

Pen to Paper:

Writing a FOIA Request

Having conducted research to determine what information to request from which agencies, you are ready to draft a FOIA request. This chapter will discuss some of the essential elements of a FOIA request letter, as well as other useful tips for the FOIA requesting process. For additional guidance, a sample request letter template is provided in appendix 3.

DRAFTING A FOIA REQUEST

ESSENTIAL COMPONENTS OF A FOIA REQUEST LETTER

A FOIA request must be in writing and must be written in English. You cannot make a FOIA request over the phone. You should follow the guidelines below to determine what to include in your request letter:

❖ **Statement of Request**

The first sentence of your request letter should state, “Pursuant to the Freedom of Information Act (FOIA), I hereby request the following”

❖ **Subject of the Request**

When drafting the subject of your request, you should:

Be clear and specific. Your FOIA request must reasonably describe the records you are asking for, which means that the text of your request must allow an agency employee to locate the record(s) with a reasonable amount of effort. Assume the FOIA officer is not familiar with your topic. Many agencies search for documents electronically, so you should use keywords and phrases and include in your request several related keywords, if appropriate. For example, an agency may not be able to search for “escalation of tension,” but could search for “military assistance.”

Make sure your request is reasonable in scope. Agencies are not required to process unreasonably broad requests or requests that require them to do extensive research or create documents. An example of an unreasonable request would be one request for all documents related to Saddam Hussein at the Department of Defense, since the search would likely generate millions of hits.

Provide a date range for records or a date of the event you are researching. Providing a date helps the agency narrow the scope of the request and locate the documents you are most

interested in. If you do not provide a date range, the agency will search all of its records, which could generate hundreds or thousands of pages. This could lead to lengthy delays, and the agency could contact you to narrow the request. The agency can also reject your request for being unreasonably broad.

Provide accurate titles and full names, and include any news stories discussing the subject of your request. In other words, assist agency employees in doing the search by providing relevant pieces of information. If you are aware of common alternate spellings for names or other key words, you may consider including them to aid in the search. News stories or other supporting materials will help the person processing the request to understand its context and may provide additional search terms or other helpful details. Copies of the articles can be appended to the request.

Keep your request brief. Include necessary supporting information, but avoid narratives or excessive supporting materials that are duplicative or will confuse agency staff.

Specify whether you want the records in paper form or electronically. Agencies are required to release records in electronic form (for example, on a CD-ROM or by e-mail) when requested, if they can reasonably do so. However, you may find that some agencies, particularly those that handle classified information, cannot comply with a request for electronic records.

❖ **Fee Status and Fee Waivers**

Under the FOIA, agencies can charge reasonable fees for the cost of searching for records, reviewing them for release, and reproducing them. Actual search, review, and duplication fees vary by agency. Search and review fees can range from \$8 to \$45 per hour, and duplication fees can be \$0.10 to \$0.35 per page. Agencies cannot require a requester to make an advance payment unless the agency estimates that the fee is likely to exceed \$250 or if the requester previously failed to pay fees. Generally, you will be asked to pay the fees incurred after the agency completes the processing of your request.

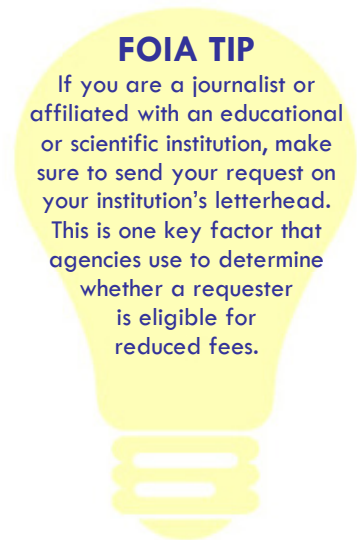
The FOIA specifies five different fee categories; some categories of requesters are eligible for reduced fees (see fig. 3.1):

- **Commercial:** Companies or individuals requesting information for a commercial, trade, or profit-seeking purpose, including for use in litigation. Commercial requesters are required to pay fees for search, review, and duplication.
- **Educational Institution:** Public or private preschools, elementary, or secondary schools, and institutions of higher education, professional education, or vocational education that operate a programs of scholarly research. Educational requesters are only required to pay duplication costs, and are entitled to the first 100 pages without charge.

Category	Agency can charge fees for
Commercial	<ul style="list-style-type: none"> • Search/review • Copies
Educational Institution	<ul style="list-style-type: none"> • No fees for search/review • First 100 pages of copies free
Noncommercial Scientific Institution	<ul style="list-style-type: none"> • No fees for search/review • First 100 pages of copies free
News Media	<ul style="list-style-type: none"> • No fees for search/review • First 100 pages of copies free
All Other	<ul style="list-style-type: none"> • Two hours free search/review • First 100 pages of copies free

- *Noncommercial Scientific Institution:* Noncommercial institutions that conduct scientific research not intended to promote a particular product or industry. Scientific requesters are only required to pay duplication costs, but are entitled to the first 100 pages without charge.
- *Representative of the News Media:* Defined as “[a]ny 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.”² News media include traditional print and broadcast media as well as freelance journalists, book authors, and Internet and other new media when they fit this definition. News media requesters are only required to pay for duplication costs, but are entitled to the first 100 pages without charge.
- *All Other Requesters:* Requesters who do not fit into any of the above categories. These requesters are persons who are not commercial, educational, scientific, or news media requesters. They are entitled to two hours of search time and 100 pages of duplication without charge, but are required to pay any additional search and duplication costs.

If you are seeking news media, educational, or scientific institution status, it is important to indicate in your initial request why you fall into a preferred fee category. Provide information about the intended professional scholarly or journalistic uses of the information you are requesting. If possible, the request should be on the letterhead of the institution you represent. List any relevant publications, including books, articles, dissertations, publication contracts or letters of intent or interest, or similar evidence of your ability to disseminate the information the agency releases. State that the materials are not requested solely for a private, profit-making, or commercial purpose.



Public Interest Fee Waivers

Under the FOIA, it is possible to have all fees (including duplication) waived by the agency if the material requested (1) “is likely to contribute significantly to public understanding of the operations or activities of government” and (2) “is not primarily in the commercial interest of the requester.”³ If you believe your request fits these criteria, you should make your complete case for a fee waiver in your request letter.

- State clearly that you are seeking a public interest fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii).
- Be sure to describe the scholarly, historical, or current public interest in the material requested.
- Identify specific operations or activities of government to which the request relates and why the information will contribute to an understanding of those activities and operations.
- State why the public in general would be interested in the information you are requesting and how the information will contribute *significantly* to public understanding of government operations or activities.

❖ **Commitment to Pay Fees**

You also need to let the agency know how much you are willing to pay in fees. Most agencies require that you commit to a minimum of \$25, but if you know your request may involve a lot of records, you may want to commit to a higher amount initially. If it appears that the actual fees will exceed the amount of your commitment, the agency will contact you to either confirm your willingness to pay more or ask you to narrow the scope of your request in order to reduce the fees.

❖ **Contact Information**

At the end of your request, be sure to include a phone number, fax number, and/or e-mail address the agency can use to contact you with questions regarding your request.

OTHER COMPONENTS OF A FOIA REQUEST LETTER

❖ **Arguments for Release**

For an ordinary FOIA request, you do not need to justify your request or in any way demonstrate that you are entitled to the records you are seeking. However, there are several types of general arguments that you may want to include in your initial letter, depending on the circumstances:

- You should state that if the agency regards any of the documents as potentially exempt from disclosure under the FOIA, the agency nonetheless should exercise its discretion to disclose them.
- To pre-empt exemption claims that you foresee the agency making, you may include brief arguments, for example, that release of the documents is in the public interest or that the passage of time has reduced potential harm so disclosure is warranted (see pp. 33-35).
- Under the FOIA, agencies are required to release all segregable, nonexempt information within a document. This is referred to as the “segregability requirement,” and it prevents agencies from withholding entire documents if only a portion is exempt. In your request letter, you should remind the agency that the FOIA requires the release of all reasonably segregable portions of records.

❖ **Supporting Documents and Additional Information**

In many cases, the FOIA officer who processes your request is not a subject matter expert, so you should not assume he or she knows anything about the subject beyond what you have included in your request letter. You should attach any information that may help agency staff to locate the documents, such as copies of articles or other documents that reference the document(s) you are seeking or the subject, event, or person you are researching.

You also may include a list of offices or bureaus within the agency where you think the documents might be located and request that the agency search the files of those offices. If you believe the information you are seeking may be in e-mail or another electronic format, you may want to include a sentence specifically requesting that the agency search its e-mails and electronic files.

❖ Requests For Privacy Information

If you are seeking records about yourself, you should submit a Privacy Act request, not a FOIA request. While a Privacy Act request is in many ways similar to a FOIA request, there are some key differences, and it often is processed by a different office than the FOIA office. You should check each agency's Web site for information on how to submit a Privacy Act request.

If you are requesting information about another individual, some of it may be protected personal information. Therefore, you must either submit proof of death if the person is deceased or, if he or she is still alive, a privacy waiver and proof of identity. Proof of death can include an obituary or death certificate. An example of a privacy waiver can be found on the FBI's Web site at <http://foia.fbi.gov/waiver.pdf>.

❖ Expedited Processing

The FOIA's expedited processing provision, added in 1996, is intended to help journalists who need to get information quickly for publication and others who have an urgent need for records. Expedited processing is available in cases where the requester can show "compelling need" for the information, as defined in the statute, and in other situations determined by the agencies (see fig. 3.2).

When should I request expedited processing?

Congress intended expedited processing to be an exceptional option for matters that are truly urgent, not simply an opportunity to circumvent delays in ordinary circumstances. Because granting expedited processing means that some requests will be processed quickly at the expense of others, agencies require a strong showing that one or more of the criteria are met. Agencies rarely grant expedited processing. Therefore, it is important to request expedited processing only when you can reasonably argue that your request is urgent and falls within one of the grounds for expedited processing.

Before filing a request for expedited processing, look at the agency's FOIA regulations (see fig. 3.3) to determine which grounds that agency will consider. All agencies grant expedited processing based on the following statutory grounds:

- If failure to obtain the requested records expeditiously poses an imminent threat to the life or physical safety of an individual.
- If there is an urgency to inform the public about actual or alleged government activity (for requests made by persons primarily engaged in disseminating information, like journalists, authors, and scholars).

Other common grounds for expedited processing (adopted by some agencies in their FOIA regulations):

FIGURE 3.2: GROUNDS FOR EXPEDITED PROCESSING

All Agencies:

- Imminent threat to life or physical safety of an individual
- Urgency to inform the public about government activity

Some Agencies:

- Loss of substantial due process rights of any person
- Matter of "widespread and exceptional media interest" involving "questions about the government's integrity which affect public confidence."

- If failure to get the requested records in an expedited fashion will result in the loss of substantial due process rights of any person.
- If the request involves a matter of “widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.”⁴

FIGURE 3.3: HOW TO FIND AGENCY FOIA REGULATIONS

1. Locate the agency’s most recent FOIA Annual Report (either on the agency’s FOIA Web site or on the DOJ site at http://www.usdoj.gov/oip/04_6.html).
2. Section XI of each annual report should contain a Web link and/or citation to the FOIA regulations. Follow the link, or access the regulations by citation at <http://www.gpoaccess.gov/cfr/retrieve.html>.

Note that several agencies have not updated their regulations to cover expedited processing and therefore do not provide any grounds for expedited processing. If this is the case, simply base your request on one of the two statutory grounds.

How do I request expedited processing?

First, review the agency’s FOIA regulations (see fig. 3.3) or the FOIA handbook on the agency’s Web site to determine what procedural requirements apply to a request for expedited processing.

Some agencies require a request for expedited processing to be made at the time of the initial request, while others allow requesters to ask for expedited treatment any time after the initial FOIA request is filed. If possible, you should make the case for expedited processing when you first submit your FOIA request. You should also try to send an expedited processing request to the correct agency component, rather than to the central FOIA processing office, for faster processing.

Then, draft a statement justifying expedited processing and certification.

- Select the most appropriate ground(s) for your particular case from the statute and/or the agency’s regulations.
- Describe the circumstances that you believe qualify your request for expedited treatment. Explain in as much detail as possible how the documents you are seeking will prevent the specific harm—such as death or injury to a person or loss of due process—or how they will inform the public about significant government activity. It is very important to connect a person, event, or public interest to the specific documents you are requesting and explain how getting the documents quickly will prevent the harm or fulfill the need for which you are arguing. You may cite news articles demonstrating public concern about impending government actions or decision-making processes to bolster your case.

SAMPLE LANGUAGE: “URGENCY TO INFORM THE PUBLIC”

I hereby seek expedited processing of this request because there is “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552. I urgently need these documents to inform the public about _____. The records sought here concern actual or alleged government activity because _____.

- Explain how you will disseminate the information to show that expediting the release of records to you will serve the purpose of the statute because you are able to get the information to the public.
- Include a certification of truth.

SAMPLE LANGUAGE: CERTIFIED STATEMENT

I certify that the statements contained in this letter regarding the alleged activity and public concern are true and correct to the best of my knowledge.

What happens after I request expedited processing?

Agencies are required to determine whether to grant expedited processing and respond to the requester within ten days. When expedited treatment is granted, the agency must process the request and provide documents “as soon as practicable.” Although there is no specific time limit in the statute, courts have determined that expedited requests should be processed in less than twenty business days. The agency must at least move your request ahead of other non-expedited requests in the queue and then process it as quickly as possible.

If you are denied expedited processing, you may appeal that decision immediately through the agency’s ordinary appeals process (see chap. 5). If you do not appeal the determination, your request will be processed as part of the agency’s regular queue of requests.

Granting expedited processing does not mean the agency will release the requested documents, but only that the agency will strive to process the request as quickly as possible. The agency will still issue a final response letter with appeal rights for any withheld information.

SUBMITTING YOUR FOIA REQUEST

All agencies accept requests by postal mail. Many agencies also accept requests sent by fax or e-mail. Some agencies, such as the Departments of State, Defense, and Education, have online submission forms.

When preparing to draft your FOIA request, you should check each agency’s FOIA Web site or regulations for information on how to submit your request as well as for any additional information the agency may require (see app. 5 to locate agency Web sites).

Make sure to clearly identify your letter as a FOIA request on the envelope or fax cover sheet so that it can be easily routed within the agency (for example, “Attention: Freedom of Information Act Office”).

KEEPING TRACK OF YOUR REQUESTS

Once you have filed your request(s), it is important to keep track of certain relevant information, including the date sent, agency or components, subject(s), agency tracking numbers, and date

and nature of any subsequent agency correspondence, including phone and e-mail correspondence. This information may be necessary for follow-up inquiries, appeals, and litigation and will help you avoid sending duplicate requests.

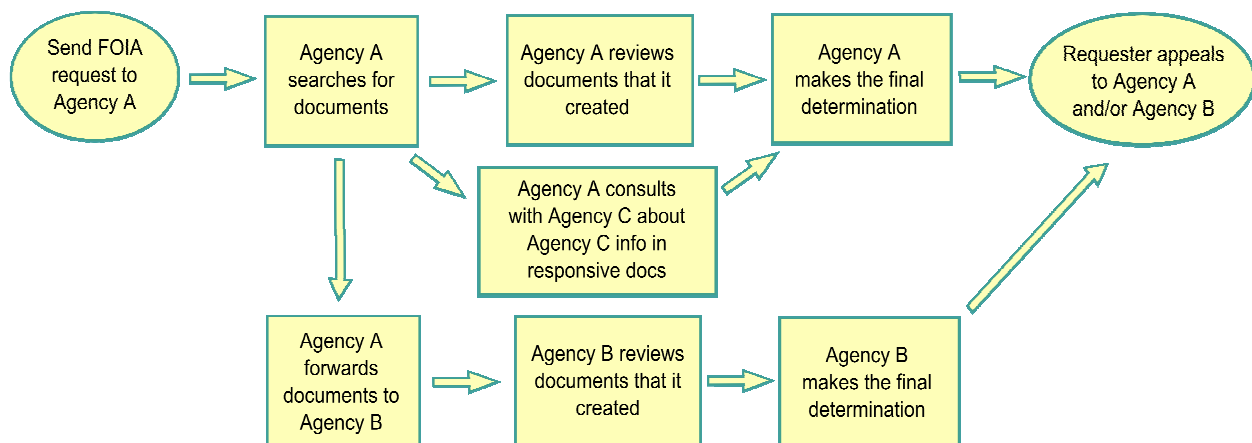
WHAT TO EXPECT AFTER SUBMITTING YOUR REQUEST

After you submit your FOIA request, the waiting game begins. Under the law, agencies are required to issue a final determination within twenty business days. But many agency FOIA offices have significant backlogs of pending requests. Additionally, some documents may contain information from another agency or office within the agency that must be referred out for a determination on whether the information can be released, which may cause further delays in processing. As a result, most agencies do not respond to ordinary requests within the twenty business day time limit.

In reality, the twenty business day time limit does not function as a clear deadline for the agency to process your request. The FOIA allows agencies to extend the deadline up to ten days in certain “unusual circumstances.” Under the 2007 FOIA amendments, the twenty-day time period may not start until ten days after your request arrives at the agency if it has to be re-routed to the proper component. The time limit may be further extended if the agency has to contact the requester to clarify the request or fee issues.

What you can generally expect within twenty business days is a letter acknowledging your request and assigning it a tracking number or case number that the agency will use to identify your request. In this letter, the agency may claim a ten-day extension for “unusual circumstances.” Keep in mind that this acknowledgment letter does not constitute a “response” that satisfies the time limit in the statute. Unfortunately, not all agencies send an acknowledgment letter, responding to you only after they have completed the processing of your request.

FIGURE 3.4: UNDERSTANDING FOIA REQUEST PROCESSING AT THE AGENCY



The process within the agency may be different depending on the nature of your request (see fig. 3.4). The FOIA officer who is assigned to your request will either initiate a search for documents or ask a relevant agency office or component to search for responsive records. After the search, the FOIA officer or other agency staff will review the relevant documents to determine whether any exemptions apply. If a document contains classified information, appropriate agency officials will review the document line-by-line to determine whether the information is properly classified and therefore can be withheld.

As part of the review process, the agency may need to communicate with other agencies regarding responsive records. If the search identifies documents that contain information from another agency (referred to as “agency equities”), the first agency will refer the records and ask the second agency to determine what can be released. This process is internal, so the original agency will make the final determination and respond directly to you. In some cases, when the agency finds documents or files that belong to another agency, it will forward the documents, and the second agency will respond directly to you regarding those documents. In this situation, you may receive multiple responses to one request from several agencies.

How long it will take an agency to issue a final response and/or provide you with documents depends on the complexity of your request, whether it involves classified information, whether the document includes information that must be reviewed by another agency or component, and the extent of the agency’s FOIA backlog. In some cases, the agency may contact you to clarify or narrow the scope of your request.

The agency’s final response will most likely consist of one of the following:

- Documents released in full.
- Documents released in part (i.e., portions redacted).
- Documents withheld in full.
- The agency found no documents responsive to your request.
- A “Glomar” response, in which the agency refuses to either confirm or deny the existence of records.
- Rejection of the request for a procedural reason that typically can be corrected.

Any time an agency withholds information, the agency must state in its response letter which exemption(s) it is claiming (see fig. 3.5). You will have a right to appeal the agency’s denial. The response letter from the agency must include information on how and when to administratively appeal an adverse determination. (See chap. 5.)

FIGURE 3.5: SUMMARY OF THE FOIA EXEMPTIONS (5 U.S.C. § 552(b))

- b(1)—National security information
- b(2)—Internal personnel rules and practices
- b(3)—Information exempt under other laws
- b(4)—Confidential business information
- b(5)—Privileged inter- or intra-agency communications
- b(6)—Personal Privacy
- b(7)—Law Enforcement Records
- b(8)—Financial Institutions
- b(9)—Geological Information

FOLLOWING UP ON YOUR REQUEST

In December 2005, President George W. Bush directed agencies to institute a new customer service structure to help FOIA requesters navigate the system. FOIA Customer Service Centers are now the initial point of contact for requesters to follow up on and track the status of their requests. FOIA Public Liaisons are supervisory officials whom a requester may contact if he or she does not get a satisfactory response from the Customer Service Center.

It is important that you establish and maintain contact with the agency after submitting your request. The agency's acknowledgment letter often will identify a point-of-contact or case officer for your request. If not, you can locate contact information for the Customer Service Center on the agency's FOIA Web site or on the Department of Justice Web site (see app. 5).

After a reasonable period of time (at least twenty days), you should call and inquire about the status of your request. This effort will indicate to the FOIA officer your continued interest. The FOIA officer may also be able to advise you at that time of estimated fees, clarify your request, and warn you about possible delays.

Under the 2007 amendments, agencies must establish a tracking system to inform requesters about the status of their requests by phone or online and provide an estimated date of completion for each request. Check the agency Web site first—some agencies now have online status inquiry forms where you can enter your tracking number and determine the status of your request. Make sure to keep your tracking number and reference it in any follow-up correspondence.

Beyond reasonable follow-up, you should not harass your FOIA officer with too many calls or letters. Your request is far from the only one the agency has received. At some agencies, program or policy officials (not dedicated FOIA staff) may handle FOIA requests, and your request is just one of many tasks for which they are responsible.

Keep track of all substantive telephone or electronic communications about your request, in addition to written correspondence with the agency, to ensure you have a complete record of your FOIA case for possible appeals or litigation.

FOIA CHECKLIST

- Am I prepared to file?** Have you checked whether the information you are seeking is already publicly available?
- Where should I file?** Have you determined all the agencies likely to have responsive documents? Have you determined whether this request needs to be sent directly to a specific agency office or component?
- Have I included all the key elements in my request letter?**
 - Is the request in writing and does it contain the statement “Pursuant to the Freedom of Information act (FOIA), I hereby request the following . . .”?
 - Is the subject of the request focused and clearly written?
 - Did you provide a date range for the records you are seeking or a date of the event or issue you are researching?
 - Did you provide accurate titles and full names and include any news stories or other supporting materials relevant to your request?
 - Did you include any arguments for release and remind the agency to release all reasonably segregable material?
 - Did you specify what fee category you belong in and include a commitment to pay fees? If you are asking for a public interest fee waiver, did you include all relevant arguments and supporting materials?
 - If you are requesting expedited processing, did include all relevant arguments and supporting materials? Did you include the certified statement?
 - Did you include contact information (address, e-mail, phone number) so that the agency can contact you?