

Another Way:

Mandatory Declassification Review

Another way to obtain documents from federal agencies is through a Mandatory Declassification Review request. Through the MDR process, any individual may ask an agency to review a classified record for declassification and release, regardless of its age or origin. The MDR process differs from the FOIA process in many respects. This chapter will help you determine which type of request is most appropriate for your situation.

WHAT IS MANDATORY DECLASSIFICATION REVIEW?

Mandatory Declassification Review is another route to the declassification and release of security-classified agency records. Under the terms of EO 12958, as amended, any member of the public may ask an agency to review a record through the MDR process.

The process of filing and following-up on an MDR request is similar in many ways to the FOIA process. First a requester writes to an agency requesting that certain documents be reviewed under the terms of EO 12958. The agency then has one year to determine whether those documents may be released to the public. If the agency does not release the documents, or if the requester is unsatisfied with the results of that review, the requester may appeal to the agency.

If the requester is unsatisfied with the results of the second agency review, or if the agency misses certain deadlines in responding to an initial request or an administrative appeal, the requester may appeal to the Interagency Security Classification Appeals Panel (ISCAP). ISCAP is a six-member body, created by EO 12958, which consists of senior-level representatives from the Department of State, Department of Defense, Department of Justice, the Central Intelligence Agency, the National Archives and Records Administration, and the National Security Council. In addition to deciding MDR appeals, ISCAP also hears classification challenges from government officials and approves automatic declassification exemptions.

The added review by ISCAP, while often providing a degree of impartiality in the MDR process, comes with a trade-off. Unlike requests filed under the FOIA, MDR requests cannot be reviewed by a federal court; the requester waives the right to litigate when choosing the MDR process.

SHOULD I USE MDR OR FOIA?

MDR requests are for security classified records. In deciding whether to file a FOIA or an MDR request, the first question you need to ask is, “Is the information subject to MDR?” If the information is security classified and the request is narrowly focused, then you need to determine whether you are more likely to get the information using the FOIA or MDR.

Unlike the FOIA process, MDR only applies to security classified records, or those records that are protected for national security reasons under EO 12958, as amended. EO 12958 establishes how information is classified, what type of information may be classified, who has the authority to classify it, and how it may be reviewed for de-classification.

FIGURE 4.1: COMPARISON OF FOIA AND MDR	
FOIA	MDR
Statutory	EO 12958, as amended
Classified and unclassified information	Security classified information only
Can request specific documents or documents related to more general subjects	Request must be either for specific documents or a narrow range of documents the agency can locate with minimal effort
Request → Appeal → Litigation	Request → Appeal → ISCAP Appeal
Twenty business days to respond (request and appeal)	One year to respond to request (180 days for agency appeal)

If the document is not classified, you can only request it through the FOIA. All classified documents are subject to the MDR process *with the exception of*: information originated by the president, vice president, or their White House staff; information originated by committees, commissions, or boards appointed by the president; other entities within the Executive Office of the President that solely advise and assist the incumbent president; and information classified under the Atomic Energy Act of 1954, as amended. As with the FOIA, Congress and the courts are not subject to the MDR process.

In reality, you may not always know whether the records you seek are classified. In this case, it may be safer to submit a FOIA request. Agencies are not obligated to review or release unclassified records that they locate in response to an MDR request.

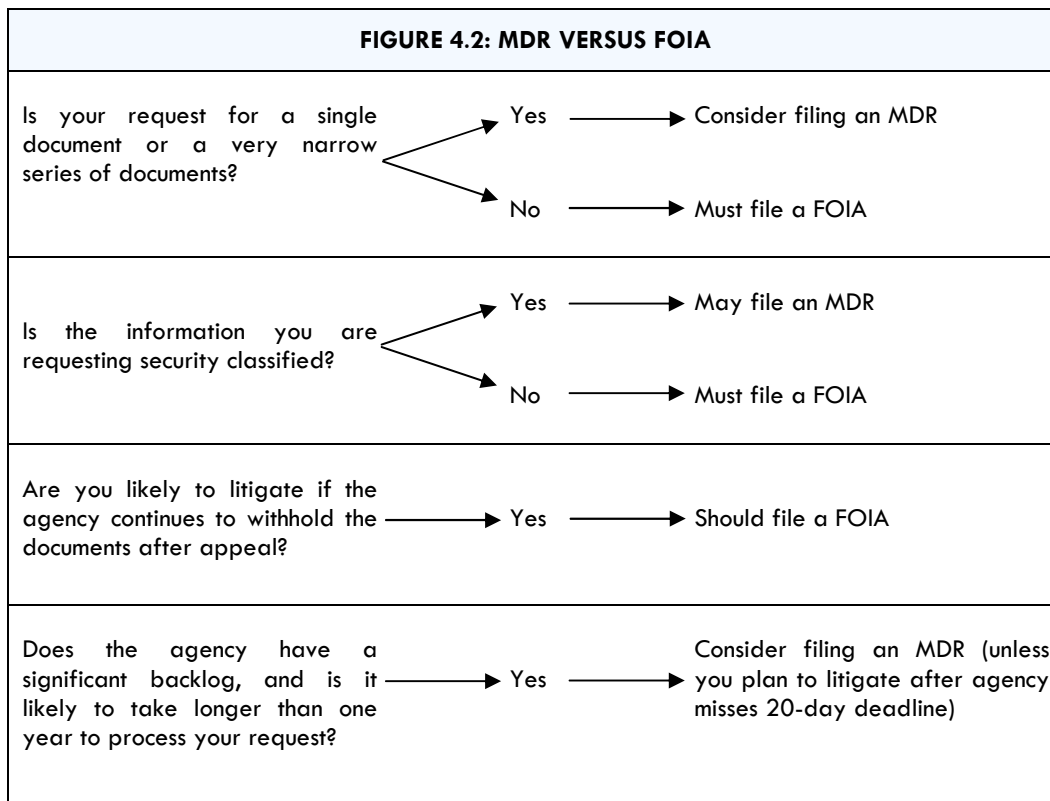
MDR requests must target specific documents. Unlike a FOIA request, which can cover records related to a general subject or issue, an MDR request must contain enough specific information about a particular document or documents so as to enable the agency to locate the material with a minimal amount of time and effort. For example, you can request specific items by document title or document number.

Additionally, you may ask for a very narrow range of documents, such as all classified cables on a specific topic from a particular embassy to the Department of State during a limited time period. The MDR process does not provide for research by the agency, however, so if you are unable to identify an individual document or very specific set of documents, it would be better to file a FOIA request.

MDR requests may take longer. In contrast to the much shorter deadlines in the FOIA, agencies have one year to send a final response to an MDR request and 180 days to respond to an MDR appeal. If an agency misses one of these deadlines, the requester may skip the rest of the agency process and appeal directly to ISCAP. However, the appeal must be submitted within

sixty days after the agency’s response was due. If the appeal is not submitted within sixty days, the requester must wait until the agency finishes processing the request.

MDR requests cannot be litigated, but ISCAP exists for second appeals. If you are not likely to litigate for the documents, then you may want to consider filing an MDR in order to have the option of appealing to ISCAP, which has a consistent record of impartiality and regularly reverses agency decisions to withhold information. Similarly, if the agency has a significant backlog and would likely take longer than one year to respond to a FOIA request, you may want to consider filing an MDR in order to be able to appeal directly to ISCAP once the agency misses the response deadline. At some agencies, this can hasten the release of records.



FILING AN MDR REQUEST

Like a FOIA request, an MDR request must be submitted in writing to the agency. At most agencies, MDR requests are sent to the same office as FOIA requests; however, some agencies have separate MDR contact information. You can find information on where to send MDR requests at each agency on NARA’s Information Security Oversight Office’s Web site: <http://www.archives.gov/isoo/contact/mdr-contact.html>.

To draft your MDR request:

- Begin your letter by stating, “This is a request for a mandatory declassification review (MDR), under the terms of EO 12958, as amended, of the following.”
- Specifically describe the document(s) you are looking for. When possible, include a title, date, and document number.
- Ask that the agency release “all reasonably segregable material.”
- Include your contact information in case agency staff have questions or difficulties locating the document.

SAMPLE LANGUAGE: MDR REQUEST

This is a request for a mandatory declassification review (MDR), under the terms of Executive Order 12958, as amended, of the following:

[INSERT SUBJECT OF REQUEST]

If you regard these documents as potentially exempt from disclosure requirements, I request that you nonetheless exercise your discretion to disclose them. Please release all reasonably segregable nonexempt portions of documents.

HOW DO I APPEAL AN MDR DENIAL?

After reviewing a document retrieved in response to an MDR request, the agency will either release it in full, release a redacted version, or withhold the document in full. In instances where all or part of a document is withheld, the agency will indicate which of the classification categories listed in EO 12958, as amended, apply to the information (see fig. 5.3 for classification categories and see app. 7 for the full text of EO 12958).

❖ Agency Appeals

You have the right to appeal an agency’s MDR decision whenever the agency denies your request and/or withholds information. The agency will include information on where to send the appeal and the appeal deadline in its response letter.

Your MDR appeal should include arguments and, when possible, supporting documents, and information as to why the information should no longer be classified. (See chap. 5 for appeal strategies.)

❖ ISCAP Appeals

Although you do not have the right to sue the agency in federal court, you can file an additional appeal with ISCAP if the agency continues to withhold information after you have appealed at the administrative level. The agency’s response to your appeal will include information on how to appeal to ISCAP as well as the deadline (sixty days from the appeal response). Be sure to

provide background on your request in your ISCAP appeal and attach copies of all correspondence, including the original request. You can make the same arguments as in the administrative appeal about why you believe the requested document(s) no longer require classification under EO 12958, as amended.

FIGURE 4.3: MDR DEADLINES

<i>Initial Request</i>	If agency does not respond in one year	Appeal to ISCAP <i>within 60 days</i>
<i>Admin. Appeal</i>	If agency does not respond in 180 days	Appeal to ISCAP <i>within 60 days</i>