacted record is provided to the requester. See sample "Partial Denial" letter at end of this chapter.

Indicate amount withheld

When a record is only partially disclosed, the part deleted must be clearly indicated on the disclosed portion of the record at the place of deletion. This requirement does not apply if including an indication of deleted information would harm an interest protected by the exemption under which the deletion is made. This requirement applies to all record formats. For a paper record, the denied portion can be visibly indicated by the portions deleted. For electronic records, this requirement applies if it's technically feasible.

Full denial of access

When responsive records have been located but none are being disclosed, tell the requester that access to the records is denied in full. All exemptions that are applicable must be cited so that the administrative record is complete. Appeal rights are given. See sample "Full Denial" letter at end of this chapter.

Estimating the volume withheld

You must make a reasonable effort to estimate the volume of records or information withheld and inform the requester, unless providing such an estimate would harm an interest protected by the exemption under which the denial is made. This requirement can be met by using the response letter to say what is being withheld in number of pages, or some other form of measurement. The notification of volume denied applies to all record formats, including electronic records, if technically feasible. Though not required, it's Treasury policy to also tell the requester the types of records being withheld (i.e., letters, memos, reports, notes, etc.).

Appeal rights language in letters of denial

Appeal rights for a partial or full denial differ slightly from the "no records response" paragraph and may be given as follows:

**You may appeal this decision within 35 days from the date of this letter.
Your appeal must be in writing, signed by you, and should be addressed to:**

[Give bureau address for appeals.]

**The deciding official on your appeal will be [see your bureau's
appropriate appeal official].**

Sending response in parts

The response can be made in parts. This method is recommended especially when processing requests for voluminous records. If records with deletions are released in a response part, tell the requester what exemptions have been claimed. However, appeal rights are provided only in the final response. Advise the requester in each response part that appeal rights will be provided in the final response.

About fees

Also include a fee status in your response. For example, “A bill will follow under separate cover.” Or, “fees were minimal and will not be charged.”

14. DOCUMENTATION

The administrative FOIA file

It is important that a request file reflects a reasonable basis for the withholding of any records. If a requester can show that a decision was made in an arbitrary or capricious manner, the court may direct the Special Counsel to initiate an investigation and determine if disciplinary action is warranted (5 U.S.C. 552(a)(4)(F)).

Use of an index is suggested when a FOIA request involves an extensive number of records, some of which may be granted and others denied. It is especially useful if the documents to be denied are subject to a variety of exemptions. The index is not to be provided to the requester and would not be attached to the response to the requester.

You should prepare an index whenever the request process is sufficiently complex to warrant one. The format and content of an index depends upon the circumstances of the request.

The index should generally:

1. Contain a listing of numbered records;
2. Identify the record by type, date, recipient, and originator;
3. Indicate the nature of the record and, if part of an investigatory file, indicate how the record related to the investigation;
4. Identify the FOIA exemption (or exemptions) used;
5. Provide justification for the use of the exemption and specify the anticipated harm which might result from release, unless use of the exemption is mandatory; and
6. Indicate those items being withheld because exemption is mandatory and cite any applicable statutes.

Separate entries may be necessary if several segregable portions are being withheld from a record for different reasons.

Groups of substantially identical records may be described generally rather than in individual detail.

Vaughn index

A Vaughn index is an itemized list correlating each withheld document or portion with a specific FOIA exemption and the relevant part of the agency non-disclosure justification. There is no statutory requirement that either a Vaughn index or similar detailed list be prepared for the requester while the agency is administratively processing the FOIA request. The Vaughn index makes a trial court's job more manageable when reviewing documents that are the subject of litigation.

Completing the FOIA Action Form (FAF)

Each Treasury bureau is responsible for collecting its own data, which is mainly for the Department's annual report to the Attorney General. **Departmental Offices (DO) uses the FOIA Action Form, which is explained below, but bureaus may elect to use another form or method.**

Part I. If the "Fee Waiver" box has been checked, the request for fee waiver or reduction should first be decided. (See Chapter 5.) If the "Coordinator" box has been checked, you must provide your portion of the response to the individual listed as coordinator, so that one response to the requester will be sent by DO.

The "Respond to" box in Part I is used by Disclosure Services to give the address of the referring Government agency when the response is to be sent to that agency. Or, the box may contain processing instructions or comments.

Part II. Check the appropriate boxes. For "Other," please explain. For example, "No records located," "Withdrawn by requester," "Records previously furnished." Using an explanation of "administratively closed" is not enough.

Part III. This part is to be filled in for all requests, regardless of fee category or if fees are being charged. This is what Disclosure Services uses to determine the cost to Departmental Offices (DO) for processing FOIA requests. Disclosure Services uses this information to compile DO's statistics for the FOIA annual report. Include all time spent by all employees in processing the request (i.e., time spent on phone with other offices discussing the request, meetings regarding the request, time spent searching for responsive records, etc.). Include anyone who has spent time looking for material that's responsive to a request, whether or not any records are actually found. Report the person's grade and time (even if only 5 minutes). Also include time spent examining the records, preparing them for release, and time spent drafting and typing the response.

Part IV. The fees reported in Part IV depend on the user category that has been assigned to the request. The terms used reflect those used in the regulations and not those in Part III of the form.

Search: All the time spent looking for material responsive to a request. A search can be done either manually in paper files or by using computers to locate electronic records. Reasonable efforts have to be made to search for records in electronic form or format. Indicate the grade and time of each employee performing the search.

Duplication: Refers to the process of making a copy of a record in order to respond to a FOIA request. The copies can be paper copies, microform, any type of magnetic media, audio visual material, etc. Specify what type of copies are provided, if other than paper. NOTE: The time spent copying records, however, is not a billable expense.

Review: Refers to the process of examining records located in response to a **commercial use request** to determine whether any portion of any record located should not be disclosed. It includes processing any records for disclosure. However, review does not include time spent resolving general legal or policy issues regarding the applicability of particular exemptions or reviewing on appeal exemptions that already are applied.

Commercial: Report the actual number of whole or partial search hours, the actual number of copies, and the actual hours spent reviewing the records for release.

Educ/Scientific/Media: Report the actual number of pages released, even though this category is entitled to the first 100 pages free of charge. Note that this category of requester is not charged for search or review costs.

Other (Individual): Report the hours in excess of the first 2 hours of search time. Individuals are entitled to 2 free hours of search time. Report the actual number of pages released, even though individuals are entitled to the first 100 pages free of charge. No review costs are charged to individuals.

It's up to the responsible official to determine whether or not a bill should be sent to the requester or the fees are to be waived. Please check the appropriate box.

The responsible official or the FOIA contact should sign and date the form. Only offices within DO will complete the form and return it with a copy of the response letter to Disclosure Services; other Treasury bureaus will follow the data reporting procedures of their respective bureaus. Do not send Disclosure Services copies of records released to the requester.

15. PROCESSING APPEALS

If the responsible official makes an initial determination to deny a request for records, either in whole or in part, that decision may be appealed by the requester in writing to a designated appellate authority.

The appeal should:

1. Contain the basis for disagreement with the initial denial; and
2. Be received within 35 days of the date of the denial.

Appeal procedures also apply to: The denial of a request for a waiver or reduction of fees; when there has been an adverse determination of the requester's fee category; a finding of no responsive records located; or the denial of a request for expedited processing.

The responsible official who made the determination to withhold information in response to a request must make the file available to the appeal official. The file should contain such items as:

1. The initial FOIA request;
2. Any correspondence between the agency and the requester acknowledging the request, negotiating the scope, fees or time required to respond to the request;
3. Copies of any information released;
4. Copies of any information withheld;
5. Any document discussing the status of the request;
6. The initial determination and any interim responses;
7. Any index that may have been prepared at the discretion of the responsible official;
8. Any notes or memoranda generated as a result of the FOIA request.

Time limits

If the requester chooses to appeal the initial determination, he must do so within 35 calendar days from the date of the final letter informing the requester that a determination to withhold has been made (or the date of the letter transmitting the last records released, whichever is later). However, an appeal of a denial for expedited processing must be made within 10 calendar days of the date of the initial determination to deny expedited processing.

Final determinations on appeals shall be made within 20 work days after receipt; however, appeal determinations of denials of requests for expedited processing shall be made within 10 work days from the date of receipt of the appeal.

Time extensions

If it's not possible to review the case file and respond to an appeal within 20 work days, the requester should be contacted and invited to agree to a voluntary extension of time.

No extension of time provision exists regarding a decision whether to grant or deny a request for expedited processing.

Preparing the administrative appeal letter

When the appeal official makes a determination to release all or a portion of records previously withheld in the initial determination, a copy of these records should be forwarded promptly to the requester.

If the appeal official determines that the appeal is to be denied, either in whole or in part, the written response shall notify the requester of the denial, the reasons for the denial including the FOIA exemptions relied upon, and the name and title of the appeal official. The response must also include a statement that judicial review of the denial is available in the U.S. district court for the judicial district in which the requester resides or has a principal place of business, the judicial district in which the requested records are located, or the District of Columbia, in accordance with 5 U.S.C. 552(a)(4)(B).

16. THE ELECTRONIC FREEDOM OF INFORMATION ACT AMENDMENTS OF 1996 (EFOIA)

After several years of legislative and administrative consideration of electronic record FOIA issues, Congress enacted the 1996 amendments to the FOIA. For an excellent reference to the EFOIA amendments, see the Department of Justice (DOJ) Fall 1996 issue of *FOIA UPDATE* available at: www.usdoj.gov/oip/foi-upd.htm.

“Index of Selected Records” procedures

The electronic access provisions of the FOIA are intended to enhance public access to agency records and information. Bureaus are responsible for establishing their own procedures for complying with the new section (a)(2) requirements of the FOIA.

Internet requirements

Bureaus must make available via Internet those records which have been created on or after November 1, 1996, and which contain, generally speaking, what the bureau has treated as authoritative indications of its position on legal or policy questions. This includes the following types of records (which are often referred to as “(a)(2)” material):

- (1) Final opinions, including concurring and dissenting opinions, as well as orders, made in a bureau’s adjudication of cases;
- (2) Those statements of policy and interpretations which have been adopted by a bureau and are not published in the Federal Register;
- (3) Administrative staff manuals and instructions to staff that affect a member of the public.

In addition, copies of all records released in response to a FOIA request which, because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests, must be placed on the bureau’s Internet web site. This is intended to make material released in response to a FOIA request that is of interest to the public at large, or at least special interest groups, more easily accessible to the public and also reduce the number of individual FOIA requests.

The Department meets the above requirements by making such records available on appropriate bureau web sites. It should be noted that at some bureaus, information has traditionally been placed in reading rooms as a matter of convenience to the public. However, not all of that material needs to be made available in the FOIA electronic reading room -- only the types of material specifically included in section (a)(2) of the FOIA that were created on or after November 1, 1996.

Other requirements

Other requirements resulting from the EFOIA amendments that pertain to request processing are briefly mentioned here. More detail is available in the chapter that addresses a particular requirement.

- (1) Records shall be provided in any form or format requested if they are readily reproducible in that form or format. (See Chapter 6.)
- (2) Reasonable efforts must be made to search for records in electronic form or format. (See Chapter 6.)
- (3) The time limit for an agency to provide an initial determination to a FOIA request was changed from 10 working days to 20 working days. (See Chapter 12.)
- (4) Agencies are permitted to implement systems for multi-track processing. (See Chapter 12.)
- (5) Agencies are required to make a reasonable effort to estimate the volume of records or information withheld and inform the requester. (See Chapter 13.)
- (6) When a record is only partially disclosed, the part deleted is to be clearly indicated on the disclosed part of the record at the place of deletion. (See Chapter 13.)
- (7) Expedited processing may be granted if the requester demonstrates a compelling need for a speedy response. (See Chapter 12.)

17. READING ROOMS

The FOIA requires each agency to provide a place where the public may inspect and copy or have copied the material required to be made available under 5 U.S.C. 552(a)(2).

These places have become known as “reading rooms.” Space for the reading room may be set aside for use by the public and should include facilities for copying documents located in the reading room. Reading room space may also be set aside on an ad hoc basis if the demand for inspection and/or copying by the public is insufficient to warrant the costs associated with dedicating space for this purpose.

To comply with this requirement of the Act, several bureaus have made arrangements with the Treasury Department library for the library to act as the bureau’s reading room. Visitors to the reading room of the Treasury library must make an appointment by calling 202/622-0990.

Although fees are not to be assessed for access to materials in the reading rooms, fees may be charged for copies of materials provided, in accordance with 31 CFR 1.7.

Electronic Reading Room

Records that meet the criteria set forth in subsection (a)(2) of the FOIA (see “Contents of Reading Rooms,” below) and which are created on or after November 1, 1996, must be posted on the Internet at the bureau’s electronic reading room site.

Contents of Reading Rooms

The only criteria for what is to be placed in a reading room is the general guidance found in the FOIA under subsection (a)(2). It is recommended that only those records meeting the criteria found in subsection (a)(2) of the FOIA be posted to FOIA electronic reading rooms. Other records a bureau may want to make available to the public can be posted on other electronic pages of a bureau web site.

The FOIA requires that (a)(2) materials be made available to the public for inspection and copying, unless such materials are published and copies offered for sale. The primary purpose of subsection (a)(2) was to compel disclosure of any “secret law” of an agency which had the force and effect of law in most cases. This material would consist of documents which contain what an agency has treated as authoritative indications of its positions on legal or policy questions. Since the enactment of the 1974 and 1996 amendments to the FOIA, courts have broadened the types of documents which meet this criteria.

The (a)(2) materials include:

1. Final opinions, including concurring and dissenting opinions and orders made in the adjudication of cases, as defined in 5 U.S.C. 551, that may be cited, used, or relied upon as precedents in future adjudications.
2. Statements of policy and interpretations that have been adopted by the agency and are not published in the Federal Register. This qualification is generally met when action is taken by the head of an agency or a responsible official who has been empowered by the agency to make an authoritative issuance.
3. Administrative staff manuals and instructions, or portions thereof, that establish Department of the Treasury policy that affect a member of the public.
4. Records that have been located and processed in response to a request that have become or are likely to become the subject of subsequent requests for substantially the same records, regardless of form or format. These are often referred to as “frequently requested” records.

Each bureau must maintain and make available to the public a current index of material described in items 1, 2, and 3 above. Also, each bureau is to maintain in its electronic reading room an index of “frequently requested” records described in 4 above.

PUBLIC LAW 110-175—DEC. 31, 2007

OPENNESS PROMOTES EFFECTIVENESS IN
OUR NATIONAL GOVERNMENT ACT OF 2007

Public Law 110-175 110th Congress
An Act

To promote accessibility, accountability, and openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes.

Dec. 31, 2007
[S. 2488]

Openness
Promotes
Effectiveness in our
National
Government Act of
2007.
5 USC 101 note.
5 USC 552 note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Openness Promotes Effectiveness in our National Government Act of 2007” or the “OPEN Government Act of 2007”.

SEC. 2. FINDINGS.

Congress finds that—

(1) the Freedom of Information Act was signed into law on July 4, 1966, because the American people believe that—

(A) our constitutional democracy, our system of self-government, and our commitment to popular sovereignty depends upon the consent of the governed;

(B) such consent is not meaningful unless it is informed consent; and

(C) as Justice Black noted in his concurring opinion in *Barr v. Matteo* (360 U.S. 564 (1959)), “The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.”; (2) the American people firmly believe that our system

of government must itself be governed by a presumption of openness;

(3) the Freedom of Information Act establishes a “strong presumption in favor of disclosure” as noted by the United States Supreme Court in *United States Department of State v. Ray* (502 U.S. 164 (1991)), a presumption that applies to all agencies governed by that Act;

(4) “disclosure, not secrecy, is the dominant objective of the Act,” as noted by the United States Supreme Court in *Department of Air Force v. Rose* (425 U.S. 352 (1976));

(5) in practice, the Freedom of Information Act has not always lived up to the ideals of that Act; and

(6) Congress should regularly review section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), in order to determine whether further changes and improvements are necessary to ensure that the

Government remains open and accessible to the American people and is always based not upon the “need to know” but upon the fundamental “right to know”.

SEC. 3. PROTECTION OF FEE STATUS FOR NEWS MEDIA.

Section 552(a)(4)(A)(ii) of title 5, United States Code, is amended by adding at the end the following:

“In this clause, the term ‘a representative of the news media’ means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ‘news’ means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.”.

SEC. 4. RECOVERY OF ATTORNEY FEES AND LITIGATION COSTS.

(a) IN GENERAL.—Section 552(a)(4)(E) of title 5, United States Code, is amended—

(1) by inserting “(i)” after “(E)”; and

(2) by adding at the end the following:

“(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either— “(I) a judicial order, or an enforceable written agreement or consent decree; or

“(II) a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.”.

(b) LIMITATION.—Notwithstanding section 1304 of title 31, United States Code, no amounts may be obligated or expended from the Claims and Judgment Fund of the United States Treasury to pay the costs resulting from fees assessed under section 552(a)(4)(E) of title 5, United States Code. Any such amounts shall be paid only from funds annually appropriated for any authorized purpose for the Federal agency against which a claim or judgment has been rendered.

5 USC 552 note.

SEC. 5. DISCIPLINARY ACTIONS FOR ARBITRARY AND CAPRICIOUS

REJECTIONS OF REQUESTS.

Section 552(a)(4)(F) of title 5, United States Code, is amended—

(1) by inserting “(i)” after “(F)”; and

(2) by adding at the end the following:

“(ii) The Attorney General shall—

Reports.

Notification.

“(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

“(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

“(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).”.

SEC. 6. TIME LIMITS FOR AGENCIES TO ACT ON REQUESTS.

(a) TIME LIMITS.—

(1) IN GENERAL.—Section 552(a)(6)(A) of title 5, United States Code, is amended by inserting after clause (ii) the following:

“The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency’s regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

“(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

“(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency’s receipt of the requester’s response to the agency’s request for information or clarification ends the tolling period.”.

5 USC 552 note.

(2) EFFECTIVE DATE.—The amendment made by this subsection shall take effect 1 year after the date of enactment of this Act.

(b) COMPLIANCE WITH TIME LIMITS.—

(1) IN GENERAL.—

(A) SEARCH FEES.—Section 552(a)(4)(A) of title 5, United States Code, is amended by adding at the end the following:

“(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.”.

5 USC 552 note.

(B) PUBLIC LIAISON.—Section 552(a)(6)(B)(ii) of title 5, United States Code, is amended by inserting after the first sentence the following: “To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency.”.

(2) EFFECTIVE DATE AND APPLICATION.—The amendment made by this subsection shall take effect 1 year after the date of enactment of this Act and apply to requests for information under section 552 of title 5, United States Code, filed on or after that effective date.

SEC. 7. INDIVIDUALIZED TRACKING NUMBERS FOR REQUESTS AND STATUS INFORMATION.

(a) IN GENERAL.—Section 552(a) of title 5, United States Code, is amended by adding at the end the following:

“(7) Each agency shall—

“(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

“(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

“(i) the date on which the agency originally received the request; and

“(ii) an estimated date on which the agency will complete action on the request.”.

(b) EFFECTIVE DATE AND APPLICATION.—The amendment made by this section shall take effect 1 year after the date of enactment of this Act and apply to requests for information under section 552 of title 5, United States Code, filed on or after that effective date.

5 USC 552 note.

SEC. 8. REPORTING REQUIREMENTS.

(a) IN GENERAL.—Section 552(e)(1) of title 5, United States Code, is amended—

(1) in subparagraph (B)(ii), by inserting after the first comma “the number of occasions on which each statute was relied upon,”;

(2) in subparagraph (C), by inserting “and average” after “median”;

(3) in subparagraph (E), by inserting before the semicolon “, based on the date on which the requests were received by the agency”;

(4) by redesignating subparagraphs (F) and (G) as subparagraphs (N) and (O), respectively; and

(5) by inserting after subparagraph (E) the following:

“(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

“(G) based on the number of business days that have elapsed since each request was originally received by the agency—

“(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20- day increments up to and including 200 days;

“(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

“(iii) the number of requests for records to which the agency has responded with a determination within

a period greater than 300 days and less than 401 days; and

“(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days; “(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

“(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

“(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

“(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

“(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

“(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;”.

(b) **APPLICABILITY TO AGENCY AND EACH PRINCIPAL COMPONENT OF THE AGENCY.**—Section 552(e) of title 5, United States Code, is amended—

(1) by redesignating paragraphs (2) through (5) as paragraphs (3) through (6), respectively; and

(2) by inserting after paragraph (1) the following: “(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.”.

(c) **PUBLIC AVAILABILITY OF DATA.**—Section 552(e)(3) of title 5, United States Code, (as redesignated by subsection (b) of this section) is amended by adding at the end “In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.”.

SEC. 9. OPENNESS OF AGENCY RECORDS MAINTAINED BY A PRIVATE ENTITY.

Section 552(f) of title 5, United States Code, is amended by striking paragraph (2) and inserting the following:

“(2) ‘record’ and any other term used in this section in reference to information includes—

“(A) any information that would be an agency record subject to the requirements of this section when maintained

by an agency in any format, including an electronic format; and

“(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.”.

SEC. 10. OFFICE OF GOVERNMENT INFORMATION SERVICES.

(a) IN GENERAL.—Section 552 of title 5, United States Code, is amended by adding at the end the following:

“(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

Establishment.

“(2) The Office of Government Information Services shall—

“(A) review policies and procedures of administrative agencies under this section;

“(B) review compliance with this section by administrative agencies; and

“(C) recommend policy changes to Congress and the President to improve the administration of this section.

“(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

Audits.
Reports.

Designation.

“(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

“(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

“(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

“(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

“(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency’s performance in implementing this section;

“(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

“(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency’s performance in implementing this section;

“(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency’s handbook issued under subsection (g), and the agency’s annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

“(6) designate one or more FOIA Public Liaisons.

“(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a

requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.”.

5 USC 552 note.

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

SEC. 11. REPORT ON PERSONNEL POLICIES RELATED TO FOIA.

Not later than 1 year after the date of enactment of this Act, the Office of Personnel Management shall submit to Congress a report that examines—

(1) whether changes to executive branch personnel policies could be made that would—

(A) provide greater encouragement to all Federal employees to fulfill their duties under section 552 of title 5, United States Code; and

(B) enhance the stature of officials administering that section within the executive branch; (2) whether performance of compliance with section 552

of title 5, United States Code, should be included as a factor in personnel performance evaluations for any or all categories of Federal employees and officers;

(3) whether an employment classification series specific to compliance with sections 552 and 552a of title 5, United States Code, should be established;

(4) whether the highest level officials in particular agencies administering such sections should be paid at a rate of pay equal to or greater than a particular minimum rate; and

(5) whether other changes to personnel policies can be made to ensure that there is a clear career advancement track for individuals interested in devoting themselves to a career in compliance with such sections; and

(6) whether the executive branch should require any or all categories of Federal employees to undertake awareness training of such sections.

SEC. 12. REQUIREMENT TO DESCRIBE EXEMPTIONS AUTHORIZING DELETIONS OF MATERIAL PROVIDED UNDER FOIA.

Section 552(b) of title 5, United States Code, is amended in the matter after paragraph (9)—

(1) in the second sentence, by inserting after “amount of information deleted” the following: “, and the exemption under which the deletion is made,”; and

(2) in the third sentence, by inserting after “amount of the information deleted” the following: “, and the exemption under which the deletion is made,”.

Approved December 31, 2007.

LEGISLATIVE HISTORY—S. 2488:
CONGRESSIONAL RECORD, Vol. 153 (2007):
Dec. 14, considered and passed Senate.
Dec. 18, considered and passed House.

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19. ADDITIONAL RESOURCES

To learn more about the FOIA, check out the following:

- Ø The Freedom of Information Act, 5 U.S.C. 552 (<http://www.usdoj.gov/04foia/foiastat.htm>)
- Ø Treasury's FOIA regulations (<http://www.treas.gov/foia/guidance.html>)
- Ø The FOIA Treasury Directive (TD 25-05 <http://www.treas.gov/regs/td25-05.htm>)
- Ø The Department of Justice "Freedom of Information Act Guide & Privacy Act Overview" (<http://www.usdoj.gov/oip/foi-act.htm>)
- Ø The Department of Justice FOIA Hotline: 202/514-FOIA (3642) – for specific questions about FOIA.