

HOW TO USE OPEN GOVERNMENT LAWS

If you are a journalist, you are probably already aware of the rich source of data and other research material available from government agencies at every level. Any writer, not only journalists, can take advantage of various open government laws to expose the work of public agencies, corroborate other sources, identify leads and story lines, and otherwise use the enormous amounts of data compiled by federal, state, and local government agencies. The right of the public to obtain information from and about the federal government is embodied in the Freedom of Information Act (“FOIA”); the Government in the Sunshine Act and the Federal Advisory Committee Act (“FACA”). FOIA requires all federal agencies promptly to make most of their records available on request to any member of the public. The Sunshine Act allows the public to attend most meetings held by federal agencies. FACA gives the public the right to attend most meetings of federal advisory committees (defined below). Every state also has its own versions of each these laws, which apply to state and local government agencies.

The dozens of agencies of the executive branch of the federal government affect the public every day in countless ways. Open government laws

apply to virtually all of them.^{54,55} Congress passed FOIA, FACA, and the Sunshine Act in order to ensure an informed citizenry, which is necessary for a functioning democracy. The laws were intended to check official corruption and waste and to hold the government accountable to the governed. As a federal appellate court described it: “the Act’s basic purpose ‘was to protect the people’s right to obtain information about their government, to know what their government is doing and to obtain information about government activities and policies’ and to remedy the ‘mischief’ of ‘arbitrary and self-serving’ withholding, by agencies which are not directly responsible to the people, of official information on how the government is operating . . .” *Westinghouse, et al. v. Schlesinger* (4th Cir. 1976).

For similar reasons, criminal and civil litigation proceedings involving adults and related court records are also generally open to the public unless a defendant’s right to a fair trial is threatened by open access or another compelling interest favors a closed proceeding. Juvenile court proceedings and records are generally closed to the public to protect minors.

If you are considering using any of these open government laws, visit the invaluable website of the Reporters Committee for Freedom of the Press (www.rcfp.org) www.rcfp.org). It provides access to every state’s current open meetings and freedom of information laws, a comprehensive Federal Open Government Guide, sample request letters, a FOIA request letter and appeal generator, and writer-friendly legal advice.

THE FREEDOM OF INFORMATION ACT

The federal Freedom of Information Act (“FOIA”) offers public access to records relating to the structure, operation, and decision-making of government agencies, their final opinions and orders, information and statistics they have compiled, indices, most staff manuals and instructions, statements of policy, and interpretations of those policies. Its scope is wide. FOIA applies to all executive branch cabinets (for example, the Departments of State, Justice, Commerce, Education, Defense, the Treasury), the Executive

⁵⁴ The Privacy Act limits the force of FOIA and other laws by preventing the disclosure of certain information about individuals to other people.

⁵⁵ Congress exempted certain government entities completely from the requirements of FOIA—Congress itself, the federal courts, and the President and Vice President and their advisors.

Office of the President, the Office of Management and Budget, all branches of the military, the Central Intelligence Agency and National Security Agency, the Federal Bureau of Investigation, NASA, the Environmental Protection Agency, government corporations such as the Postal Service, government-controlled corporations such as Amtrak, and other agencies in the executive branch, including presidential commissions, and those agencies' numerous offices and subagencies. It applies equally to all independent regulatory agencies, such as the Federal Communications Commission and the Federal Trade Commission.

The government's FOIA website, www.foia.gov, maintained by the Department of Justice, lists every agency to which FOIA applies and has direct links to each agency's individual FOIA office and procedures.

Under FOIA, any member of the public who requests and "reasonably describes" documents in the possession of an agency has the right to receive them. The person requesting the information need give no reason for the request, and in fact, need not even reveal her identity to the agency. The law requires that agencies respond substantively to FOIA requests within twenty days and disclose the data requested "promptly." If the agency claims an exemption from disclosure, it has the burden of showing the exemption is valid. Some agencies meet the deadlines, but many others have backlogs and take much longer to respond. The Justice Department's FOIA website tracks the number of requests made, rejected, appealed, pending, and the length of time for responses and disclosures of every agency by year, sorted according to "complex" and "simple" requests. Your target agency's track record can help you plan your project and prepare to follow up and to appeal, depending on the complexity of your request and the nature of the documents you seek.

Every requester has the right to appeal a denial of disclosure to a specified official of the agency and then to a federal court. Each agency has established and published on its website its own procedure for requesting documents and for appealing denials. The law requires that if a court reverses an agency's denial of a disclosure request, the government must pay the requester's attorneys' fees.

THE PRESUMPTION IN FAVOR OF DISCLOSURE

Every open government law, both federal and state, contains categories of information that are exempted from the disclosure requirements for various policy reasons. FOIA exempts nine specific categories of data, and some of

the exempt categories are broad enough to give an agency great leeway to refuse disclosure.⁵⁶ Even though FOIA imposes the burden of justifying an exemption on the agency, the experience of the past two decades shows that an agency's tendency to exploit an exemption to avoid disclosure depends largely on the current Administration's stance. The Clinton Administration's Attorney General instructed federal agencies in 1993 to lean in favor of disclosing requested documents and that even if requested information could arguably fall into an exempt category, the agency should not invoke it unless a specific foreseeable harm would arise from disclosure. The Bush Administration took the converse position. It encouraged federal agencies to carefully consider and use any reason to deny disclosure. In 2001, the Bush Administration's Attorney General assured agencies that the Justice Department would aggressively support denials and delays of disclosure if they were "legally defensible." One of President Obama's first acts as president was to reverse the Bush Administration's directive on FOIA disclosure. President Obama directed his Attorney General to reestablish the presumption in favor of disclosure and urged agencies to disclose information on a timely basis. Obama's directive essentially revived the presumption in favor of agency disclosure that the Clinton Administration had instituted. In addition, it encouraged more "proactive disclosure" of agency records (i.e., without specific FOIA requests) and many agencies have posted a wealth of information on their websites since 2009.

Federal agencies are required to disclose certain categories of records on a continuous basis. These records include final opinions and orders from the adjudication of administrative cases; specific agency policy statements; certain administrative staff manuals; and records disclosed in response to FOIA

⁵⁶ The nine exempt categories are:

1. Records properly classified in the national defense or for foreign policy.
2. Internal personnel rules and agency practices.
3. Records required to be kept secret by other federal laws.
4. Confidential trade secrets belonging to private entities.
5. Internal agency memos that would normally be privileged from discovery in litigation in a lawsuit involving the agency.
6. Records with sensitive, medical or personnel information that would invade a person's privacy if disclosed.
7. Certain law enforcement records (where secrecy is needed to protect public or personal safety or privacy).
8. Bank examination reports prepared by agencies.
9. Oil and gas well geological and geophysical data.

requests since March 31, 1997, that the agency determines will be the subject of subsequent requests for substantially the same records. Moreover, all such records created since November 1, 1996, must be available online. Most agencies accomplish this through “electronic reading rooms” on or through their websites. If you are seeking documents of a federal agency, review what the agency has already published before formulating a FOIA request.

HOW TO MAKE A FOIA REQUEST

You can access the request and appeal procedures and the office dealing with FOIA requests for every federal agency at its website, in the Federal Register (www.gpoaccess.gov/fr/), or by calling the FOIA or public affairs department of the agency. If you are not sure which agency has the records you are seeking, these sources or your local congressional representative’s office might be able to help you navigate the executive branch to pinpoint the right agency or agencies.

Some agencies will accept an oral request, but your rights under FOIA do not arise unless you make a written request for documents. To obtain access to specific records, you must submit a written request to the agency that “reasonably describes” the records sought. Beyond that, each agency has its own, often detailed, procedures. Some agencies allow you to submit the request through an electronic request form. If you use regular mail, you should clearly label your letter and the envelope as a “Freedom of Information Request,” address the request to a particular FOIA officer, and send it to the specified location. In most cases, you will want to describe what you are looking for as specifically as possible. Although you do not need to explain the reasons for your request, doing so might help the agency find responsive documents more quickly. Nor do you have to disclose your identity, but if you identify yourself as a journalist, scholar, or as a person seeking information in order to contribute significantly to public understanding of government operations and activities, you are entitled to fee waivers and expedited processing.

A sample generic FOIA request appears at the end of this chapter.

DEADLINES TO RESPOND

Once you have filed a FOIA request, the burden is on the government to respond and to release the documents promptly or show that they are covered by one or more of the nine exemptions. Under amendments to FOIA made

in 2007, all requests are given a tracking number, which allows you to check the status of your request online or by calling, and the agency website should also disclose the estimated date by which the request will be processed.

Depending on the scope and complexity of your request, you might need to spend more time and effort than you planned to obtain the desired information. The agency is required by statute to respond to a written FOIA request within twenty working days, but agencies often do not respond within that time, and they are not penalized, except to the extent your fees might be waived for late responses. The required agency response is an actual grant or denial of the records sought; an acknowledgment that the agency has received your request is not the timely response that FOIA requires. The agency may also respond that it is extending its deadline to produce or deny the information by up to ten additional working days if they must search through voluminous records, retrieve files from various offices, or consult other agencies. If you do not follow all the procedural requirements in your initial request letter, such as setting forth the amount in fees you are willing to pay (beyond any fee exemptions) or adequately explaining your entitlement to a fee waiver, or if the agency seeks to clarify the scope of your request, then it might send you a request for this information, and that request effectively stops the clock on its response deadline.

Once your request is properly filed, the agency must make responsive records “promptly available” to you. The amount of time any given agency really takes to disclose records depends on the situation, and an agency is entitled to an extension if it has made a good faith, diligent effort to comply. The agency should advise you that it is taking the extension and its reasons. It might ask you to narrow your request in order to respond more quickly. Should the agency fail to issue a response or to produce the records within the twenty-day deadline, it is legally allowed more time if it claims “unusual or exceptional circumstances,” although a backlog of requests does not count.

In short, if you are making a FOIA request, you should plan ahead as much as possible for delays, because there is little you can do about them until they become unreasonable.

EXPEDITED PROCESSING

If you have an urgent need for the information, you may ask for “expedited processing.” You are entitled to expedited processing if you can show a “compelling need” to the agency. Most often, an agency will expedite

processing if someone's health and safety are at issue or if you are a journalist or author primarily engaged in disseminating information and there is an urgent need to inform the public about an actual or alleged governmental activity. Agencies may also decide to grant expedited processing in certain other specific situations. For instance, the Justice Department will grant expedited processing for requests concerning issues of government integrity that are already the subject of widespread national media interest. The Justice Department (including its components such as US Attorneys' offices and the FBI) also grants expedited processing if a delay might cause the substantial loss of somebody's due process rights.

FEES

Agencies may use their discretion to charge "reasonable" fees to search for, review, and duplicate documents for requesters. Fee schedules for each of these categories are typically available on agency websites and in the Federal Register. In deference to freedom of the press, FOIA exempts representatives of the news media (including book authors who cull and use information from agency documents, established freelancers, and journalistic bloggers) and noncommercial requesters from academic institutions from paying hourly search fees and for the first 100 pages of duplication. All other noncommercial requesters receive two hours of search time and the first 100 pages of duplication free. But fees can fluctuate dramatically among agencies and in many cases can be prohibitive. Some agencies will ask a requester to pay in advance if they anticipate that fees will exceed \$250. Review the agency's fee schedule and be sure to state in your request letter how much you are willing to spend (many agencies require this) and request an estimate of the costs to satisfy your request. If costs will be too high, reconsider whether you have the right to a fee exemption or reduction, or, if possible, ask the agency to make them available for review in its offices instead of making copies for you. Also, consider asking your publisher for a research budget if you anticipate high costs for FOIA requests.

No matter what category of requester you are in, FOIA might entitle you to further fee waivers or reductions if you can show that the disclosure of the information you seek is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." If you are making the request for commercial purposes,

it might be difficult to meet this standard. You may appeal the denial of a fee waiver request in the same way you appeal the denial of disclosure (described below).

In 2007, Congress amended FOIA to prod agencies to meet their statutory deadlines to produce documents. Now, if an agency fails to comply with any time limit, it may not charge search fees, even if the requester is not a journalist, writer, or scholar. For requesters already exempt from paying search fees, agencies that miss deadlines may not charge duplication fees, no matter how much copying is required.

APPEALING A DENIAL

If an agency refuses to disclose all or part of the information, or does not respond within twenty working days to your proper FOIA request, you may appeal to the agency's FOIA Appeals Officer. You may avoid the agency appeal process and sue directly in federal court only if the agency does not respond at all within the required time period. If you file an agency appeal that is denied or not addressed within twenty working days, you may then file a lawsuit in federal court. (The Reporters Committee's website has a sample complaint.) If you can demonstrate the need for prompt consideration, the court might expedite your case. If you win in court, a judge will order the agency to release the records and may award you attorney's fees and court costs.

EXCEPTIONS TO THE DISCLOSURE REQUIREMENT

Congress recognized that legitimate government interests, such as national security, the right to privacy, and the needs of law-enforcement agencies to maintain secrecy in investigating crime might override the strong disclosure policy of FOIA. In such cases, the agency involved might decide to disclose responsive information, but it is not legally required, and therefore cannot be compelled, to do so. If it refuses disclosure on the basis of an exemption, it must explain that on its response to your request. It is also possible for the agency to redact (i.e., black out) information it considers exempt on documents it discloses.

SAMPLE REQUEST

This sample letter is illustrative. You should always review and follow the agency's specific instructions and procedures.

**FREEDOM OF INFORMATION ACT REQUEST
SAMPLE REQUEST FOR DISCLOSURE OF INFORMATION**

Date:

Agency Headquarters [specify FOIA officer and address]

Agency Field Office (if applicable) [specify FOIA officer and address]

Dear FOIA Officer:

This letter is a non-commercial request under the Freedom of Information Act, 5 USC. Sec. 552.

I request a complete and thorough search of all filing systems and locations for all records maintained by your agency pertaining to and/or captioned:

[clearly specify and describe the information you are seeking, including names, dates, places, etc. Be as thorough and specific as possible]

If possible, I would like to receive the information in electronic [or other] format [if applicable].

I am required to pay fees only for the cost of duplication beyond the first 100 pages because I [am a representative of the news media affiliated with [name of organization] and am compiling this information for dissemination to the general public; or I am a freelance author under a publication contract writing about [name subject]⁵⁷.]

However, I request a waiver of all fees because I am compiling information that is in the current public interest because it will contribute significantly to public understanding of government operations and activities. [Explain].

If I am not entitled to a waiver of fees beyond two hours of search time and 100 pages of duplication, I agree to pay fees for the fulfillment of this request in an amount not exceeding [fill in your maximum]. Please advise me of the estimated cost to fulfill my request prior to incurring fees, and please advise me before incurring fees in excess of [your maximum].

If my request for disclosure of any of these documents is denied in whole or in part, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Give the number of pages in each document and the total number of pages pertaining to this request and the dates of documents withheld. I request that excised materials be "blackened out" rather than "whited out" or cut out

⁵⁷ If you are a freelancer but do not yet have a publishing contract, you must convince the FOIA officer that you expect to have your piece published by setting forth your publishing history or describing the interest expressed in your work by publishers.

and that the remaining nonexempt portions of documents be released as provided under the Freedom of Information Act.

Please send a memo (with a copy or copies to me) to the appropriate unit(s) in your office to assure that no records related to this request are destroyed. Please advise of any destruction of records and include the date of and authority for such destruction.

I can be reached at the phone number and email address listed below. Please call rather than write if there are any questions or if you need additional information from me. I expect a response to this request within twenty (20) working days, as provided in the Freedom of Information Act.

Sincerely,

(Signed) _____

Name: (print or type) _____

Address: _____

Telephone: _____

[for access to files related to a person]

Date of Birth: _____

Place of Birth: _____

Social Security number: [optional] _____

[for access to files related to an organization]

Date of founding: _____

Place of founding: _____

Address of organization _____

To obtain documents pertaining to an individual, give the individual's full name and include all other names used by that individual. To obtain documents about an organization, state the full name of the organization and any other name used to describe the organization. To obtain files about a specific subject or event, give the full name of the subject or event, including any relevant dates, locations, news coverage or other helpful identifying data.

CASE STUDY—*THE NATION MAGAZINE V. DEPARTMENT OF STATE*

Just before the presidential election of 1992, author Max Holland, a contributing editor to the *Nation*, attempted to obtain information from the CIA and other federal agencies about the prominent independent presidential candidate H. Ross Perot. In his FOIA requests, the writer stated he hoped to “contribute to the ongoing public debate about [Perot’s] qualifications to become President of the United States.” He and his publisher noted that a FOIA request for information about candidate Bill Clinton made by another had been filed after Holland’s requests and that the CIA had expedited it. In response to Holland’s request, the CIA directed him, for privacy reasons, to first obtain the written consent of Mr. Perot. Holland replied that he could not obtain consent and therefore requested all documents that were not protected by Perot’s privacy rights, and also suggested that his privacy rights should be circumscribed due to Perot’s national prominence. When he received no response, he hand-delivered a request for expedited processing to the CIA, claiming an urgent need for the documents on the grounds that the election was less than a month away. In denying his request, the CIA stated that it granted requests for expedition “only in the rare instances where health and humanitarian considerations create circumstances of exceptional urgency and extraordinary need” and that his request did not satisfy those criteria. The other government agencies involved, including the Department of Defense, the FBI, and the Department of State, also denied Holland’s requests either explicitly on privacy grounds, or implicitly through silence.

Holland and the *Nation* sued and sought a court order from a federal district court that would compel the government to disclose the requested documents on an expedited basis. The court refused to grant the writer’s motion because it found he had not shown a “substantial likelihood” that

the agencies were violating FOIA by refusing to expedite his requests. The court ruled that even though they had exceeded the deadlines given by FOIA, the deadlines were “not mandatory but directory” if the agencies could establish exceptional circumstances and were processing his requests with due diligence. The agencies demonstrated that they were “deluged with FOIA requests” and that the plaintiffs had failed to show requisite urgency, such as a deportation proceeding, a murder trial, or other felony criminal proceeding. The court did not find the dual purposes of selling magazines and adding to the political debate sufficiently urgent to warrant moving the writer’s FOIA request to the front of the line.

When the plaintiffs pointed out that the CIA had expedited a similar request for documents about Bill Clinton, the court responded that it would have ordered the Perot documents expedited had the Clinton documents actually been released on an expedited basis. But the agency had admitted it was wrong to expedite the Clinton-related requests, had curtailed the processing mid-stream, and had sworn that it had “returned the requests to their proper places in the queue, and not disclosed them.” The court also opined that two wrongs do not make a right: no law requires an agency to extend the erroneous treatment of one party to other parties, “thereby turning an isolated error into a uniform misapplication of the law.”

OPEN MEETINGS AND PROCEEDINGS

Along the same lines as FOIA, the Government in the Sunshine Act gives anyone the right to attend meetings of the governing boards of dozens of federal agencies. The Sunshine Act applies to the same agencies as are subject to FOIA. It requires that every part of every meeting conducted by a federal agency be open to the public, unless the meeting is exempt, as determined by a vote of the membership of the agency that is confirmed by the agency’s chief legal officer. Agencies must publicize the time, place, and subject matter of their meetings at least a week in advance and publish the notice in the Federal Register (www.gpoaccess.gov/fr/), but the Act does not dictate how the agency must announce the meeting. Some leave an outgoing message on a special phone line; others send messages to parties on its mailing list. Others only list the meeting in the Federal Register. Transcripts of meetings must be kept and made available to the public. If the meeting is closed, detailed minutes must be kept and made available.

The Federal Advisory Committee Act allows the public to attend federal advisory committee meetings. A federal advisory committee is a body of individuals, generally in the private sector, that an executive branch agency establishes or uses to obtain advice or recommendations about government policy. The records and materials of such advisory committees must be publicly available, subject to the FOIA exemptions, and their meetings must be open to the public and publicized in the Federal Register in advance.