



CHD 2023 Conference - Rise & Resist  
Savannah, GA  
November 4, 2023

Transparency & Freedom of Information

Presented by Risa Evans, Esq.  
[Risa.evans@childrenshealthdefense.org](mailto:Risa.evans@childrenshealthdefense.org)

## AGENDA

- Overview of the FOIA and CHD's FOIA work
- Drafting a FOIA request: thinking through the heart of the request
- Exemptions: a few highlights
- Administrative appeals
- FOIA litigation
- Brief tour of online resources & CHD's FOIA webpages



Learn more about CHD's FOIA work at  
[https://childrenshealthdefense.org/legal\\_justice/foia/](https://childrenshealthdefense.org/legal_justice/foia/).

## Overview of the FOIA

- The federal Freedom of Information Act (FOIA), enacted on July 4, 1966, gives the public a statutory right to access information in the executive branch of the federal government. *See* [5 U.S.C. §552](#). The FOIA requires agencies to proactively disclose several types of general agency information in the Federal Register, including organizational structure and functions, procedural and substantive rules, and statements of policy. Additionally, Agencies must make available in electronic format final agency opinions and orders, specific policy statements, and some staff-related materials, as well as FOIA releases that are likely to be requested again. *See* 5 U.S.C. §552 (a)(1), (a)(2).
- In addition to requiring these proactive disclosures, FOIA gives every person a right to access federal agency records that are not already public, except portions that are protected under one of nine exemptions (see below) so long as the person reasonably describes the records being sought. *See* 5 U.S.C. §552 (a)(3).
- Every state has an analogue to the federal FOIA, although often with a different name—e.g., “open records law.”
- Every federal agency (or parent agency) is required to have regulations that track the FOIA, and that fill in some details where the FOIA leaves room for the agency to do that. *See, e.g.*, 5 U.S.C. §552 (a)(4)(A) (regulations regarding fees).
- The FOIA sets out a detailed timeframe for federal agencies to respond to requests for records.
  - Generally, an agency must respond within 20 business days of receiving a request, stating whether or not the agency will comply with the request, the reasons for the decision, a description of the scope of documents to be produced, as well as any claimed exemptions. *See* 5 U.S.C. §552(a)(6)(A)(i), (ii),
  - Once an agency decides to comply with a request, the records must be made “promptly available” to the requester. §552(a)(6)(C)(i).
  - Under limited circumstances that are defined in the FOIA, an agency may toll the running of the 20-day period or extend the determination deadline by 10 business days. *See* §552(a)(6)(A)(ii), §552(a)(6)(B)(i).
  - The agency may extend the response deadline beyond ten days only if it provides written notice that requester can limit scope of request so it can be processed within the time limit or offers requester a chance to arrange with the agency an “alternative time frame” for processing the request. 5 U.S.C. §552(a)(6)(B)(ii).
  - If a requester seeks “expedited processing,” the agency must decide within ten calendar days whether to grant such processing. 3 5 U.S.C. § 552(a)(6)(E)(ii)(I). An agency’s denial of a request for expedited processing, or its failure to rule on such request in a timely fashion, may be appealed directly to federal court. 4 5 U.S.C. § 552(a)(6)(E)(iii). If an agency grants expedited processing, it must produce the records “as soon as practicable.” 5 5 U.S.C. § 552(a)(6)(E)(iii).

- The FOIA includes nine exemptions, each of which allow agencies to withhold certain records in part or in whole. *See* 5 U.S.C. §552(b).
- Any adverse “final determination,” including the use of exemptions, may be appealed to the agency, §552(a)(6)(A), and the agency must make a determination on the appeal within 20 working days of receipt, with extension allowed only under “unusual circumstances, as defined by the FOIA. §552(a)(6)(A)(ii); §552(a)(6)(B)(i), (iii).
- If an agency fails to make a determination on a request or rule on an appeal within the applicable time frame, or if a requester believes that the agency has improperly withheld or redacted records, the requester can file a lawsuit in federal court, asking the court to compel the agency’s compliance with FOIA. *See* §552(a)(4)(B).
- Suit may be brought in D.C., in the jurisdiction where the requester resides or has a principal place of business, or in the jurisdiction where the agency records are located. §552(a)(4)(B).
- In addition to ordering production of records, when the complainant “substantially prevails,” the court may order the government to pay attorney fees and litigation costs. *See* §552(a)(4)(E).

## A Few Reasons to Love the FOIA

- “People think transparency is the cherry on top of a pie of good state management, but it’s false. Transparency is the fundamental basis upon which political stability is constructed over time. Without information, leaders are indisputable and thus separate from their base of control, which is the people.” Alfonso Grimaldo
- “Sunshine is the greatest disinfectant.” Justice Louis D. Brandeis
- “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” United States Supreme Court in *NLRB v. Robbins Tire Co.*, 437 U.S. 214, 242 (1978)
- “Without publicity, no good is permanent; under the auspices of publicity, no evil can continue.” Jeremy Bentham, 1768
- “The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.” Patrick Henry
- “Government ought to be all outside and no inside....Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety.” Woodrow Wilson
- “Examining public records should never require extraordinary legal or bureaucratic efforts. When it does, it’s usually a red flag.” Don Baldwin
- “Information is the currency of democracy.” Thomas Jefferson
- “Nothing so diminishes democracy as secrecy.” Ramsey Clark
- “Secrecy is the freedom zealots dream of: no watchman to check the door, no accountant to check the books, no judge to check the law. The secret government has no constitution. The rules it follows are the rules it makes up.” Bill Moyers
- “The very word ‘secrecy’ is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths, and to secret proceedings.” John Fitzgerald Kennedy
- “Power corrupts, and there’s nothing more corrupting than power exercised in secret.” Daniel Schorr

# Outline of a FOIA Request

## NAME & CONTACT INFO FOR REQUESTER

### DATE

AGENCY, Attention: [Name if available]

Via AGENCY's Online Public Access Link [hyperlink]

**Re:** Freedom of Information Act Request for BRIEF DESCRIPTION OF RECORDS SOUGHT (ONE SENTENCE TOPS)

To Whom It May Concern:

**[Brief intro]** Describe who you are or who your client is, if it is germane to anything below. If you represent a media organization, indicate that the organization “gathers information of interest to the general public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” *See* 5 U.S.C. § 552(a)(4)(A)(ii).]

### **[Background for Request]**

Include any relevant and necessary background material. This may include facts about the materials being sought, which should be fully sourced and cited.

### **Request**

[DEFINITIONS—only if they are necessary! E.g., “For the purposes of this request, “AGENCY NAME” means the Agency as a whole, any officer, official, employee, or agent of the Agency, and any subordinate components . . . “Communications” means . . . Etc.]

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and the implementing regulations of your agency, please provide the following records:

DESCRIBE RECORDS SOUGHT

## **Guidance Regarding the Search and Processing of Requested Records**

Please search all locations, agency departments, and systems likely to have responsive records, regardless of format, medium, or physical characteristics. Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records.

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably searchable non-exempt portions of the requested records. Please describe any redacted, deleted or withheld material in detail and specify the statutory basis for the denial in addition to the reasons that statutory basis applies. Please also indicate whether and how the “foreseeable harm” standard applies to each redaction.

If a request is denied in whole, please state the specific reason(s) why it is not reasonable to segregate portions of the record for release. Please also separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest.

### **Request for Fee Waiver**

[REQUESTER is a member of the media, and thus, should not be charged search or review fees. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II).]

[And/Or] A fee waiver is required here because “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *See* 5 U.S.C. § 552(a)(4)(A)(iii). ARGUMENT.

### **Request for Expedited Processing**

REQUESTER requests expedited processing of this request. FOIA provides for “expedited processing of requests for records” upon the showing of a “compelling need.” 5 U.S.C. §552(a)(6)(E)(i)(II). When the person requesting the information is “primarily engaged in disseminating information, the urgency to inform the public concerning actual or alleged Federal Government activity” constitutes a “compelling public need” for expedited processing. §552(a)(6)(E)(v)(II). ARGUMENT.

### **Conclusion**

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of the records, please do not hesitate to contact REQUESTER to discuss this request at CONTACT INFORMATION. By working together at the outset, we can decrease the likelihood of costly and time-consuming litigation in the future.

Signature & contact info

## Questions to Consider Before Drafting a FOIA Request

- Questions: what are you trying to figure out? What do you want to know?
- Are your questions answerable through records that are already publicly available? If so, stop here and go find the records. If not, proceed.
- Types of records: What types of records will help you answer your questions? Remember, a FOIA request is not like an interrogatory or deposition question; it's more like a request for production of documents.
- Location of records: which agency or agencies might have the records that will help to answer your questions? Is there a particular department/unit/component within the agency likely to have custody of the records?
- Search parameters: considering your request *from the perspective of a person looking for responsive records*, what guidance can you provide to help identify responsive records?
  - Timeframe: what is the timeframe for the records?
  - Custodians: what individual or entity within the agency might possess the records?
  - Individuals involved in creating or receiving the records: are there particular individuals who might be involved in the records, as authors, recipients, etc? Email domain names?
  - Search terms or keywords?
- Key: read the request from the perspective of the person charged with locating the records!!
- Standard: request must “reasonably describe” the records sought. “A description “would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.” *Dale v. I.R.S.*, 238 F. Supp. 2d 99, 104 (D.D.C. 2002) (citation omitted). “The linchpin inquiry is whether the agency is able to determine precisely what records are being requested.” *Nat'l Sec. Couns. v. CIA*, 898 F. Supp. 2d 233, 278 (D.D.C. 2012), *aff'd*, 969 F.3d 406 (D.C. Cir. 2020) (internal quotations and citations omitted).
- How much background information should the request include?
- Why are you making the request? How will you use the agency's response? How will you use the records when you get them?



## Summary of FOIA Exemptions and Their Limits

### I) EXEMPTIONS

The FOIA at 5 U.S.C. §552(b) 1-9 describes nine kinds of material that are exempt from disclosure. From [https://www.justice.gov/d9/what\\_are\\_the\\_9\\_foia\\_exemptions.pdf](https://www.justice.gov/d9/what_are_the_9_foia_exemptions.pdf), here's an overview:

- Exemption 1: Information that is classified to protect national security.
- Exemption 2: Information related solely to the internal personnel rules and practices of an agency.
- Exemption 3: Information that is prohibited from disclosure by another federal law.
- Exemption 4: Trade secrets or commercial or financial information that is confidential or privileged.
- Exemption 5: Privileged communications within or between agencies, including those protected by the: 1. Deliberative Process Privilege (provided the records were created less than 25 years before the date on which they were requested) 2. Attorney-Work Product Privilege 3. Attorney-Client Privilege 4. Presidential Communications Privilege
- Exemption 6: Information that, if disclosed, would invade another individual's personal privacy.
- Exemption 7: information compiled for law enforcement purposes that:
  - 7(A) Could reasonably be expected to interfere with enforcement proceedings, or
  - 7(B) Would deprive a person of a right to a fair trial or an impartial adjudication, or
  - 7(C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy, or
  - 7(D) Could reasonably be expected to disclose the identity of a confidential source, or
  - 7(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
  - 7(F) Could reasonably be expected to endanger the life or physical safety of any individual.
- Exemption 8: Information that concerns the supervision of financial institutions.
- Exemption 9: Geological information on wells.

### (II) LIMITS

Three important notes about limits on an agency's use of exemptions:

- (a) The Agency has the burden of showing the FOIA exemption applies. Each exemption has elements, and all elements must be shown. Before appealing, review the caselaw for the relevant exemption. Helpful resources for understanding how courts think about each exemption:
  - <https://foia.wiki/wiki/Exemptions>

- <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>
- <https://www.justice.gov/oip/court-decisions-overview>
- [https://foiaproject.org/issue\\_search/](https://foiaproject.org/issue_search/)

(b) The Agency has the burden of showing the “foreseeable harm” standard is met, as set forth in 5 U.S.C. 552 (a)(8)(A):

An agency shall –

- (i) withhold information under this section only if –
- (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
  - (II) disclosure is prohibited by law;
- and
- (ii)
- (I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and
  - (II) take reasonable steps necessary to segregate and release nonexempt information . . .
- (c) The agency must attempt to segregate and disclose non-exempt material. *See* above, plus requirement that follows exemption (b)(9):

“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

## **Questions to Consider Before Filing an Administrative Appeal**

- Have you followed up with the agency to try to resolve your differences?
- Which records/redactions are worth pursuing and which are not?
- Do you plan to litigate?
- How good are the issues?

## **Questions to Consider Before Filing a FOIA Lawsuit**

- How badly do you want the records?
- Is the original FOIA request well-drafted? If necessary, has it been narrowed effectively?
- Have you followed agency FOIA regs and satisfied administrative exhaustion requirements, including a well-drafted administrative appeal, if applicable?
- Have you made a good-faith effort to work with the agency, documented in a clear paper trail?
- How good is the issue? Can you show the agency has (1) improperly (2) withheld (3) agency records? *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136. 150 (1980).
- Where should you file?

## Online FOIA Resources

### Information about Making Requests under the Federal Freedom of Information Act

- The [FOIA statute](#)
  - <https://www.justice.gov/oip/freedom-information-act-5-usc-552>
- [The FOIA Project](#)
  - <https://foiaproject.org/>
- [Department of Justice Guide to the Federal Freedom of Information Act](#),
  - <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>
  - <https://www.justice.gov/oip/foia-resources>
  -
- [Reporters Committee for Freedom of the Press FOIA Wiki](#),
  - [https://foia.wiki/wiki/Main\\_Page](https://foia.wiki/wiki/Main_Page)
- [Transparency 101: Judicial Watch FOIA Handbook](#)
  - <https://www.judicialwatch.org/documents/transparency-101-judicial-watch-foia-handbook/>

### Information about Making Requests under State Open-Records Laws

- [State by state info from the National Freedom of Information Coalition](#)
  - <https://www.nfoic.org/state-freedom-of-information-laws/>
- More state-by-state guidance
  - [Open Government Guide from Reporters Committee for Freedom of the Press](#),  
<https://www.rcfp.org/introduction-to-the-open-government-guide/>
- American Oversight's [Tips for Filing a Public Records Request in Your State or City](#)
  - <https://www.americanoversight.org/tips-for-filing-public-records-requests-in-your-state-or-city>

### Information about Federal Agencies

- [A-Z Index of U.S. Government Departments & Agencies](#)
  - <https://www.usa.gov/agency-index>
- [Code of Federal Regulations](#)
  - <https://www.ecfr.gov/>
- [Searchable data base of FOIA metrics for all federal agencies:](#)
  - <https://www.foia.gov/data.html>

### A Few Federal Agency FOIA Portals and some other links

- FDA Online FOIA info, as an example of online agency links
  - [FDA's "FOIA How-To" Page](#)
  - [FDA's FOIA Submission Portal](#)
  - [FDA's Electronic Reading Room](#)
  - [FDA FOIA Logs](#)
- [Federal Spending Database - USAspending.gov](#)
- [Grants.gov](#), <https://www.grants.gov/web/grants/search-grants.html>