

EFFECTIVE FOIA REQUESTING FOR EVERYONE

**A National Security
Archive Guide**

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The National Security Archive

Gelman Library, Suite 701

2130 H Street NW

Washington, DC 20037

(202) 994-7000

E-mail: nsarchiv@gwu.edu

Web site: <http://www.nsarchive.org>

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Preface

The Freedom of Information Act (FOIA) is one of the glories of American democracy, yet—like democracy—making the law actually work requires real effort both inside and outside of government. Based on more than two decades of FOIA experience here at the National Security Archive, we offer this guide to help make the law work for you.

The concept of “publicity for official documents” originated in late-eighteenth-century Europe, when a new parliamentary majority in Sweden and Finland opened up the secret budgets and trade monopolies of its predecessors. The idea that government information belonged to the people was transformational. Today the levels of government transparency across Scandinavia are the greatest in the world, and more than eighty other countries have enacted FOIA laws, most of them just in the past few years. Requesters in those countries could no doubt use a guide like this for their own laws.

Congress passed the US Freedom of Information Act in 1966, after a campaign led by newspaper editors and members of Congress seeking greater accountability for the executive branch. The Watergate scandal resulted in amendments that significantly strengthened the FOIA, including the requirement of greater court review of agency decisions.

US government agencies now answer more than four million requests each year, the majority from veterans, senior citizens, and their families seeking their own records. Most of these requests are handled fairly quickly by the agencies. More difficult are the approximately one million requests that require search and review inside government and precision and persistence by the requester. Here is where our guide should help.

The authors acquired their expertise the hard way, through a half-dozen government-wide audits of agency performance under the FOIA. Supported by the John S. and James L. Knight Foundation since 2001, these audits have covered all of the more than ninety federal agencies with formal FOIA operations, plus more than a dozen major agency components that handle large numbers of requests (see <http://www.gwu.edu/~nsarchiv/nsa/foia/audits.htm>). The Archive’s own experience with thousands of FOIA and MDR requests also provides a wealth of data and fundamental lessons that you will find in these pages.

There may come a time when the World Wide Web makes it possible for government to put almost all of its workings online, and FOIA requests will be the exception rather than the rule for acquiring government information. But we are not there yet. Good luck in using this guide, and remember, when you make the FOIA work for you, you are making democracy work for all of us.

*Tom Blanton
Executive Director
National Security Archive*

About This Guide

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HOW TO USE THIS GUIDE

Government records are fundamental to understanding official policies and decision-making processes. They can be vital resources for a journalist following a breaking news story about government misconduct, a military veteran's family seeking information about benefits, or a student writing a history paper. Government documents provide first-hand, real-time accounts of events as they unfolded, generally without the editorial filter that characterizes secondary sources like books and news articles.

This guide provides a comprehensive overview for obtaining documents from executive branch agencies of the federal government. It deals primarily with the Freedom of Information Act process. But it also briefly treats other means of accessing government records, including locating publicly available records and using Mandatory Declassification Review (MDR) to obtain previously classified records.

As you embark on your quest for government records, you must first conduct some preliminary research and map out a strategy for your journey. After an overview of the FOIA in chapter 1, chapter 2 of this guide will help you navigate through these initial steps. It will assist you in determining what records you are looking for, where they might be located, and whether some of them might be publicly available.

Chapter 3 focuses on the nuts and bolts of drafting and sending your FOIA request. It will guide you through the key elements of a request letter and what to expect throughout the requesting process.

Chapter 4 explains the MDR process as an alternative means for obtaining government records and will help you to determine whether MDR is right for you. This chapter also offers basic guidance for drafting and filing an MDR request.

Chapters 5 and 6 focus on challenging an agency's response to your FOIA or MDR request. In chapter 5, you will learn about the administrative appeals process, which you can use to challenge the initial decision on your request at the agency level. You need not read chapter 5 in its entirety. Rather, you should read the introductory materials outlining the appeals process and the general arguments to make in your appeal. Then, focus on those arguments that apply to your specific case, in particular the statutory exemptions claimed by the agency in response to your request.

Chapter 6 provides a very basic overview of litigating a request under the FOIA and can serve as a starting point if you decide to sue an agency after completing the administrative appeals process. Additional resources are provided that will help you if you choose to move forward with litigation.

Throughout the text of this guide, you will see yellow light bulbs containing "FOIA Tips"—tricks and tips to help you through the FOIA maze. You also will see blue figures that offer additional details about some of the key concepts covered in the text. Finally, green "Sample Language" boxes will provide you with examples to help in drafting your request or appeal. Keep in mind that some of the sample language may not apply to all requesters, so make sure to read the text carefully and craft your request or appeal to suit your individual case.

Checklists at the ends of chapters 3 and 5 summarize the request and appeals processes and help remind you about key items to include in your correspondence with the agency.

The guide also includes appendices of useful resources to consult during the FOIA process.

LEGAL NOTE

None of the information contained in this guide should be considered legal advice, nor is the National Security Archive available to provide legal advice. Although we have striven to present accurate and useful information about the Freedom of Information Act in this guide, we recommend that you consult a lawyer if you need professional advice about your particular situation or if you intend to file a FOIA lawsuit.

Introduction:

What is the FOIA?

The Freedom of Information Act provides public access to federal government records from executive branch agencies or entities. (See app. 6 for the full text of the statute.) Any person, including US citizens, foreign nationals, organizations, associations, and universities, may submit a FOIA request asking for records held by the government. The FOIA carries a presumption of disclosure, which means an agency that receives a FOIA request is required to disclose relevant records unless the records are excluded from disclosure under one of nine specific FOIA exemptions. This right of access is enforceable in federal court. The burden is on the government to show why a document cannot be released.

The federal government answers more than four million FOIA requests each year, the majority from veterans and senior citizens seeking information about their benefits and service records, as well as many from journalists, researchers and historians, businesses, and nonprofit organizations.

The vast majority of requests that are received and processed under the FOIA are routine, such as individuals asking for their own records or for copies of standard documents that are released regularly. Many other FOIA requests are denied, however, and move through the administrative appeals process. Some of these cases are resolved through litigation in federal court. Despite the delays and obstacles that FOIA requesters often confront, particularly when seeking sensitive or high-level documents, millions of government records that rightfully belong to the public are released every year.

FIGURE 1.1: FOIA QUICK REFERENCE

What is the FOIA? A law that allows the public to access government records.

Who may file a FOIA request? Anyone.

Where may I send a request? All federal executive branch agencies (except the president and some White House offices).

What may I ask for? Any records the agency retains (paper, electronic, etc.)

How long does it take? The law requires agencies to respond within 20 days, but it often takes months or years.

How much does it cost? It depends on the request and the requester. Some requesters are eligible for reduced fees.

May I challenge the agency's decision? Yes. You may appeal and/or litigate a denial.

HISTORY OF THE FOIA

The FOIA was enacted in 1966 after several years of wrangling between Congress and federal agencies that strongly opposed the proposed legislation. President Johnson signed the bill grudgingly without a formal ceremony and accompanied it with a signing statement that actually undercut the thrust of the law.

In the wake of the Watergate scandal and the ensuing public outrage regarding excessive government secrecy, Congress sought to amend the FOIA. After negotiations between Congress and the Ford Administration broke down, Congress passed significant amendments to the FOIA. President Ford vetoed the amendments, and Congress swiftly voted to override his veto. The amendments strengthened the FOIA and forced greater agency compliance with a number of significant new provisions, including narrowed definitions of several exemptions, concrete deadlines for processing requests, public interest fee waivers, more fair and efficient court proceedings, and mandatory agency reporting on their compliance with the FOIA.

Some of the most significant recent changes to the FOIA came in 1996, when the Electronic Freedom of Information Act (E-FOIA) amended the law to allow for greater access to electronic records. The E-FOIA amendments required agencies to make guidance and certain documents, including frequently requested records, available online so that members of the public could access this information without filing a FOIA request.

Major amendments to the FOIA enacted in December 2007 targeted some of the most persistent procedural problems in the FOIA system, including excessive delays, lack of responsiveness, and litigation gamesmanship by federal agencies.

POLITICS AND THE FOIA

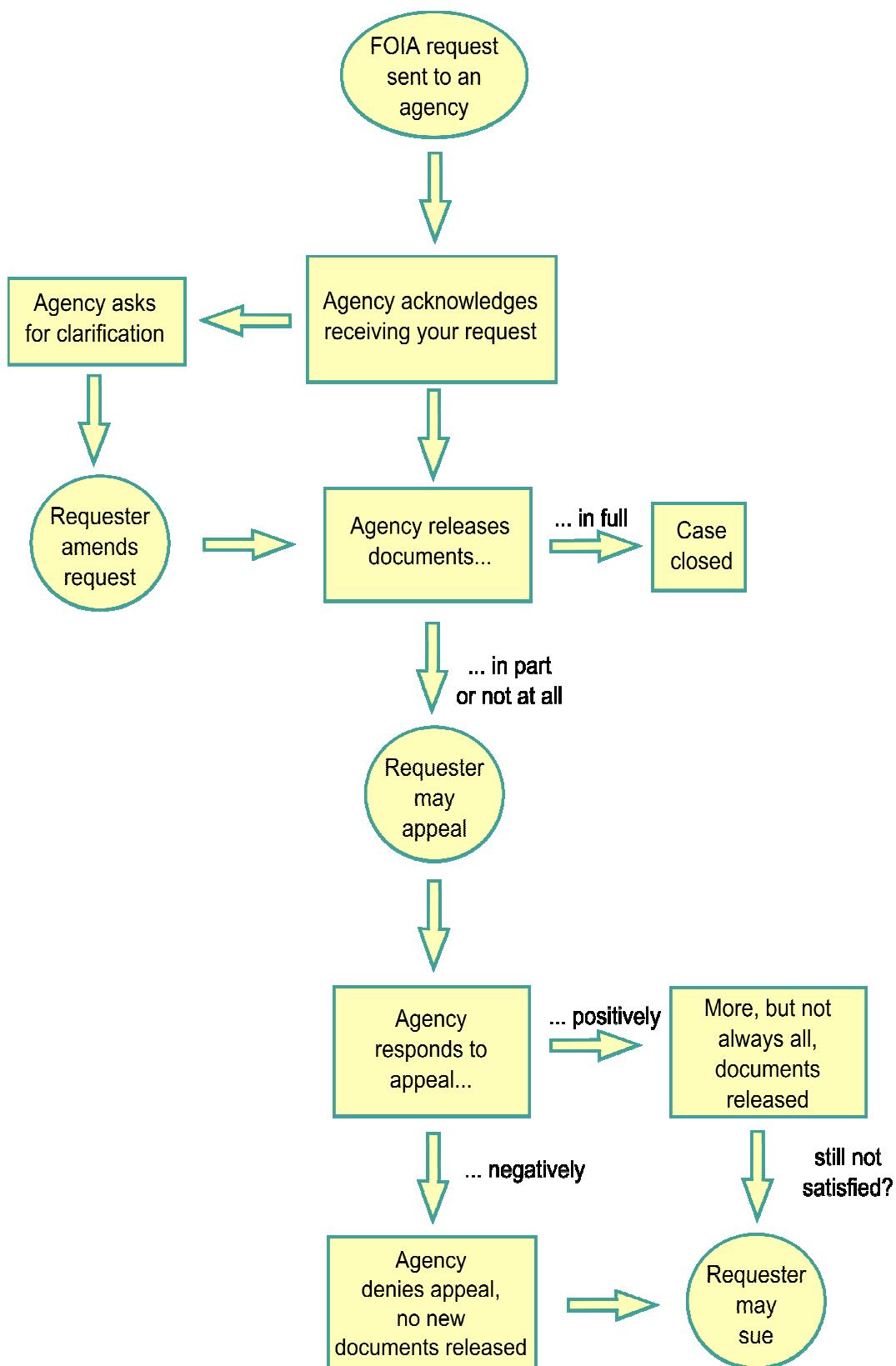
Although nonpolitical and career staff at federal agencies largely drive the FOIA process, access to information is not wholly insulated from the ebb and flow of the political climate.

After the end of the Cold War, classification fell dramatically and record numbers of documents were declassified and released during the 1990s. However, in the late 1990s, and especially after September 11, 2001, the openness trend was reversed, and the levels of classification and secrecy rose across the government. When more records are classified or otherwise protected, there may be more hurdles to obtaining sensitive records under the FOIA.

Moreover, the president and/or the Attorney General typically have set the tone for the conduct of the FOIA process in each administration. In most administrations, the Attorney General issues a memorandum to the heads of all federal agencies setting forth general policies with regard to the FOIA. For example, in 1993 Attorney General Janet Reno announced a new policy directing agencies to follow a “presumption of disclosure” and to act at their discretion to disclose records when there would be no harm from doing so. In contrast, in 2001 Attorney General John Ashcroft reversed the Reno policy and counseled against discretionary disclosures, even when no potential harm could be identified.

None of these actions changes the letter of the law, because only Congress can amend the FOIA through legislation. However, the impact of the ebb and flow of secrecy on the attitudes and actions of government employees who process FOIA requests is an ongoing consideration for everyone who seeks to access information from the government.

FIGURE 1.2: FOLLOW A REQUEST THROUGH THE FOIA PROCESS



First Steps: Getting Started with the FOIA

The most successful Freedom of Information Act requests are focused, well-researched, and clear. This chapter will discuss research strategies and preliminary steps to filing a FOIA request.

PREPARING TO FILE A FOIA REQUEST

❖ Start Your Research

The FOIA is a tool of last resort; it should be used only to request documents that are not otherwise publicly available. Before filing a FOIA request, therefore, you should do research to determine what types of documents you are looking for, which agencies are likely to have the documents, and what government records on your topic are already in the public domain.

Older documents are more likely to be publicly available, either online, at the National Archives and Records Administration (NARA), or at the Presidential Libraries. For classified records, many documents more than twenty-five years old should be available under the automatic declassification provisions of Executive Order (EO) 12958, as amended (see app. 7).

As you begin, you may want to develop a chronology or list of key events and issues related to your topic in order to identify likely subjects and/or documents to request. Familiarize yourself with your topic through research in secondary sources including books and articles. Agency Web sites are a key tool for conducting preliminary research before filing a FOIA request.

❖ Search for Public Records

Agencies must make certain records available to the public automatically, without the need for a FOIA request. Certain types of general documents and information about the agency must be published by each agency in the *Federal Register*. You can search the *Federal Register* online on the Government Printing Office's Web site (<http://www.gpoaccess.gov/>).

FIGURE 2.1: LOCATING AGENCY FOIA WEB SITES

There are three ways to locate an agency's FOIA Web site:

1. Use the links on the Department of Justice's Web site for "Other Agencies' FOIA Web Sites":
http://www.usdoj.gov/oip/other_age.htm.
2. All agencies are required to put a link to their FOIA page on their homepage. (Usually, it can be located on the bottom of the page listed as "FOIA" or "Freedom of Information.")
3. Do an Internet search using the agency's name and "FOIA" as search terms.

Certain categories of records must be published on agency Web sites, generally in “electronic reading rooms” within the agency’s FOIA Web site (see fig. 2.1). Agency electronic reading rooms commonly contain significant policy documents as well as records that are requested frequently (see fig. 2.2). Consult these sources first if you believe the records you are seeking may fall within one of these categories. You should also search the Internet, press accounts, agency publications, and other parts of the agency’s public Web site for any relevant materials.

FIGURE 2.2: PUBLICATION OF REQUIRED RECORDS	
Federal Register	FOIA Reading Room
Descriptions of the agency's organizational structure and how the public may obtain information, make submissions or requests, or obtain decisions	Final opinions and orders made in the adjudication of cases
Nature of agency functions, including all formal and informal procedures	Statements of policy and interpretations adopted by the agency (not published in the <i>Federal Register</i>)
Rules of procedure, descriptions of agency forms, and instructions as to the scope and contents of all papers, reports, or examinations	Administrative staff manuals and instructions to staff that affect a member of the public
Substantive general rules and general policies and policy interpretations adopted by the agency	Records that have been or are likely to become the subject of frequent FOIA requests
Amendments, revisions, or repeals of the above	Index of frequently requested records

WHAT RECORDS MAY I REQUEST?

❖ Agency Records

Almost all executive branch agency records are subject to the FOIA. However, records of Congress and the courts are not subject to the FOIA. Some intelligence operational files held by agencies have been granted specific exemptions.

The term “agency records” refers to those materials either created or obtained by an agency that are under the control of the agency at the time a FOIA request is made.¹ “Records” include information in any form or format, including multimedia and all types of electronic records. While the FOIA allows you to request electronic records, such as e-mails, not all agencies are able currently to comply with such requests because of the nature of their electronic records systems.

Agencies are not required to create records to satisfy a request. This means that you cannot ask the agency to answer a question or generate a list or another document that does not already exist. However, generating records from an existing database is not considered creating a record, so you can request information that may be contained in a database.

One specific category of records may be excluded entirely from the FOIA. Operational files are records of intelligence agencies such as the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency that contain raw intelligence or information

related to the collection of intelligence, namely sources and methods. Congress has granted a limited group of intelligence agencies specific exemptions for their operational files.

❖ Identifying Records to Request

Once you have determined that the information you are looking for is not publicly available, you should identify the specific documents, types of documents, or subjects of documents you wish to seek. Here, too, Web sites, books, press accounts, and agency publications are useful research tools. Previously released documents are another resource that can be used to identify other specific documents or types of documents (see app. 4).

You can send a FOIA request for a specific document, a series of documents, or documents related to a general subject (see fig. 2.3). Keep in mind that agencies are required only to search for existing documents under the FOIA, not create or compile new documents. You cannot ask an agency to do your research for you.

FIGURE 2.3: DRAFTING A FOIA REQUEST SUBJECT

A general subject request:

"All documents related in whole or in part to the Department of Defense's policy regarding the handling and disposition of personal papers or the distinction between personal and official papers."

A request for records related to a particular event:

"All documents related in whole or in part to the August 14, 2000, sinking of the Soviet submarine Kursk in the Barents Sea."

A request for documents for a specific period:

"All cable traffic to and from the US Embassy in Bucharest between March 24 and June 10, 1999, relating in whole or in part to Operation Allied Force, NATO's military operation in Yugoslavia."

A request for a regularly issued report for a specific time period:

"Copies of the National Intelligence Daily (NID) for the following dates: April 12, 1998; April 14, 1998; and April 15, 1998."

A request referring to a newspaper article/clip:

"The spring 2003 memorandum from Maj. Gen. Jack L. Rives, Deputy Judge Advocate General (JAG), Department of the Air Force, on interrogation techniques that is discussed in the attached June 24, 2004, article from *The Washington Post* by R. Jeffrey Smith."

A request for a record by its title:

"A December 2002 document titled, '2001 Intelligence Report to Congress on the Chemical Weapons Convention.' This document was cited in the March 31, 2005, report by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (Silberman-Robb Report), p. 228."

WHERE DO I SEND MY FOIA REQUEST?

All executive branch departments and agencies are subject to the FOIA. A list of these departments and agencies can be found on the Department of Justice's FOIA Web site. (See app. 2 for a list of agencies.)

Congress and the courts are not covered by the FOIA, which means that you cannot send a FOIA request to a court or a congressional office.

The president and his immediate staff also are excluded from the FOIA. Courts have held that components of the Executive Office of the President whose primary function is to advise the president, such as the National Security Council, are not subject to the FOIA. However, under the Presidential Records Act (PRA) most presidential documents become available through the FOIA between five and twelve years after the president leaves office.



FOIA TIP
You can find contact information and links to the FOIA Web sites for all federal departments and agencies subject to the FOIA on the DOJ Web site:
<http://www.usdoj.gov/oip/index.html>

In general, private entities are not subject to the FOIA. This includes organizations and entities that are funded by the federal government or that enter into contracts to do work for the federal government. Contracts and related records can be requested from the contracting agencies, but you cannot file a request for records belonging to the private contractor, even if they are related to the contract work.

Under the 2007 amendments, documents that are maintained for an agency by a private entity under a records management contract are considered government records subject to the FOIA. To obtain such records, you must file a request with the federal agency, which is required to retrieve them from the contractor.

❖ Centralized and Decentralized Agencies

Some agencies have “centralized” FOIA programs. This means that one central office is responsible for processing all FOIA requests for the entire agency. Other agencies have “decentralized” FOIA programs, where multiple components, offices, or bureaus within the agency have independent FOIA staff responsible for processing the component’s requests.

The Department of Defense is an example of an agency with a decentralized FOIA program. The Office of the Secretary of Defense has its own FOIA office that processes general Defense Department FOIA requests. But each military branch (Army, Navy, Air Force, Marines) and major command has its own FOIA office. Within these components, there are even some subcomponents with independent FOIA offices.

At a decentralized agency, you should send your request directly to the appropriate component or office if possible. You can also send the request to the central processing office, which generally will forward it to the appropriate office, but this may delay processing.

❖ Choose the Correct Agency

Conduct preliminary research to identify which agencies or agency components are likely to have materials about your research topic. A number of different tools are available to learn about agency operations and help you find out which agencies may have been involved in the topic or issue you are researching. For example:

- Secondary sources like books and articles can provide useful information about agencies or even about documents relevant to your subject.
- Investigate the agency's Web site, and look for mission statements, organizational charts, or other background material about the agency's work.
- Call the agency FOIA office or public affairs office if you are still not sure whether you have selected the correct agency.
- The agency's FOIA site or FOIA office may be able to help you determine whether you need to send your request to the headquarters or to a field office or component.

Depending on your research topic or subject of interest, several agencies or components may have relevant documents. If this is the case, you should send your request to each of these agencies or components to ensure that you get all relevant information rather than just the portion held by one agency. For example, if you are searching for information about US policy on drug trafficking in Colombia, you may want to send your request to the Department of State as well as to the Drug Enforcement Administration, the Department of Defense, US Southern Command, and the Defense Intelligence Agency.

❖ Historical Records

For historical records (records that were created more than twenty-five years ago), you should begin your research at NARA or at the Presidential Libraries before filing a FOIA request. Generally, agencies have transferred to NARA records that were created before the 1980s. However, there is no clear cut-off date for when agencies transfer materials to NARA. Moreover, NARA is suffering from a backlog in the processing of documents from agencies. To browse materials NARA has received recently from agencies, see <http://www.archives.gov/research/acquisitions/listing.html>.

Note that FOIA requests to NARA are significantly different from requests to other executive branch agencies because NARA cannot search for documents using keywords or electronic searches. Instead, the requester must identify the specific document and its location at NARA (record group, project number, collection, box, file, title, and item number) in the initial request.

To locate identifying information about the record(s) you are seeking, you should visit the National Archives and review relevant finding aids, so that you can call up boxes of documents and review file folders. If a document has been withdrawn because it contains exempted or classified material, there will be a withdrawal sheet that provides basic information about the document (date of document, author, recipient, etc.).

FOIA TIP

Always try to send your request to the correct office or component at the agency to shorten processing time. Learn more about agency organization with these tools:

- Agency Web sites
- US Government Manual
- Federal Yellow Book
- General Web search (e.g., Google)

DEVELOPING A FOIA STRATEGY

Once you determine precisely what information you are seeking, it is important to develop a strategy to request records effectively.

For general subject requests, drafting a FOIA request is a delicate balancing act between making the request broad enough so that the agency can locate the information you are looking for, yet specific enough that the agency can search for the documents without generating a cumbersome amount of pages to process. Overly broad requests waste time and resources, both yours and the government's.

Most agencies have a two-track system for processing simple and complex FOIA requests. This means your request goes in a queue depending on its complexity. A simple request is one that seeks a single document, a small number of documents, or a very narrow subject that is easy to search for—and where the information is unclassified. Complex requests usually require the agency to search longer to find responsive documents, involve a large number of documents or a broad subject, or concern classified information.

The key is to determine how to get the most information in the shortest amount of time without overburdening the agency. Mapping out the information you are looking for is helpful. You should also try to determine what types of documents might be available at which agencies and how to effectively group the information into separate requests.

Agencies generally process simple requests more quickly. In some cases, requesting a single document will allow you to get the document in a relatively short amount of time. However, one downside to a simple request is that if the request is too narrow or specific, you may not get all of the relevant information you seek.

For example, you probably would not want to send out twelve requests for twelve individual documents if you could craft one broader request that encompasses all twelve records as well as additional, potentially relevant materials. Likewise, if you see a document referenced in a book or article, you may not want simply to send a single request for that document. Rather, you should consider whether other related documents—background records, supporting materials, or other information—might also be helpful, and craft a broader, more encompassing request to include those. However, you should not make the request too general, since the agency may place it in the complex queue. It can even reject the request if it considers it unreasonably broad.

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.

FIGURE 3.1: FOIA FEE CATEGORIES	
Category	Agency can charge fees for
<i>Commercial</i>	<ul style="list-style-type: none">• Search/review• Copies
<i>Educational Institution</i>	<ul style="list-style-type: none">• No fees for search/review• First 100 pages of copies free
<i>Noncommercial Scientific Institution</i>	<ul style="list-style-type: none">• No fees for search/review• First 100 pages of copies free
<i>News Media</i>	<ul style="list-style-type: none">• No fees for search/review• First 100 pages of copies free
<i>All Other</i>	<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.

FOIA TIP

If you are a journalist or affiliated with an educational or scientific institution, make sure to send your request on your institution’s letterhead. This is one key factor that agencies use to determine whether a requester is eligible for reduced fees.

❖ 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.

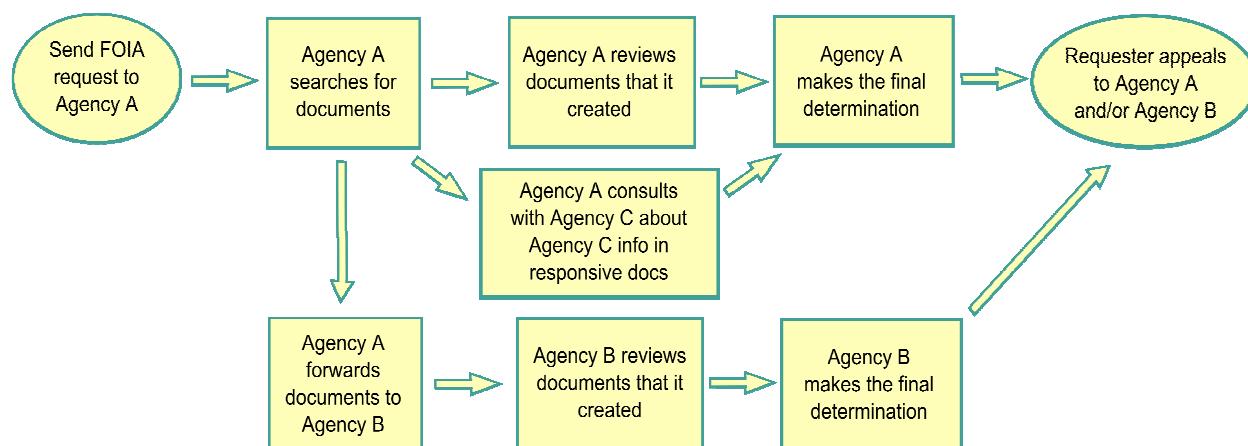
WHAT TO EXPECT AFTER SUBMITTING YOUR REQUEST

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?

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.

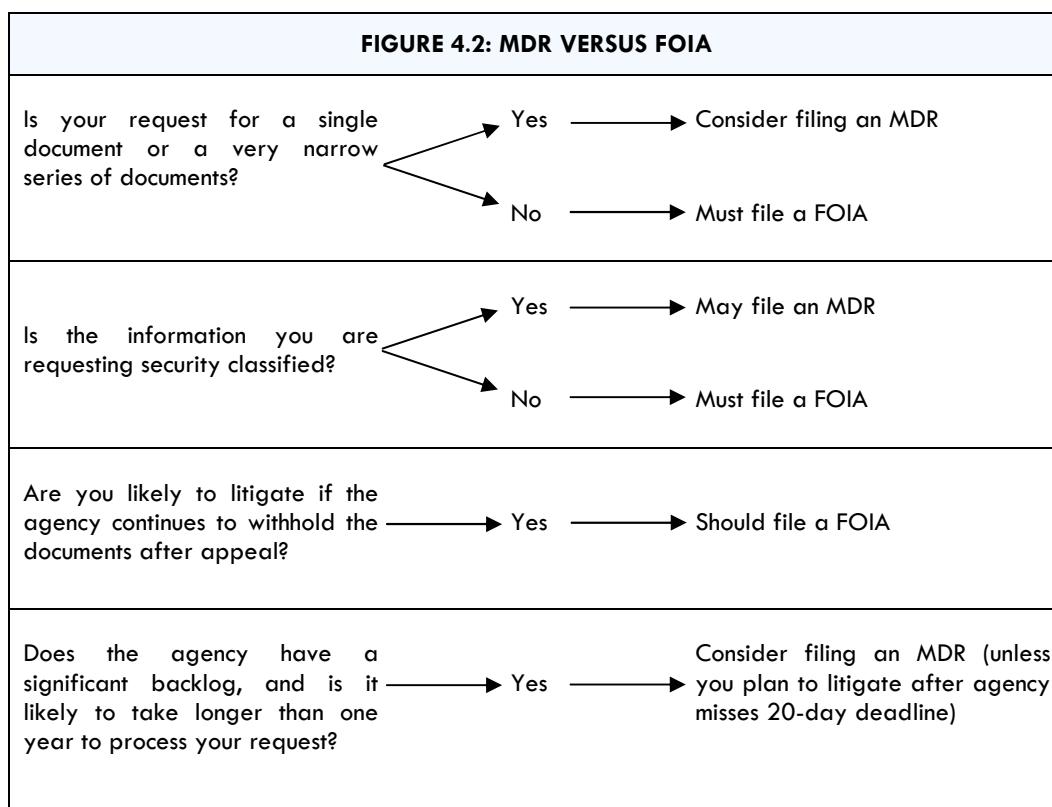
MDR requests must target specific documents. Unlike a FOIA request, which can cover records related to a general subject or issue, an MDR request must contain enough specific information about a particular document or documents so as to enable the agency to locate the material with a minimal amount of 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>

A Second Look: Appealing Agency Denials

MAY I APPEAL?

FIGURE 5.1: ADVERSE DETERMINATIONS THAT MAY BE APPEALED

- Agency withholding requested record or any portion of requested record
- Agency failure to comply with twenty-day time limit for responding to request
- “No records” response or failure to conduct an adequate search
- Denial of request for preferred fee status
- Denial of fee waiver request
- Denial of request for expedited processing
- Charging of excessive fees
- Rejection of request based on failure to adequately describe requested documents
- “Glomar” response—agency says it can neither confirm nor deny the existence of requested records
- Determination that requested records are not subject to FOIA because they are not agency records or are operational files

The FOIA permits a requester to appeal “any adverse determination.” An adverse determination is a decision by the agency denying part or all of a FOIA request, including any procedural denials that may prevent the requester from obtaining the requested records.

Most commonly, appeals are filed when an agency withholds records or provides records with redacted portions. In these situations, your appeal will challenge the agency’s determination that the withheld information fits within one of the nine FOIA exemptions. But you also may appeal when an agency does not find any records, delays its response beyond the statutory time limit, makes an improper decision to charge fees, or otherwise impedes your access to the records you requested. (See fig. 5.1.)

Whenever an agency makes an adverse determination, it must inform the requester of

the reason for the denial and the requester’s right to appeal. In addition, agencies must provide the names and titles of the official(s) responsible for the decision. Even if an agency does not state in the denial letter that you have appeal rights, you can still appeal if you believe the agency has made an “adverse determination.”

Denials of information requested through the MDR process may also be appealed to the agency and MDR appeals generally will follow the same format as FOIA appeals (see chap. 4). Because MDR appeals primarily challenge the agency’s decision not to declassify and release classified information, use the same arguments as for FOIA Exemption 1 appeals (see pp. 38-40, below).

SHOULD I APPEAL?

In most cases, it is useful to file an appeal when the agency has denied any part of your request. The law requires agencies to respond by taking another look at the request, and the appeal generally triggers review by a different employee at the agency who may be more senior and therefore more willing to exercise discretion, or who may simply have a different perspective on the response. More often than not, a timely and well-written appeal results in at least some additional information being released.

If you plan to file a lawsuit in federal court challenging the agency's decision, you *must* first complete the administrative process by submitting an appeal—and you should be sure to file the appeal on time to ensure your right to litigate later. If you anticipate litigating your request, you may consider consulting an attorney about your appeal.

It is particularly important to ask the agency to review its decision when one or more documents have been withheld in their entirety. The FOIA requires agencies to release any segregable portions of a document that are not exempt from disclosure under one of the nine exemptions. Therefore, you should request that the appeal authority review the records to ensure that *all* portions of the withheld records are covered by the claimed exemptions.

In some cases, it may be reasonable to accept the agency's decision on your request. For example, you may have been uncertain about whether the requested record existed and the agency responded that it had no documents responsive to your request. Or, the document was released with only a few redactions, such as names removed for privacy reasons. In these circumstances, you should make a judgment as to whether filing an appeal is worthwhile, considering the likelihood of success, the importance of the requested documents to your work, and the negative implication of overburdening the agency unnecessarily.

FOIA TIP

File your appeal on time! For most agencies, appeals will be due thirty to ninety days after the agency's denial.

But each agency is different, so check your response letter or the agency's FOIA regulations.

WHEN MUST I APPEAL?

The deadline for filing an appeal is set in each agency's regulations and varies among agencies. Most agencies allow between thirty and ninety days after the date of the agency's denial letter to file an appeal, but some may provide a shorter time period. Read the agency's response letter carefully, and if it does not provide any details, call the FOIA Service Center or consult the agency's regulations or FOIA Web site for specific requirements (see app. 5). To guarantee that the agency considers your appeal, make sure to file it within the time limit provided. This is very important because an agency can reject any late appeal and you will lose your right to challenge the agency's denial of your request.

DRAFTING AN APPEAL

ESSENTIAL COMPONENTS OF AN APPEAL LETTER

The appeal must be in writing and in English and must follow any other procedural requirements set by the agency. Review the statement of appeal rights in the denial letter, as it may include additional requirements (such as to label the mailing envelope or fax cover as an “appeal”). Include the following items in your appeal letter:

- ❖ **Statement of Appeal.** State clearly that the letter is an appeal of the agency’s adverse determination.
- ❖ **Background on Initial Request and Agency Denial.** Include details about your initial request, identified by date and agency tracking number(s), and a description of requested and withheld material. Enclose copies of all relevant correspondence with the agency, including the initial request letter and agency response(s).

SAMPLE LANGUAGE: STATEMENT OF APPEAL AND BACKGROUND

This letter constitutes an administrative appeal under the Freedom of Information Act, 5. U.S.C. Sec. 552(a)(6).

I am writing to appeal the determination by the [agency] with regard to my FOIA request filed on [initial request date], [request tracking number], for records concerning [subject of request]. By letter of [agency response date], [describe agency denial: withheld records / denied expedited processed / no documents]. [Attach request letter and agency response].

“I am writing to appeal the determination by the Central Intelligence Agency (CIA) with regard to my FOIA request, filed on February 17, 2005, for several records referenced in the July 7, 2004, Senate Intelligence Committee’s Report on the US Intelligence Community’s Prewar Intelligence Assessments on Iraq (Req. No. 05-2137). By a letter of September 2, 2005, the CIA withheld four of six requested documents under exemptions (b)(1) and (b)(3) of the FOIA.”

- ❖ **Arguments in Support of Appeal.** There are a variety of different arguments that can be made in support of an appeal, depending on the nature of the request and the agency’s response. Consider whether policy (common sense) or legal arguments may be appropriate for your appeal. Some examples of policy arguments include:

- disclosure is in the public interest
- the information is already publicly available
- passage of time has reduced potential harm

Some examples of legal arguments include:

- the agency conducted an inadequate search
- the agency did not release all segregable portions of the records
- the agency improperly denied a procedural request

- one or more of the FOIA exemption(s) were improperly applied

More detailed information about potential arguments and strategies for making them are laid out below. Include as many alternative arguments for release as possible.

- ❖ **Supporting Materials.** Be sure to enclose any supporting documentation, such as portions of documents already released that show why additional material should be disclosed, news articles, or other documents that support your arguments. Be sure to reference the materials in your letter and identify them clearly (for example, by labeling them “Attachment A,” “Attachment B,” etc.).
- ❖ **Contact information.** Include your contact information (phone and/or e-mail) and offer to discuss your appeal with agency staff.

SAMPLE LANGUAGE: CLOSE OF APPEAL LETTER

I look forward to receiving your decision on this appeal within the 20-day statutory time limit. If you have any questions, or believe discussion of this matter would be beneficial, please contact me directly at joeschmoe@gwu.edu or (202) 555-2000.

CRAFTING APPEAL ARGUMENTS

Filing an administrative appeal does not require the assistance of a lawyer. In many cases you will be able to write a successful appeal based solely on your personal knowledge of the requested records and common sense about why those records should be released.

Nonetheless, keep in mind that a successful appeal will often include legal arguments. There is no single, settled interpretation for most provisions of the FOIA statute. Rather, over time courts have examined parts of the statute in the context of disputes between requesters and agencies and have explained the meaning of the law as they understand it. In some cases, different courts have come up with different interpretations of the same provision. What you argue in your appeal should be based not only on the text of the FOIA but also on the common understanding of what a provision means, including courts’ interpretations.

Must you read court opinions and cite cases in your appeal? Sometimes reading a court decision about a FOIA request similar to yours might help you to understand how the FOIA applies in your case and what the agency’s obligations are towards you (and therefore whether or not it has fulfilled those obligations). At the very least, it is useful to understand the meaning of a given provision or exemption as it is commonly interpreted from both the statute and the cases. Brief summaries of the key provisions are below, as well as information about additional resources that can help you to develop your legal arguments.

FIGURE 5.2: LOCATING AND READING A FOIA COURT DECISION

FOIA cases are decided by federal courts around the country. You can locate court decisions through various sources, by subject or citation. It may help to cite relevant court decisions that support the argument in your appeal.

How to read a case citation:

Weisberg v. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983)

/ | | | / \
Plaintiff Defendant Citation to publication, page # court year of decision
(FOIA requester) (agency) volume, start page (Federal Reporter)

Finding a specific decision:

Go to <http://www.findlaw.com/casecode/> or another source of federal case law (such as WestLaw or LexisNexis, which generally require subscriptions). Select the appropriate court (district court, court of appeals, Supreme Court) and the relevant jurisdiction (state or circuit number—from citation) and search to locate specific decision.

See also *Significant Judicial Decisions Interpreting the FOIA* (compiled by Public Citizen Litigation Group), http://www.citizen.org/litigation/free_info/foic_lr/foiacases/index.cfm.

Reading a decision:

- The decision will describe the facts of the case (i.e., the nature of the FOIA request at issue and the circumstances of the agency's decision). Consider how these facts may be similar to or different from your request and denial.
- Read the court's reasoning. This is where the court explains the meaning of the FOIA provision at issue and how it applies to the facts of the case.
- Consider the court's conclusion. Did the judge determine that the agency was wrong? Would describing the circumstances of this case help the argument in your appeal? If the court decided in favor of the agency, can you show that this case is different from yours and the agency should therefore reconsider its adverse determination on your request?

POLICY ARGUMENTS

The following are some examples of the types of “common sense” arguments you can make using your own knowledge about the requested records and/or the request subject matter. Keep in mind that these arguments are largely fact-specific, which means you will need to craft your appeal based on the actual records you are seeking and be as specific as you can by including factual information that supports your argument.

In some cases, agencies have discretion to release records, even if they are not required to do so, because the records fall within one of the FOIA exemptions. The following arguments may be helpful in convincing the agency official reviewing your appeal to conclude that release would not harm the interests protected by a FOIA exemption and to exercise his or her discretion to release the records.

❖ Disclosure is in the Public Interest

Agency discretion means that if agency officials feel there is not likely to be any harm from release, or if there is a compelling reason to release the information, then they may choose to do so. For example, the two exemptions for privacy information have built-in balancing tests

that permit agencies to evaluate an individual's privacy interests in not having information released and the countervailing public interest that counsels in favor of disclosure.

For these reasons, it is helpful if you can argue that there is a strong public interest in releasing the requested material. Some examples of requests where significant public interest may justify disclosure include information that is about current or recent US policy decisions that directly impact the public—the war in Iraq or the National Security Agency's warrantless wiretapping program—or materials that expose government wrongdoing, misconduct, or misuse of public funds. There may also be arguments in favor of discretionary release based on public health and safety, ongoing public debate, value to scholarly interests, and personal urgency. The possible public interest reasons are as varied as the issues agencies handle.

❖ **The Information Is Already Publicly Available**

Often, some information about the subject matter or specific program, policy decision, or event covered by your request is already known to the public. If some details about a secret government program have been disclosed, such as through a newspaper article, congressional testimony, or speech, the government can show no harm from releasing the information because any such harm would have already occurred. Moreover, the fact that details about the policy or program have been released without consequence is evidence that at least some of the information you are seeking should be released.

When the agency has withheld records in their entirety, search for publicly available information that might be relevant. For example, there may be newspaper articles on the topic or press conferences, speeches, or testimony where government officials have discussed it. In addition, portions of other released government documents or books written by former officials may provide more details. If you believe that some information in the denied records is in the public domain, argue that at least those portions of the records that cover the already-public information should be released.

When you argue that requested information is already publicly available, be sure to include any documentation of the previous public disclosures. Do not assume that the FOIA office will do this research for you. If a subject has been discussed repeatedly by agency officials, attach transcripts of testimony, speeches, or press conferences to show that broad disclosure has already taken place. Official acknowledgment will prove the most compelling to the agency. Even without knowing for sure what the requested documents contain, you can explain why you believe that certain factual information likely would be contained within the given records.

❖ **The Passage of Time Has Reduced Potential Harm**

If you are requesting historical information or information about a program or policy that is no longer in effect, you can argue that the information should no longer be protected because time has passed and therefore arguments about harm from disclosure are no longer relevant.

Depending on the type of information requested, you may argue that information about private citizens can be released because many of the individuals involved are no longer living, or that national security interests should not prevent disclosure because there would be no harm to current security interests. This is also a very useful argument to make in the context of internal agency deliberations or decision-making processes where disclosing predecisional or other

types of protected information would not cause harm if the final decision was made in the past and disclosure would inform the public about important historical government decision making.

LEGAL ARGUMENTS

❖ Inadequate Search or “No Documents” Response

An agency may respond by saying that it has “no documents” responsive to your request. This means that the FOIA officer did a search based on the information you provided in your request and did not locate the specific record(s) you asked for or did not find any records when searching using keywords taken from your request. A “no documents” response does not necessarily mean that the agency has no documents that satisfy your request, although this may be the case; it simply means the agency did not find any documents in its search.

Agencies are required to conduct a search that is “reasonably calculated to uncover all relevant documents.”⁵ This means the agency has to do a reasonably good job of selecting search terms and searching in the right places for the records you requested. In addition, agencies have a duty to interpret FOIA requests liberally, rather than second-guessing the requester’s intention to make the request narrower and more easily searchable.

You may either appeal a “no documents” response broadly or very specifically, depending on the nature of your request and the information you have. If you asked for a specific document, explain why you believe that document exists. For example, you may have seen the document or meeting referenced in a news article. Attach any supporting materials, such as a copy of an article or statement by an agency official that references the document.

If you asked for documents about a general subject and you have reason to believe that the agency has records about this topic, you can simply ask it to search again. To support your request, present any facts you have that support the claim that the agency *has* or *should have* records about this topic (e.g., representatives of the agency were present at a meeting on the subject, so they likely prepared briefing materials and other background information).

The agency may not have found responsive records because it did not search in the right places, either because of the organization of its records, its search capabilities, or its interpretation of your request. You might consider calling the agency to learn more about how it searched for the records. When drafting your appeal, try to determine which office, bureau, or component of the agency would have worked on the subject matter you are interested in and ask that a new search be conducted of all records in that office. You can learn about the organization of the agency and the responsibilities of its offices on the agency’s Web site or through other public sources. Include a list of any offices or bureaus within the agency where you think the documents might be located and a request that the agency search those files.

Before drafting your appeal, it is best to get more information about the nature of the document(s) you are seeking and/or the agency’s organization and filing system. For example, some agencies such as the FBI may search only in a central records database that likely does not reference all of the agency’s paper records or all records held by individual offices or components. Or the agency FOIA staff interpreting your request may select only particular offices or components to search, and they may not search broadly enough to locate the relevant records.

If your request concerns a recent matter that probably involved intra-agency e-mail correspondence, specifically state in your appeal that the agency should search all electronic files, including e-mail systems, for responsive records. Although agencies are required by law to search e-mail and electronic files just as they search paper files, some agencies do not have the capacity to do a keyword search across their entire e-mail system for relevant messages and may have to conduct a more targeted search.

❖ **Agency Did Not Release Segregable Portions**

The FOIA mandates that an agency must release any portions of a record that are not exempt, provided the nonexempt portions are “reasonably segregable,” i.e., they can be easily separated from the exempt portions for release. This segregability requirement applies to all documents and all FOIA exemptions. It means that when you request a record and the record is withheld in its entirety, the agency is obligated to justify why every word of that record is exempt. If some portion of the record does not fall within one of the nine exemptions, the agency must release the segregable nonexempt portions. In some cases, you will receive redacted documents with exempt portions blacked out.

Because many agency exemption claims are subjective, it is important to cite the segregability requirement in administrative appeals to ensure that the official reviewing the appeal considers whether additional material—even a few words or sentences—can be released without harm. Making a segregability argument in your appeal often will result in additional material being released. Keep in mind, however, that despite the segregability requirement, an agency may withhold nonexempt material if it is so intertwined with exempt material that disclosure would provide only meaningless snippets of information.

❖ **Improper “Glomar” Response**

In responding to a FOIA request, an agency may refuse to either confirm or deny the existence of records if doing so could cause harm. This type of refusal is known as a “Glomar response,” named for a case in which the CIA refused to confirm or deny the existence of records that would have revealed the CIA’s connection with a seagoing vessel known as the Glomar Explorer. The response is different from an ordinary FOIA denial, where the agency either says it has no responsive documents or that it is withholding responsive documents.

Glomar responses are most common when the request concerns national security or intelligence information. A Glomar response in the national security context is only appropriate when the fact of the existence or nonexistence of the record is itself properly classified. Cases where a Glomar response would be permissible include when disclosure of the existence or nonexistence of documents would reveal the agency’s interest in a person or activity, if that interest is a classified fact or would otherwise harm national security. Agencies also have used Glomar responses in the privacy context, where disclosure of the existence or nonexistence of records would result in an invasion of an individual’s privacy.

Glomar responses are difficult to overcome, both on appeal and in litigation. The easiest way to challenge a Glomar response is to show that the information requested has already been disclosed. Keep in mind that to succeed with this argument, the information requested must be virtually identical to the information previously released and the information must have been made public through a documented official disclosure, not simply public speculation or a leak. For example, if a CIA official has referenced a particular individual when publicly discussing an

investigation conducted by the agency and you file a request for all records about that individual, the CIA cannot Glomar your request because it has publicly acknowledged that the individual was part of an investigation and, therefore, that the CIA has some records about him.

Make sure to carefully consider the scope of your request and the agency's Glomar response. If your request was very broad—for example, covering records about an aspect of the warrantless wiretapping program, which has been publicly acknowledged—you can argue that the agency may not properly invoke Glomar (even if the response would be appropriate for a narrower request).

Beyond instances of prior public disclosure, courts generally have shown great deference to agency claims of potential harm to national security. If you do not feel that you can make any of the above arguments on appeal, it may be possible to redraft your request and file it again to attempt to avoid a Glomar response. If you file a broader request, the subject of which would encompass your initial, narrower request, the agency may be unable to Glomar because the existence or nonexistence of any documents about the broad subject matter would not be a protected fact. Keep in mind, however, that if a Glomar response is overturned on appeal or withdrawn, the requester will receive confirmation of the existence or nonexistence of documents but will not automatically gain access to the documents themselves if their contents are protected by a FOIA exemption.

❖ **Improper Denial of Procedural Request**

When you receive an adverse determination on a procedural matter, such as a request for expedited processing or a fee issue, you may file an appeal that essentially repeats the same arguments you made in your initial request. You should already have provided all of the required details—for example, why your request qualifies for expedited processing under the agency's standards or why you fall into a given fee category or deserve a public interest fee waiver. It is nonetheless useful to reiterate these arguments and file an appeal if your request is denied, because at most agencies a different official will review your appeal and may come to a different conclusion than the original reviewer.

You should also read the response letter to see if the agency gave any specific reasons for its decision to which you can respond. If you have any additional arguments or further support (e.g., a list of publications or examples to back up your claim that you are a representative of the news media), you should include those as well. If you intend to litigate the denial of a procedural request, you will be limited to the arguments you made at the administrative level. Thus, you should develop all of your arguments fully to the agency in the initial request and/or the appeal.

❖ **Improper Rejection of Request**

Sometimes, an agency will reject or refuse to accept a request because the agency believes that the records requested are not “agency records” within the meaning of the FOIA, or because the agency is not an “agency” subject to the FOIA, or for another procedural reason. A request to an intelligence agency may also be rejected because the agency claims that the requested records are contained in operational files that are not subject to search and review.

When an agency rejects your request, the response letter may or may not state that you have a right to appeal this decision. Even if the agency has not explicitly granted appeal rights, you

should file an appeal arguing that at least some of the information you requested is subject to the FOIA and that the agency should therefore process your request.

ARGUMENTS REGARDING SPECIFIC FOIA EXEMPTIONS

When an agency withholds information (either documents in their entirety or portions of documents), it is important to argue in as much detail as possible why the withheld information does not fall within the statutory exemption(s) cited by the agency. In some cases, it is useful to support your argument with case law interpreting the relevant exemption, which may narrow or clarify the reach of the exemption or imply that the particular information you requested is not covered by the cited exemption. Even if the document(s) have been withheld in their entirety and you do not know much about their contents, you can make general arguments about the exemption(s) that the agency has claimed.

Begin by determining which exemptions the agency has used to withhold the information. The agency is required to inform the requester of the reasons for withholding, and generally will do so in the denial letter. If some records have been released in redacted form, agencies are also required to indicate on the released records themselves which exemption(s) have been applied to each withheld portion. If it is not clear from the response letter and/or released records why the information you requested has been withheld, contact the agency to inquire before drafting your appeal. It is very important to make specific arguments that are tailored to the agency's justification for withholding.

❖ Presumption of Disclosure

The FOIA establishes a strong presumption in favor of disclosure of government records, placing the burden on the agency to justify the withholding of requested documents under one of the nine specific exemptions provided in section 552(b) of the statute. According to the Supreme Court, the FOIA is grounded in "a general philosophy of full agency disclosure unless information is exempted under the clearly delineated statutory language."⁶ The Supreme Court also has concluded that the FOIA exemptions are limited and "are to be narrowly construed."⁷

Keep these general principles in mind when crafting administrative appeals. If you don't feel that the agency has adequately justified its decision to withhold the information you requested, say so. Remind the agency in your appeal that it must interpret the exemptions narrowly and review each and every document in detail for protected material, rather than sweeping broad groups of records within the exemptions.

❖ Exemption 1: National Security Information

Exempts information that is "(A) specifically authorized under criteria established by an executive order to be kept secret in the interest of national security or foreign policy and (B) are in fact properly classified pursuant to such executive order."

Classification is governed by an executive order issued by the president. The national security executive order currently in force is EO 12958, as amended.⁸ The FOIA provides that a document that has been properly classified under the executive order can be withheld from disclosure. In response to a FOIA request, an agency must review a classified document to

determine if it still requires protection. If the agency determines that the requested document is properly classified, a requester may challenge this decision on appeal.

Note that most MDR appeals will be similar to Exemption 1 appeals in that they challenge withholding of material based on security classification (see chap. 4). In most cases, MDR response letters will indicate not only that information has been withheld pursuant to EO 12958, but also in which classification category the information falls (see fig. 5.3).

You may be able to argue that the document(s) you requested should not be withheld under Exemption 1 for one of the following reasons:

- ***The information does not fall within the categories of information that may be classified under EO 12958, as amended.***

The executive order specifies eight categories of information that may be classified if disclosure of the information could cause damage to national security (see fig. 5.3; app. 7 for text). Agencies likely will not inform you about the specific rationale for classifying the information you are seeking, but if you feel that the information you requested would not fall within *any* of the specified categories, make that argument in your appeal.

- ***The information is old or outdated and no longer needs to be classified.***

Generally, when information is classified it must be designated for declassification after ten years, but more sensitive information may remain classified for up to twenty-five years. Records of permanent historical value are subject to automatic declassification when they reach twenty-five years old, unless they are specifically exempted. Although age alone is not proof that a record should be declassified, it is one consideration in determining whether the record can be released. Therefore, if you know that a document you are seeking is more than ten or twenty-five years old, argue that the original sensitivities have eroded and protection is no longer required because release would not cause harm to national security today.

- ***A prohibition on classification in EO 12958 applies.*** Under the executive order, information may not be classified to “conceal violations of law, inefficiency, or administrative error;” “prevent embarrassment to a person, organization, or agency;” “restrain competition;” or “prevent or delay the release of information that does not require protection in the interest of the national security.”⁹ In addition, scientific research not related to the national security may not be classified.¹⁰

FIGURE 5.3: CLASSIFICATION CATEGORIES

Information cannot be considered for classification unless it concerns:

- military plans, weapons systems, or operations
- foreign government information
- intelligence activities (including special activities), intelligence sources or methods, or cryptology
- foreign relations or foreign activities of the United States, including confidential sources
- scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism
- United States Government programs for safeguarding nuclear materials or facilities
- vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism
- weapons of mass destruction

- ***The information has not been properly marked or treated as classified.*** The executive order requires that a document be properly marked as classified with the name of the classifying authority and office that classified it, the level of classification, the reason for classification (i.e., the category), and the declassification date. If only a portion of the record is classified, the classified and unclassified sections or paragraphs must be clearly marked. This requirement is particularly relevant if an agency releases a document redacted on the basis of Exemption 1. Examine the document carefully to determine if any of the withheld portions were not marked as classified or if the document itself lacks clear classification markings.
- ***The information has been publicly disclosed or is otherwise publicly available.*** Information that has been publicly disclosed can no longer be considered classified because the agency cannot successfully argue that its release would cause harm to national security. If the information is found in other declassified documents or has been discussed publicly, such as in a book or memoir or another agency publication, you can argue that at least those segregable portions of the record that contain already public information should be released. Attach any supporting materials you have, including copies of declassified documents or publications that reference the material you are seeking.

❖ **Exemption 2: Internal Personnel Rules and Practices**

Exempts information “related solely to the internal personnel rules and practices of an agency.”

Exemption 2 has two distinct components (Low 2 and High 2), either of which an agency may rely on to withhold information.

The “Low 2” Exemption covers internal agency matters in which the public could not reasonably be expected to have any interest. Examples of the type of information that can be withheld under this exemption include:

- Administrative file markings.
- File numbers, internal report numbers, access numbers, and routing codes.
- Computer codes for internal systems.

The best way to challenge the Low 2 Exemption is to argue that the requested material cannot be considered solely related to “internal personnel rules and practices” of the agency. Courts have concluded, for example, that internal databases of information and some instructions and communications between an agency and its staff or members of the public are not solely for internal use and therefore are not covered by Exemption 2. As part of this argument, you should try to show that there is, in fact, a public interest in the requested material such that it cannot be considered solely internal.

The “High 2” exemption covers internal agency matters where disclosure would risk circumvention of the law or an agency regulation. The most common circumstance where agencies attempt to use the High 2 Exemption is law enforcement. For example, an agency may withhold law enforcement manuals or internal instructions to staff about how to conduct law enforcement activities.

Although this interpretation of Exemption 2 has been recognized by some courts, it is not clear that this interpretation was intended by Congress when it enacted the FOIA. Therefore, it is

important to argue that the information you are seeking is not related *solely* to internal matters of the agency, but rather concerns the public and/or is of interest to the public.

When faced with a High 2 exemption claim, also consider another provision of the FOIA, which requires that “administrative staff manuals and instructions to staff that affect a member of the public” be made available for public inspection and copying automatically, without a FOIA request.¹¹ If you can argue that the material you are requesting is an internal manual, instruction, or guidance document that affects the public, cite § 552(a)(2)(C) to support your argument that Exemption 2 does not apply and that the information must be released.

❖ **Exemption 3: Information Exempt Under Other Laws**

Exempts information that is “specifically exempted from disclosure by statute (other than section 552b of this title), 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.”

Exemption 3 is a complicated exemption because it actually encompasses a number of different exemptions that are set forth in laws other than the FOIA and directed at a category of information held by a specific agency or group of agencies. In order to effectively challenge an Exemption 3 withholding, you have to learn not only about the FOIA, but also about the Exemption 3 statute(s) at issue.

FIGURE 5.4: LOCATING AN EXEMPTION 3 STATUTE IN THE U.S. CODE

The U.S. Code is a multi-volume publication containing the text of all federal statutes.

Go to <http://www.gpoaccess.gov/USCODE/>
Search or browse for relevant section of United States Code.

How to read a citation to the U.S. Code:

50 U.S.C. § 403-3(1)(5)

Title number within Code	United States Code	Section and subsection of Code containing statute
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An agency denying information under Exemption 3 should indicate in the denial letter which statute was used to justify withholding. The first step is to locate and read the statute or portion of the statute cited by the agency (see fig. 5.4).

There are two ways to approach challenging an Exemption 3 denial. The first involves a complex legal argument that the statute claimed by the agency cannot properly be used as an Exemption 3 statute because it does not meet certain criteria developed by Congress and the courts. It is unlikely that you will be able to make such an argument successfully in your appeal unless you do in-depth legal research about the genesis of the statute and its formulation. The second approach is to learn about what types of information the statute covers and argue that the information you requested is not covered by statute and therefore cannot be withheld.

There are hundreds of Exemption 3 statutes that apply to agencies across the federal government. The following are examples of a few commonly used Exemption 3 justifications for withholding:

- **Intelligence sources and methods.** The National Security Act directs the CIA (as well as now the Director of National Intelligence (DNI)) to protect “intelligence sources and methods from unauthorized disclosure.”¹² Another portion of the statute says that the CIA and DNI do not have to disclose “the organization, functions, names, official titles, salaries, or

numbers of personnel employed by the agency.”¹³ These provisions may be used to withhold information regardless of whether the information is properly classified under Exemption 1.

- **National Security Agency information.** The National Security Agency (NSA) is exempt from disclosing information related to the organization or function of the agency or its employees.¹⁴
- **Information from international sources.** Another statute allows the Defense Department to withhold information provided by a foreign government or international organization, if the entity requests or requires that the information be withheld or kept confidential.¹⁵
- **Tax return information.** A statute that controls the dissemination of income tax return information permits the IRS to withhold tax returns and related materials under Exemption 3. Under this statute, as well, the IRS has no obligation to redact identifying information from a tax return and provide the redacted version. “Return information” under the statute includes a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions credits, assets, liabilities, and other data, but does not cover data that cannot be associated with a particular taxpayer.¹⁶
- **Grand jury records.** Under the Federal Rules of Criminal Procedure, agencies may withhold grand jury transcripts as well as information that would reveal the identities of witnesses or jurors or other details about the testimony, strategy, or deliberations of the grand jury.¹⁷

❖ **Exemption 4: Confidential Business Information**

Exempts “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”

In order to withhold information under Exemption 4, an agency must show that the information is either (1) a trade secret or (2) commercial or financial information, obtained from a person, which is privileged or confidential.

Trade Secrets

There is no definition in the FOIA for what constitutes a “trade secret,” but generally this term applies to plans, formulas, processes, and the like that are commercially valuable, used in business, and kept confidential. A narrow definition, adopted by some courts, defines trade secret as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”¹⁸

Confidential Commercial Information

The standard test for whether information falls within the second part of Exemption 4 has three parts. If you do not believe the information you are seeking satisfies one or more of these parts, you should argue that it cannot be withheld.

First, agencies may only withhold information that is “commercial” or “financial” in nature. These terms are defined in a straightforward way and essentially cover any information related to commerce or profit making of a business or corporate entity. Information about the operation of the business, including research, statistics, and sales, as well as information related

to the design, development, and sale of products, business methods, or technical specifications, are generally protected.

Second, the information must have been “obtained from a person” by the agency. The exemption applies only to information provided to the government by a nongovernmental entity or business. The government’s own confidentiality interests are protected by other FOIA exemptions. However, “person” is very broadly defined and includes individuals as well as all different types of private businesses, corporations, nonprofit organizations, and even foreign governments. But any government-prepared documents that are based primarily on information the government generated itself or gathered from outside sources (rather than on information provided by a “person”) are not exempt under this provision.

Third, the information must be “privileged or confidential.” Generally, agencies rely on claims that information is “confidential” because “privileged” information refers to specific legal privileges that are generally covered by Exemption 5.

There is, however, a strict test for determining whether information is “confidential” under Exemption 4. Information is confidential 1) if it has not been made publicly available or widely distributed within the agency *and* 2) if its disclosure would either “impair the government’s ability to obtain the necessary information in the future” or “cause substantial harm to the competitive position of the person from whom the information was obtained.”¹⁹ If you can argue that some of the information has been disclosed, make sure to include supporting materials that document the disclosure.

In determining whether the record is confidential, you must consider whether it was voluntarily submitted to the government and whether submission was required. That assessment depends on whether the agency possesses the legal authority to require submission of the information, such as through a statute, executive order, regulation, or “less formal mandate,” and whether the agency has exercised its authority to obtain the information. The test does not depend on whether the submitter is voluntarily participating in an agency program. If the information was voluntarily submitted, the agency will be considering whether the information is “of a kind that would customarily not be released to the public by the person from whom it was obtained.”²⁰

If the submission is required, then the agency will consider whether disclosure of the information would impair the government’s ability to obtain necessary information in the future. The agency will look at criteria such as whether the disclosure would cause substantial harm to the competitive position of the person from whom the information was obtained. As part of its assessment, the agency will notify the submitter of the information about your FOIA request and solicit the submitter’s views as to whether disclosure will cause substantial competitive harm. This notice to the submitter is currently authorized by EO 12600. As you may imagine, this process can be time consuming and will likely push the agency beyond the 20-day response deadline.

In some instances, when the submitter is unable to persuade the government of the risk from disclosure, the submitter may file a lawsuit to prevent the disclosure. This is called a “reverse FOIA” lawsuit. Finally, the agency will also consider whether disclosure will harm other governmental interests such as regulatory and legal compliance or program effectiveness.

Exemption 4 has been the subject of a great deal of litigation over the years, and the law differs somewhat in each jurisdiction. Thus, if you are likely to file an appeal of an Exemption 4 denial, you should consult specialized resources that describe the law in your jurisdiction.

❖ **Exemption 5: Privileged Inter- or Intra-Agency Communications**

Exempts “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.”

Exemption 5 protects information that is covered by established legal privileges, such as those that protect attorney-client and similar relationships, lawyers' legal strategies, and deliberative materials prior to a final decision by government officials. Because Exemption 5 protects the government's own privileges, disclosure of material covered by this exemption is discretionary, and an agency may choose to release potentially exempt information if it does not foresee harm from doing so.

Because of its vague language, Exemption 5 has been the subject of numerous lawsuits seeking to clarify its application. When information is withheld under Exemption 5, a requester challenging the denial must determine first whether the document itself falls under Exemption 5 and then whether the claimed privilege in fact protects the type of information requested. Some of the arguments that may be applicable to an appeal of an Exemption 5 denial are outlined below.

In its denial letter, the agency should state which part of Exemption 5 it has relied on to withhold the requested information. If you do not know which privilege the agency has applied (and the agency will not provide further explanation upon request), make relevant arguments under each of the privileges that you think could potentially be applied to the information you requested (for example, if the request involves an agency's legal opinions on a given topic, challenge the withholding under the deliberative process, attorney-client, and attorney work product privileges).

Threshold Issue: Inter- or Intra-Agency Records

Exemption 5 applies to documents created by an agency to be transmitted internally within the agency or to another agency. The exemption has also been held to apply to documents generated by an outside party acting on behalf of the agency, such as a consultant.

If you believe that the records you are seeking were either provided to the agency by an outside party (for example, an application or other submission from a corporation or member of the public) or were created by the agency for an outside party (such as Congress or a foreign government), provide any evidence you have to demonstrate that the records are not inter- or intra-agency.

Privileges Covered by Exemption 5

Deliberative Process Privilege

The deliberative process privilege protects information that is both “predecisional” and “deliberative,” meaning advice, recommendations, and opinions that are part of a consultative decision-making process within the agency. This privilege is intended to encourage open and frank deliberations on policy matters and to ensure that proposed policies or rationales are not disclosed before they are finalized and adopted. When an agency withholds information

pursuant to the deliberative process privilege, you may be able to make one or more the following arguments:

- *The information is not “predecisional.”* Predecisional documents are protected by Exemption 5, but postdecisional documents are not. This means that final opinions or administrative decisions are not protected and must be disclosed if not otherwise exempt. Likewise, courts have held that all agency records that constitute the “working law” of the agency, such as orders, decisions, interpretations, instructions, or guidelines affecting the public cannot be protected by Exemption 5.

Drafts, proposed policies, or documents that are part of a back-and-forth process before the final decision is made may be withheld under this privilege. However, in order to be considered predecisional, a document must actually be part of the decision-making process, for example, containing recommendations or opinions about prospective policies.

If the agency expressly adopts or incorporates deliberative materials in making its final decision, those materials can no longer be protected. For example, if the Attorney General announces a new policy and describes a legal opinion on which the agency relied in making its decision about the policy, the legal opinion, although predecisional, can no longer be withheld because it was incorporated into the final decision.

- *The information is not “deliberative.”* Even if a document is predecisional, it can only be withheld under Exemption 5 if it contains deliberative material, such as opinions or recommendations, and not merely factual information. Factual information contained in a predecisional document must be released unless it is “inextricably intertwined” with the exempt portions.

Attorney–Client Privilege

The attorney–client privilege protects confidential communications between a client and his or her attorney, where the communication is based on confidential information provided by the client. The privilege has been held to apply to government attorneys; in this case, the agency is considered the client. The attorney–client privilege covers facts as well as advice contained in a protected communication.

In the government context, the attorney–client privilege protects only those communications between agency officials and attorneys that are based on confidential information from the agency and provided in order to obtain legal advice and that are maintained as confidential (generally meaning that they are not disclosed beyond senior agency officials). The privilege protects only those communications that concern a legal matter for which the agency client sought professional legal advice. Neutral legal analyses that do not constitute advice or legal conclusions that the agency applies in its dealings with the public are not privileged.

Keep in mind that while many attorneys work in federal agencies, not every agency document a government attorney creates is privileged, and only those that constitute *confidential legal advice* sought by the agency from its attorneys are exempted. When drafting your appeal, therefore, you may be able to argue either that the information was not maintained as confidential (particularly if you are aware that some of it was disclosed outside of the agency), or that it did not constitute professional legal advice from a government attorney to his or her agency client.

Work Product Privilege

The attorney work product privilege protects records prepared by an attorney for litigation, in particular where the records would reveal the litigation strategy. In order to withhold a record under the work product privilege, the agency must show that the document was prepared in anticipation of specific litigation (and not merely in the ordinary course of legal work at the agency), by an attorney representing the government. The courts have interpreted this privilege broadly, however, protecting a wide range of documents related to litigation.

If you believe that the record you requested does not relate to litigation or has segregable portions of clearly factual information that do not disclose any legal reasoning or strategy, argue for the agency to reconsider its decision on this basis.

Exemption 5 Waiver

In general, an agency may not withhold records under Exemption 5 if the agency has waived the privilege by disclosing the records to third parties or others outside of the executive branch. There are some exceptions to this rule, including where the agency has disclosed information to another agency or to a member of Congress or was compelled by a court order or subpoena to disclose the material. But it is generally the case that when an agency has disclosed the record publicly or has repeatedly referred to information contained in the record in a public forum, it can no longer assert the protection of Exemption 5. To appeal on this basis, be sure to include supporting information showing public references to the record or information at issue.

❖ Exemption 6: Personal Privacy

Exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”

Exemption 6 protects from disclosure “personnel and medical files and similar files,” but only when disclosing the files “would constitute a clearly unwarranted invasion of personal privacy.” Therefore, the agency must conduct a balancing test before it may withhold information under Exemption 6. Although there is likely to be some invasion of privacy from the disclosure of personal information contained in government files, the agency may withhold the information only if it determines that the invasion of privacy is “clearly unwarranted” in light of the public interest in disclosure and other countervailing factors.

Although Exemption 6 can be used to withhold entire records, often records will be released but with personal information redacted pursuant to this exemption. If records responsive to your request are withheld in whole or in part under Exemption 6, there are several arguments that can be helpful in challenging the denial.

Types of Records

Despite the seemingly narrow language of Exemption 6, the universe of “similar files” beyond personnel and medical files that are eligible for protection has been interpreted broadly. In effect, any records that implicate privacy interests similar to those in personnel or medical files and contain detailed information about an identifiable individual may be withheld.

Clearly Unwarranted Invasion of Privacy

According to courts that have interpreted the “clearly unwarranted invasion of personal privacy” language of Exemption 6, the exemption requires agencies to balance the privacy interests against the FOIA’s purpose “to open agency action to the light of public scrutiny.”²¹ Moreover, the statute tilts the balance in favor of disclosure by requiring proof of a “clearly unwarranted” invasion of privacy.

On appeal, you should make an argument about the public’s interest in the information you are seeking and emphasize that the balance in your case clearly favors disclosure. The following specific arguments may be relevant:

- *Information about public officials.* The privacy interests of public officials are reduced compared to those of private citizens whose information is contained in government records. If you believe the information withheld contains personal details about a government official, argue that the public interest in release is strong because the FOIA allows the public to find out what their government is up to and because government officials have limited privacy interests, particularly with regard to their official conduct.
- *Business information.* It is generally the case that only individuals have privacy interests, so business information should not be withheld under Exemption 6. In addition, courts have held that disclosure of information about an individual’s business or professional activities does not implicate privacy interests and so would not be protected under Exemption 6.
- *Insignificant privacy interest.* Based on the facts you have about the requested information, you may be able to argue that the privacy interests at stake are insignificant compared with the public interest in disclosure. For example, courts have often found only minimal privacy interest in individuals’ names alone, including names of federal employees and identities of people who submitted comments, applied for federal grants, or made voluntary reports to the agency. Although phone numbers, social security numbers, or other personally identifying information about individuals will rarely be released, you may be able to argue that the release of individuals’ names does not invade privacy in some circumstances and, therefore, should not be redacted. Often, the names of agency officials or others involved are key to understanding how the government was making policy or conducting activities.
- *Significant public interest.* In general, the public interest considered on the other side of the Exemption 6 balancing test focuses on the public’s understanding of agency actions and policymaking processes as a way to exercise oversight and promote accountability. If you believe that the information at issue will help to inform the public about agency conduct or misconduct, argue why the public needs access to the information.

Keep in mind that you will generally not be able to satisfy this test if the information you are seeking is for personal or commercial purposes only. Conversely, if you can show that obtaining the information will help the public better understand government activities (a particularly useful argument for journalists and others who will disseminate the information broadly), you will have a good chance of satisfying the test if the privacy interests are comparatively insignificant.

❖ **Exemption 7: Law Enforcement Information**

Exempts “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.”

Threshold Issue: Records Compiled for Law Enforcement Purposes

Exemption 7 only protects records that are compiled for law enforcement reasons. The most important issue to consider when challenging an Exemption 7 claim is whether the record(s) at issue were in fact “compiled for law enforcement purposes.” In order to fall within Exemption 7, the records must be related to a civil or criminal investigation or an agency administrative enforcement proceeding. Criminal law enforcement agencies (like the FBI) can generally withhold documents related to investigations conducted under federal laws or to maintain national security, as long as the investigations reasonably fall within their law enforcement duties. Other agencies that do not have law enforcement powers (such as the CIA, which is prohibited from conducting domestic law enforcement activities) generally cannot use Exemption 7 to withhold records related to an investigation.

Even if the requested information was in fact “compiled for law enforcement purposes,” however, it is not exempted under Exemption 7 unless disclosure would lead to one of the specific harms set forth in the subparts of this exemption. When faced with an Exemption 7 denial, carefully consider whether the disclosure of the requested records would in fact cause one of these harms (discussed below); if not, they should be released.

Components of Exemption 7

Ex. 7(A): Interference with enforcement proceedings

Information may be withheld under Exemption 7(A) when disclosure could impede an investigation or harm the government’s case in an ongoing proceeding. An agency generally cannot withhold records related to an investigation that is complete and/or closed, unless the government intends to reopen the investigation later. In addition, the agency may only withhold information if there is actually an ongoing investigation or concrete likelihood of a future investigation, but not if it merely speculates that there might be an investigation.

Agencies may justify withholding based on a range of different potential harms, including where disclosure might discourage potential witnesses from testifying, provide the subject of the investigation or prosecution with information about the government’s case, or interfere with the agency’s ability to control the investigation.

Ex. 7(B): Interference with right to fair trial

An agency may deny a request pursuant to Exemption 7(B) if the information (1) relates to a civil or criminal trial or agency adjudication that is pending or imminent and (2) disclosure of the material would interfere with the fairness of the proceedings. This exemption places a higher burden on agencies than other subsections of Exemption 7, requiring a relatively strong showing that disclosure would give one side an unfair advantage or would prejudice the outcome of the case (for example, by affecting the judgment of jurors or the administrative authority in the case).

Ex. 7(C): Unwarranted invasion of personal privacy

This exemption is closely related to Exemption 6 and also requires a balancing of public interest against the potential invasion of privacy from disclosure. However, the standard for withholding is somewhat lower than Exemption 6, because Exemption 7(C) requires only a showing of “unwarranted invasion” of privacy rather than “clearly unwarranted invasion.”

Courts have generally found that this subpart of the exemption applies when a third party requests law enforcement records about a private citizen that are held by the agency and do not contain information about the agency or its activities.²² Examples of the types of records that can generally be withheld are rap sheets or other records information about the criminal history of an individual.²³ Agencies are also permitted to categorically withhold names and addresses contained in law enforcement records, unless that information is necessary to show that the agency engaged in illegal activity.

This exemption also applies to information that, if disclosed, would personally embarrass an individual referenced in a law enforcement file, especially information that would reveal the names of individuals investigated but not charged with criminal activity. In situations like these, the public interest supporting disclosure must be exceptional. As in Exemption 6, public officials may have a diminished expectation of privacy under Exemption 7(C).

Ex. 7(D): Confidential sources

To permit withholding under Exemption 7(D), the records must have been compiled by a law enforcement agency as part of the agency’s law enforcement duties. Pursuant to this exemption, a law enforcement agency may withhold records containing information furnished by a confidential source during the course of a criminal investigation. There is no time limit on how long confidential source information may be withheld, even if many years have passed or if the source is deceased. A “confidential source” can be an individual or an institution, such as a foreign, state, or local law enforcement agency. Exemption 7(D) will not apply if the confidentiality of the source has been breached, for example if the source appears to testify or the identity of the source is otherwise publicly revealed.

Ex. 7(E): Investigation techniques and procedures

This exemption does not protect *routine* investigative techniques and procedures that are already common knowledge (for example, ballistics tests, fingerprinting, eavesdropping, and wiretapping). Agencies may only withhold materials that would reveal unique or secret techniques and procedures or specific, unknown ways that existing techniques are being employed for law enforcement purposes. This exemption also does not apply to administrative staff manuals or instructions that affect members of the public, which fall within the FOIA’s automatic disclosure provisions.

Ex. 7(F): Danger to life or physical safety

This exemption applies when the release of law enforcement information may endanger individuals, including law enforcement personnel, informants and sources, and members of the public at large. Some courts have interpreted Exemption 7(F) broadly, finding that it may be used to withhold information that the agency believes could be used by terrorists to plan an attack. But at the very least, the information withheld must have been compiled for law enforcement purposes, and there must be a clear connection between the information and the potential harm.

❖ **Exemption 8: Financial Institutions Information**

Exempts information “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.”

Exemption 8 has been interpreted broadly to protect individual financial institutions as well as the integrity of the financial industry as a whole. Although there is no settled definition of “financial institutions,” it has generally been held to include banks, trust companies, investment firms, and securities exchanges; the term is not limited to depository institutions. The exemption can block disclosure even when the information does not relate to an institution’s financial soundness or stability or is not part of any investigation. Use of the exemption also is not limited to agencies that supervise the financial institution.

❖ **Exemption 9: Geological Information**

Exempts “geological and geophysical information and data, including maps, concerning wells.”

Exemption 9 is rarely invoked or litigated. Courts have found significant overlap with Exemption 4. Exemption 9 has been used to provide a near-blanket exemption for oil well materials, but the Interior Department has also cited it to apply to water wells. At least one court has held that this exemption is to be construed narrowly and applied only to technical or scientific information about wells, not proprietary information that may be otherwise exempted under Exemption 4.

APPEALS CHECKLIST

- May I appeal?** Determine whether the agency's response is an "adverse determination":
 - Records withheld in whole or in part
 - Delay
 - No records or inadequate search
 - Denial of fee waiver, preferred fee status, or expedited processing
 - Excessive fees
 - Rejection of request
 - Glomar response
 - Other decision that will impede access to records
- When must I appeal?** Most agencies allow at least thirty days; check response letter or agency regulations for exact deadline.
- Where do I send the appeal?** Find appeal authority information in response letter or call agency/check agency Web site to determine contact information for appeals.
- How do I draft my appeal?** Make sure to include the following in your appeal letter:
 - Statement of appeal
 - Background information about request and agency response, including copies of correspondence
 - Substantive arguments: policy and/or legal
 - Supporting materials
 - Contact information
- Have I made all applicable policy arguments?**
 - Public interest
 - Information publicly available
 - Passage of time
- Have I made all applicable legal arguments?**
 - Inadequate search
 - Insufficient segregation of nonexempt materials
 - Exemptions improperly applied
- Are there procedural issues for appeal?**
 - Glomar response
 - Denial of fee waiver or fee status request
 - Denial of expedited processing
 - Improper rejection of request

Going to Court: Litigating Your FOIA Request

MAY I LITIGATE?

If you are not satisfied with the agency's decision on your FOIA request or if the agency has been nonresponsive, you have the right to file a lawsuit in federal court under the FOIA. Often, litigation will produce a strict schedule for review of the records and additional review by different agency officials of the agency's exemption claims. There are many considerations that may affect your decision to litigate your FOIA request. The following is a brief introduction, and is not intended to be a comprehensive guide to FOIA litigation.²⁴

Keep in mind that you cannot litigate a denial of information in response to an MDR request. (See ch. 4 for more information about appealing MDR denials.)

FIGURE 6.1: ADDITIONAL RESOURCES FOR FOIA LITIGATION

This chapter is not a comprehensive guide to FOIA litigation. Please consult the following sources and/or an attorney for additional information:

- *Litigation Under the Federal Open Government Laws 2008* (Harry A. Hammitt, et al, 2008).
- *Department of Justice FOIA Guide* (March 2007), http://www.usdoj.gov/oip/foia_guide07.htm.
- *Resources for FOIA Legal Research on the Internet* (from Public Citizen), http://www.citizen.org/litigation/free_info/foic_lr/.

SHOULD I LITIGATE?

Bringing a lawsuit requires a commitment of time and resources. A private attorney will often require you to provide an upfront retainer for his or her work. If you are successful in your suit, it may be possible in some cases to recoup the attorney's fees from the government. Although you may litigate a case without an attorney, it may be difficult to make an impact on your own if you are not familiar with case law and court procedures.

In making the decision to litigate, remember that judges do not look kindly on frivolous cases. You must consider whether your dispute is worth bringing to court. How important are the records you are seeking? Is the agency engaging in a pattern or practice that is systematically interfering with your research and that is in violation of the law? Are you able to gain support from other organizations or FOIA requesters to help explain to the court the importance of the case? Do you know enough about the denied records to make a compelling case in court?

WHAT ISSUES MAY I LITIGATE?

Under the FOIA and the Administrative Procedure Act, a requester may litigate when he or she believes that the agency has improperly withheld agency records that should have been disclosed. In addition, requesters may litigate over fee questions (such as when the agency charges excessive fees or denies a fee waiver) or any other agency decision that impairs the requester's ability to obtain the requested information (for example, excessive delay, unreasonable interpretation of the request, inadequate search for records, etc.).

WHEN MAY I FILE A FOIA LAWSUIT?

Before bringing a FOIA lawsuit, the requester first must exhaust his or her administrative remedies, which means receiving the agency's denial, filing an administrative appeal, and receiving a denial of the appeal. Alternatively, you may file a lawsuit without having filed an administrative appeal if the agency fails to comply with any of the FOIA's time limits (twenty working days to respond to an initial request or to respond to an administrative appeal). In some cases it may be effective to go to court immediately after the twenty-day initial request deadline has passed. However, in most cases it is productive to talk with the agency and wait a reasonable time for the agency to process the request rather than going to the time and expense of litigation before the agency has made its final decision.

There is a maximum time limit for filing a FOIA lawsuit (called a "statute of limitations"). The statute of limitations says that you may not go to court to challenge an agency's decision on your FOIA request if more than six years have passed since the agency's response to your appeal (or since the date your administrative remedies were exhausted, i.e., twenty business days after filing, if there has been no agency action on the request). It is important to note that when an agency does not respond to a request at all and no administrative appeal is filed within six years, the statute of limitations has expired, and the requester will not be permitted to file a lawsuit. However, the requester may simply refile the same request and then litigate the agency's failure to respond and/or subsequent denial.

WHERE MAY I FILE A FOIA LAWSUIT?

The FOIA provides that a requester may file a FOIA lawsuit in the federal district court where the requester lives or works or in the district where the records are located (i.e., the agency office that has the records), or in the district court in Washington, DC.

Endnotes

¹ *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136 (1989).

² Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, § 3 (2008).

³ 5 U.S.C. § 552(a)(4)(A)(iii).

⁴ See, e.g., 28 CFR § 16.5(d).

⁵ *Weisberg v. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

⁶ *Dep’t of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976).

⁷ *FBI v. Abramson*, 456 U.S. 615, 630 (1982).

⁸ 68 Federal Register 15315-34 (Mar. 28, 2003).

⁹ EO 12958, as amended, sec. 1.7(a).

¹⁰ EO 12958, as amended, sec. 1.7(b).

¹¹ 5 U.S.C. § 552(a)(2)(C).

¹² 50 U.S.C. § 403-3(1)(5).

¹³ 50 U.S.C. § 403g.

¹⁴ 50 U.S.C. § 402.

¹⁵ 10 U.S.C. § 130c.

¹⁶ 26 U.S.C. § 6103.

¹⁷ Federal Rules of Criminal Procedure, Rule 6(e).

¹⁸ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

¹⁹ *National Parks & Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

²⁰ *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*), cert. denied, 507 U.S. 984 (1993).

²¹ *Rose*, 425 U.S. at 372.

²² *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989).

²³ *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991).

²⁴ For a comprehensive guide to FOIA litigation, see Harry A. Hammitt et al, *Litigation Under the Federal Open Government Laws 2008* (2008).

Glossary of Key Terms and Acronyms

Administrative Appeal: A submission made by a requester asking an agency to reconsider its initial adverse determination on his or her request and making arguments as to why that decision was improper.

Agency: An agency within the meaning of the FOIA (i.e., one required to respond to FOIA requests) is “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency” (5 U.S.C. § 552(f)(1)). This definition includes most executive branch agencies, except those components of the Executive Office of the President the primary function of which is to advise the president. Congress, the courts, and the president himself are not agencies subject to the FOIA.

Agency Record: Courts have defined an “agency record” as any record that is created or obtained by the agency and is in the control of the agency at the time the request is made. The FOIA covers records maintained by the agency in any format, including electronic.

Attorney–Client Privilege: An evidentiary privilege that protects confidential communications between a client and his or her attorney when the communications are based on confidential information provided by the client in order to obtain legal advice. The attorney–client privilege is incorporated into FOIA Exemption 5 and applies to communications between agency officials and agency attorneys.

Automatic Declassification: Process established by Executive Order (EO) 12958, as amended, whereby records of permanent historical value that are more than twenty-five years old are automatically declassified. The EO permits agencies to designate specific information as exempt from automatic declassification if release could damage the national security. Records that are automatically declassified do not immediately become available to the public, but rather must first be processed for release by the National Archives.

Classified Information (or Security Classified Information): Information that, if released, could cause harm to national security within the meaning of the Executive Order on Classification (currently, EO 12958, as amended by EO 13292) and that has been classified by an appropriate authority. Classification of information imposes restrictions on access to the information by individuals within and outside of the government. There are three classification levels: confidential, secret, and top secret.

Commercial Requester: FOIA requester category that covers companies or individuals requesting information for a commercial, trade, or profit-seeking purpose. A commercial requester pays the maximum processing fees for search, review, and duplication.

Compelling Need: In order to be granted expedited processing, a requester must show “compelling need,” defined as circumstances where “failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual” or where there is an “urgency to inform the public concerning actual or alleged Federal Government activity” (5 U.S.C. § 552(a)(6)(E)(v)).

Deliberative Process Privilege: A privilege protecting the policymaking process in order to encourage open discussion among government decision makers. The deliberative process privilege is incorporated into FOIA Exemption 5 and permits withholding of records that are both predecisional and deliberative, such as advice, recommendations, and opinions that are part of an agency decision-making process.

Electronic Reading Room: A portion of an agency Web site that makes available electronic versions of certain records that are required to be disclosed under the FOIA (5 U.S.C. § 552(a)(2)). The categories of information that must be in the electronic reading room include final opinions and orders made in the adjudication of cases by the agency, policy statements and interpretations adopted by the agency, administrative staff manuals and instructions that affect the public, and frequently requested records.

Executive Order 12958, as amended by EO 13292: Executive order governing classification of information. See “classified information.”

Executive Order 13392: Executive order entitled “Improving Agency Disclosure of Information,” issued by President Bush on December 14, 2005, and directing federal agencies to improve their FOIA operations through greater efficiency and a new approach to FOIA customer service.

Exemption: The FOIA contains nine specifically enumerated exemptions that set forth the bases for withholding information requested by a member of the public under the FOIA. The government agency bears the burden of demonstrating that information falls within one of the nine exemptions.

Exemption 2 “Low”: Component of FOIA Exemption 2 that protects internal agency matters in which the public could not reasonably be expected to have any interest.

Exemption 2 “High”: Component of FOIA Exemption 2 that protects internal agency matters where disclosure would risk circumvention of the law or agency regulation, although not all courts have accepted this interpretation of the FOIA statutory language.

Exhaustion of Remedies: Before filing a lawsuit in federal court, a requester must exhaust all administrative remedies by filing an administrative appeal. The requester may be deemed to have exhausted his or her remedies if the time period for the agency to process the request or appeal has passed and the agency has not responded.

Expedited Processing: The FOIA requires agencies to provide for expedited processing of requests where there is a “compelling need” or in other circumstances determined by each agency. The agency must make a determination whether to grant expedited processing within ten days and must process expedited requests “as soon as practicable.”

Federal Register: The official daily publication for rules, proposed rules, and notices of federal agencies and organizations, as well as executive orders and other presidential documents.

Fee Status (or Fee Categories): The FOIA specifies three different categories of FOIA requester. A requester's status (i.e., placement within one of the specified categories) determines the type of fees the requester may be charged. The fee status categories include: commercial requesters (search, review, and duplication fees); educational or noncommercial scientific institution or representative of the news media requesters (duplication fees only); and all other requesters (search and duplication fees) (5 U.S.C. § 552(a)(4)(A)(ii)).

Fee Waiver (or Public Interest Fee Waiver): The FOIA directs agencies to waive or reduce fees charged to a requester "if 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" (5 U.S.C. § 552(a)(4)(A)(ii)(II)).

Final Determination: An agency's final decision on a FOIA request, including the decision on whether or not to release the requested information.

Glomar: An agency response to a FOIA request in which the agency refuses to confirm or deny the existence of the requested records. The Glomar response is invoked when an acknowledgement that the records exist would itself cause harm protected by one of the FOIA exemptions (generally, national security or privacy).

Historical Record: Term used in this guide and elsewhere to refer generally to government records older than twenty-five years, the point at which many agency records are transferred to NARA and classified records are automatically declassified under EO 12958.

Information Security Oversight Office (ISOO): Office responsible to the president for policy and oversight of the government-wide security classification system and the National Industrial Security Program. ISOO is a component of NARA and receives its policy and program guidance from the National Security Council (NSC).

Interagency Security Classification Appeals Panel (ISCAP): Created by EO 12958 in 1995, ISCAP is a six-member body consisting of senior level representatives appointed by the Departments of State, Defense, and Justice; the Central Intelligence Agency; NARA; and the Assistant to the President for National Security Affairs, with a chair appointed by the President. ISCAP's functions include deciding mandatory declassification review appeals from requesters whose requests have been denied at the agency level; ruling on appeals filed under sec. 1.8 of EO 12958; and approving, denying, or amending agency exemptions from automatic declassification.

Law Enforcement Proceedings: Under FOIA Exemption 7, agencies may withhold information "compiled for law enforcement purposes," which includes both civil and criminal judicial proceedings as well as administrative enforcement proceedings.

Mandatory Declassification Review (MDR): A process established in EO 12958, as amended, which allows a member of the public to request that an agency review a classified record to determine whether continued classification is warranted under the executive order or whether some or all of the record can be declassified and released. The MDR process operates much like the FOIA process, with requests and administrative appeals; however, an MDR requester may file an additional appeal with ISCAP but may not file a lawsuit challenging a denial.

No Records: Response to a FOIA request when an agency conducts a search and does not find any agency records that satisfy the request. Requesters may appeal a “no records” response and require the agency to conduct a new search.

Operational Files: Designated intelligence agency files that are excluded from search and review under the FOIA.

Predecisional: Records related to a specific decision making process that are drafted prior to a final decision being made within the agency. Records that are predecisional may be exempt under the deliberative process privilege of Exemption 5, but postdecisional documents like final opinions and administrative decisions cannot be withheld under that exemption.

Presidential Records Act (PRA): Statute governing the preservation and release of official records of presidents and vice presidents (beginning with the Reagan administration). The PRA mandates that all presidential records become the property of the public, to be managed by NARA after the president leaves office, and establishes a framework for public access to the records beginning five years after the end of the administration (44 U.S.C. §§ 2201-2207).

Privacy Act: Statute that restricts disclosure of personally identifiable information in government records and establishes a system for individuals to access records about themselves as well as to correct government records that are inaccurate or incomplete (5 U.S.C. § 552a).

Privacy Waiver: Waiver that an agency may require a FOIA requester to submit before the agency will release personal information about an individual.

Public Interest: When considering the application of Exemptions 6 and 7(C), the Supreme Court has said that the relevant public interest to be balanced against the privacy interest is “the preservation of the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny’” (*Dep’t of Air Force v. Rose*, 426 U.S. 352, 372 (1976)).

Redaction: Process used by agencies to delete or black out exempted information from records that must otherwise be released under the FOIA.

Representative of the News Media: Category of requester that is entitled to pay reduced fees (duplication costs only) for FOIA request processing, defined in the FOIA 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” (5 U.S.C. § 552(a)(4)(A)(ii)).

Segregable: Under the FOIA, agencies are required to release all segregable, nonexempt information within a document. This “segregability requirement” prevents agencies from withholding entire documents if only a portion is exempt from release. Agencies are not required to segregate exempt information when doing so would leave no comprehensible information or where the exempt and the nonexempt information is “inextricably intertwined.”

Statute of Limitations: A time limit for suing in a civil case based on the date when the claim first arose. Under the statute of limitations, FOIA cases must be filed within six years after the agency’s decision on the FOIA request or the date when administrative remedies were exhausted if the agency has not acted on the request.

Trade Secret: Some courts have cited a broad definition covering virtually any business information that provides a competitive advantage. But the DC Circuit Court of Appeals has announced a narrower definition—"a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort" (*Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983)).

Unusual Circumstances: Basis on which agencies can claim a ten-day extension beyond the twenty business day processing deadline, including a voluminous request or the need to consult with other offices or agencies about the request.

Work Product Privilege: An evidentiary privilege, incorporated into FOIA Exemption 5, which protects from disclosure records prepared by an attorney in anticipation of or for the purpose of litigation. To withhold information under the FOIA, an agency must show that the record was prepared in anticipation of a specific lawsuit, by an attorney representing the government.

Federal Agencies Subject to the FOIA

FEDERAL DEPARTMENTS

Department of Agriculture
Department of Commerce
Department of Defense
Department of Education
Department of Energy
Department of Health and Human Services
Department of Homeland Security
Department of Housing and Urban Development
Department of the Interior
Department of Justice
Department of Labor
Department of State
Department of Transportation
Department of the Treasury
Department of Veterans Affairs

FEDERAL AGENCIES

Agency for International Development
American Battle Monuments Commission
Amtrak (National Railroad Passenger Corporation)
Broadcasting Board of Governors
Central Intelligence Agency
Chemical Safety and Hazard Investigation Board
Commission on Civil Rights
Committee for Purchase From People Who Are Blind or Severely Disabled
Commodity Futures Trading Commission
Consumer Product Safety Commission
Corporation for National Service
Court Services and Offender Supervision Agency
Defense Nuclear Facilities Safety Board
Environmental Protection Agency
Equal Employment Opportunity Commission
Executive Office of the President
 Council on Environmental Quality
 Office of Administration (in dispute)
 Office of Management and Budget
 Office of National Drug Control Policy
 Office of Science and Technology Policy

Office of the United States Trade Representative
Export-Import Bank
Farm Credit Administration
Farm Credit System Insurance Corporation
Federal Communications Commission
Federal Deposit Insurance Corporation
Federal Election Commission
Federal Energy Regulatory Commission
Federal Housing Finance Board
Federal Labor Relations Authority
Federal Maritime Commission
Federal Mediation and Conciliation Service
Federal Mine Safety and Health Review Commission
Federal Open Market Committee
Federal Reserve System
Federal Trade Commission
General Services Administration
Institute of Museum and Library Services
Inter-American Foundation
Legal Services Corporation
Merit Systems Protection Board
Millennium Challenge Corporation
National Aeronautics and Space Administration
National Archives and Records Administration
National Capital Planning Commission
National Credit Union Administration
National Endowment for the Arts
National Endowment for the Humanities
National Indian Gaming Commission
National Labor Relations Board
National Mediation Board
National Science Foundation
National Transportation Safety Board
Nuclear Regulatory Commission
Occupational Safety and Health Review Commission
Office of the Director of National Intelligence
Office of Federal Housing Enterprise Oversight
Office of Government Ethics
Office of Personnel Management
Office of Special Counsel
Overseas Private Investment Corporation
Peace Corps
Pension Benefit Guaranty Corporation
Postal Rate Commission
Railroad Retirement Board
Securities and Exchange Commission
Selective Service System
Small Business Administration

Social Security Administration
Surface Transportation Board
Tennessee Valley Authority
United States Copyright Office
United States International Boundary and Water Commission
United States International Trade Commission
United States Postal Service
United States Trade and Development Agency

Sample Request Letters

SAMPLE FOIA REQUEST LETTER

Agency Head [or Freedom of Information Act Officer]

Name of Agency

Address of Agency

City, State, Zip Code

Re: Freedom of Information Act Request

Dear _____:

This is a request under the Freedom of Information Act. I hereby request copies of the following records [or all records containing the following information]: [IDENTIFY RECORDS OR INFORMATION]

[ATTACH SUPPORTING DOCUMENTS]

As the FOIA requires, please release all reasonably segregable nonexempt portions of documents.

[INCLUDE ARGUMENTS FOR RELEASE, IF APPLICABLE.]

In order to help to determine my status to assess fees, you should know that I am:

[INSERT REQUESTER DESCRIPTION, for example:

- an individual seeking information for personal use and not for commercial use.
- a representative of the news media affiliated with the _____ newspaper/magazine/television station/Web site/etc., and this request is made as part of news gathering activity and not for commercial use.
- affiliated with an educational or noncommercial scientific institution, and this request is made for a scholarly or scientific purpose and not for commercial use.
- affiliated with _____ corporation and seeking information for the company's business.]

[Optional] I request a waiver of all fees for this request. Disclosure of the requested information to me 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 my commercial interest. [Include a specific explanation.]

I am willing to pay fees for this request up to a maximum of \$_____. If you estimate that the fees will exceed this limit, please inform me before processing my request.

If you have any questions regarding this request, please contact me at [PHONE and/or E-MAIL]. I look forward to receiving your response within the twenty day statutory time period. Thank you for your consideration of this request.

Sincerely,

SAMPLE MDR REQUEST LETTER

Agency Head [or MDR Officer]

Name of Agency

Address of Agency

City, State, Zip Code

Re: Mandatory Declassification Review Request

Dear _____:

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

[IDENTIFY RECORDS OR INFORMATION]

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. Furthermore, to permit me to reach an intelligent and informed decision whether or not to file an administrative appeal of any denied material please describe any withheld portions and explain the basis for your claims.

If you have any questions regarding the identity of these records, their location, the scope of the request or any other matters, please contact me at: [insert phone number or e-mail].

I look forward to receiving your response.

Sincerely,

How to Read Agency Documents

Government documents can provide a wealth of information on the types of records an agency maintains, how an agency is organized, how communications are routed through an agency, and the existence of other documents to request under the FOIA. It is useful to learn how to read government documents in order to identify these types of clues. Below are three examples: a Department of State cable, a Department of Defense memorandum, and a Defense Intelligence Agency cable.

DEPARTMENT OF STATE CABLE

SECRET

1 UNCLASSIFIED

C25

PAGE 01 ISLAMA 06752 01 OF 02 281200Z
ACTION SS-01

2 RELEASED IN PART
B1, 1.4(B), 1.4(D)

INFO LOG-00 ADS-00 SSO-01 /002 W
----- 264572 281201Z /38

O 281200Z MAR 90
FM AMEMBASSY ISLAMABAD
TO SECSTATE WASHDC IMMEDIATE 2175
INFO AMEMBASSY LONDON T51
AMEMBASSY MOSCOW
AMEMBASSY RIQYADH
AMCONSUL PESHAWAR

S E C R E T SECTION 01 OF 02 ISLAMAQAD 06752

EXDIS KHQYBER

6 DECAPIONED

E.O. 12356: DECL:OADR
TAGS: PREL, AF, PK, US, US
SUBJECT: BRIEFING PRESIDENT ISHAQ ON U.S.-SOVIET
Q
- EXPERTS TALKS

REF: (A) STATE 95642 (B) PESHAWAR 571

1. S - ENTIRE TEXT

2. SUMMARY: THE REACTION TO PRESIDENT ISHAQ MARCH
26 TO A BRIEFING ON THE QHELSINKI TALKS WAS
POSITIVE.

B1

END SUMMARY

SECRET

SECRET

PAGE 02 ISLAMA 06752 01 OF 02 281200Z

3. AMBASSADORS OAKLEY AND TOMSEN, ACCCOMPANIED BY
POLCOUNSELOR, MET MARCH 26 WITH PRESIDENT GHULAOQM
ISHAQ KHAN TO BRIEF HIM ON THE EXPERTS TALKS IN

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: CHARLES L DARIS
DATE/CASE ID: 19 APR 2005 200403874

UNCLASSIFIED

- 1 “Unclassified” indicates the document in this form (with excisions) has been declassified and cleared for public release.
- 2 “Released in Part” indicates part of the document has been approved for release to the public. However, part remains withheld from public disclosure based on the classification categories in EO 12958, as amended.
- 3 “Islam 06752” is the cable number of the document. It indicates the cable was sent from the American Embassy in Islamabad, Pakistan.
- 4 Cable distribution list—This cable was sent from the American Embassy in Islamabad (“Fm Amembassy Islamabad”) to the Secretary of State (“To Secstate Washdc”) for immediate distribution. “Info” indicates that copies were sent to the embassies or consulates in London, Moscow, Riyadh, and Peshawar.
- 5 “281200Z Mar 90” indicates the date and time of the creation of the document, this is known as the cable’s “date-time group,” or DTG. Standard format lists the date and time of processing in Zulu time (GMT), indicated by the Z at the end of the date-time sequence, followed by the month in tri-letter abbreviation and the two-digit year. This document was created 12:00 p.m. GMT March 28, 1990.
- 6 “Decaptioned” indicates the strict distribution restrictions initially placed on the EXDIS document (see below) have been lifted. The marking of “Decaptioned” indicates the document is currently available for wider distribution even though it was initially highly restricted.
- 7 “EXDIS” indicates “exclusive distribution to officers with essential need to know.” This caption limits distribution to senior officials, and is used for highly sensitive cables sent between the White House, the Secretary of State, Deputy Secretary, under secretaries and chiefs of mission.
- 8 “REF” stands for “reference.” These are the numbers for any cables referred to in this document. In this instance, there are two such cables (From the State Department, No. 95642, and from the American Consulate in Peshawar, No. 571).
- 9 “TAGS” stands for “Traffic Analysis by Geography and Subject.” Used judiciously, these abbreviations can be a very useful means of identifying cables that are relevant to your research.

DEPARTMENT OF DEFENSE MEMORANDUM

DECLASSIFIED
Authority NND969057
By K [initials] Date 2/3/82

~~TOP SECRET~~ SENSITIVE 7107882
5/25/71
25 MAY 1971

THE SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

NODIS

COPIES TO: 1

S
U
J
PM
EUR
S/PC
S/S
S/S-S

Honorable Henry A. Kissinger
Assistant to the President for
National Security Affairs
Executive Office of the President
Washington, D.C. 20501

2

3

NODIS REVIEW

Cat. A - Caption removed;
transferred to O/FADRC
Cat. B Transferred to O/FADRC
with additional access
controlled by S/S
Cat. C Control and custody
retained by S/S

Reviewed by: *Gleeson*
Date: 7/31 1978

As a follow-up to his letter of April 20, Dr. Foster met with M. Blancard in Paris on May 12. From all appearances, the meeting went exceedingly well. Dr. Foster restated the President's decision to provide assistance, outlined the type of assistance we would be willing to furnish, stated there would be limits, indicated their nature, and emphasized that our help was to be directed towards helping fix their present systems, so they work in a reliable manner and achieve their design objectives, rather than to help make major performance advances in these systems or help develop next generation systems with significantly improved performance characteristics.

Dr. Foster also noted the overall sensitivity of the matter, calling attention to the security classification and close-hold basis assigned it in the United States, and requested the French accord it similar treatment.

In order to initiate the exchange it was suggested that the next phase consist of a visit to France, in early June, by a team from the U.S., led by a member of Dr. Foster's staff, accompanied by top level personnel from both our Polaris and Minuteman program offices and a member of G. Warren Nutter's staff. The purpose of this visit would be to learn more of the technical details of the French problems, work out tentative arrangements for assistance in their solution, and to write a series of guidelines and ground rules to

4

5 Sec Def Cont Nr. X- 2497 NODIS EXCLUDED FROM AUTOMATIC REGRADING; DOD DIR 5200.10 DOES NOT APPLY

6 OSD Rec No. 1 TOP SECRET SENSITIVE

DEP 12 FPP 12/1/78
MICROFILMED BY S/S

- 1 Distribution of the document at the Department of State. This is the list of bureaus within the State Department that received a copy of the document.
- 2 NODIS indicates “messages of highest sensitivity” at the Secretary of State level. This caption limits distribution to the intended recipient only, unless permission is given by the executive secretary for wider distribution.
- 3 “NODIS review, caption removed” indicates that the document was downgraded on July 31, 1978. However, the document was still classified as “Top Secret” until it was reviewed and released under either the FOIA or MDR.
- 4 Department of State filing information. DEF indicates that this is a document about defense issues. “12” indicates it deals with nuclear issues, and “FR” indicates it deals with France. XR indicates it is a cross reference with the document number DEF 12 US.
- 5 Department of Defense Top Secret tracking number.
- 6 This “OSD Rcy No. 1” indicates that this document is copy #1 of a limited set of original copies produced by the Office of the Secretary of Defense.
- 7 Indicates this document is exempt from automatic declassification review, which means it would not automatically be reviewed for release after twenty-five years.

DEFENSE INTELLIGENCE AGENCY CABLE

1 -~~SECRET~~-

DOCUMENT_ID: 178798311
INQNO: DOC44D 00192700
DOCNO: [REDACTED]
PRODUCER: JCS
SOURCE: DODIR
DOCTYPE: [REDACTED]
DOR: 19971224
TOR: 071529
DOCPREC: R
ORIGDATE: 199712241154
MHFNO: 97 0085494
DOCCLASS: -

HEADER
RR RUEAIIA
DE RUEHBO #2080/01 3581154
ZNY 33999
R 241154Z DEC 97
FM [REDACTED]
TO RUEKJCS/DIA WASHDC [REDACTED]
INFO RUMIAAA/USCINCSO MIAMI FL [REDACTED]
RUEHC/SECSTATE WASHDC [REDACTED]
RUEKJCS/SECDEF WASHDC [REDACTED]
RUEAIIA/CIA WASHDC [REDACTED]
[REDACTED]
BT

CONTROLS
~~SECRET~~ 012080

~~SECRET~~

SERIAL: (U) IIR [REDACTED]

TEXT
COUNTRY: (U) COLOMBIA (CO); PANAMA (PM).

//IPSP: (U) [REDACTED]

COMBINE: COMPLETE

6 SUBJ: IIR [REDACTED] CASHIERED COLONEL TALKS FREELY
ABOUT THE ARMY HE LEFT BEHIND (LASER STRIKE) (U)

7 WARNING: (U) THIS IS AN INFORMATION REPORT, NOT
FINALLY EVALUATED INTELLIGENCE. REPORT CLASSIFIED
~~SECRET~~.

DEPARTMENT OF DEFENSE

8 DOI: (U) 971117.

(b)(2),(b)(3):
10 USC 424

9

-~~SECRET~~-

Page 1

- 1 The document was classified "Secret" before declassification. The word "Secret" has been crossed out to indicate that it has been declassified.
- 2 The date and time of transmission. This document was transmitted on December 24, 1997, at 11:54 GMT.
- 3 The origin of the document has been excised.
- 4 The report was transmitted to the DIA in Washington, but copies were also sent to several other offices, some of which are classified.
- 5 "IIR"—Intelligence Information Report. Serial Number—The IIR number is normally withheld under FOIA exemption (b)(2). A typical IIR number consists of ten digits.
- 6 The subject line is the de facto title of the document.
- 7 This document contains raw, unevaluated intelligence
- 8 "DOI"—Date of Information. The information in this cable was current as of the date given—in this case, November 17, 1997.
- 9 These numbers refer to the exemptions that justify further withholding of the information blacked out in the document.

Additional Resources

LAWS AND EXECUTIVE ORDERS

The Freedom of Information Act, 5 U.S.C. § 552 (see appendix 6 for text)
<http://www.usdoj.gov/oip/amended-foia-redlined.pdf>

The Privacy Act of 1974, 5 U.S.C. § 552a
<http://www.usdoj.gov/oip/privstat.htm>

The Presidential Records Act (PRA) of 1978, 44 U.S.C. § 2201-2207
<http://www.archives.gov/presidential-libraries/laws/1978-act.html>

Executive Order 12958 (as amended) on Classified National Security Information
<http://www.archives.gov/iso/policy-documents/eo-12958-amendment.html>

Executive Order 13392 on Improving Agency Disclosure of Information
<http://www.whitehouse.gov/news/releases/2005/12/print/20051214-4.html>

FOIA Legislative History, from the National Security Archive
[http://www.gwu.edu/~nsarchiv/nsa/foalehistory/legistfoia.htm](http://www.gwu.edu/~nsarchiv/nsa/foialehistory/legistfoia.htm)

AGENCY INFORMATION

Links to Federal Agencies' FOIA Web Sites
http://www.usdoj.gov/oip/other_age.htm

Principal FOIA Contacts at Federal Agencies
<http://www.usdoj.gov/oip/foiacontacts.htm>

A – Z Index of US Government Departments and Agencies
http://www.usa.gov/Agencies/Federal/All_Agencies/index.shtml

The US Government Manual—Official handbook of the Federal Government, which provides comprehensive information on legislative, judicial, and executive branch agencies.
<http://www.gpoaccess.gov/gmanual/index.html>

FOIA RESOURCES

Governmental Resources

Department of Justice FOIA Guide (March 2007)—An extensive guide to the Act's exemptions and procedural requirements.
http://www.usdoj.gov/oip/foia_guide07.htm

Federal Agencies' Annual FOIA Reports to Congress
http://www.usdoj.gov/oip/04_6.html

Your Right to Federal Records—A 2006 publication of the Department of Justice and the General Services Administration.
http://www.pueblo.gsa.gov/cic_text/fed_prog/foia/foia.htm

A Citizen's Guide to the FOIA—A 2005 publication of the House Committee on Government Reform.
<http://www.fas.org/sgp/foia/citizen.html>

FOIA Post—A Web-based newsletter published by the Department of Justice, containing FOIA information and guidance for federal agencies.
<http://www.usdoj.gov/oip/foiapost/mainpage.htm>

Nongovernmental Resources

Access Reports—Newsletter publication that covers freedom of information and privacy issues, tracking policy trends while summarizing and analyzing court decisions, legislation (federal and state), regulations, and agency guidance.
<http://www.accessreports.com/>

Litigation Under the Federal Open Government Laws 2008, Harry A. Hammit et al, (Electronic Privacy Information Center, 2008).

How To Use The Federal FOI Act, 9th Edition—From the Reporters Committee for Freedom of the Press, 2004.
<http://www.rcfp.org/foiact/>

Federal FOI Act Letter Generator
http://www.rcfp.org/foi_letter/generate.php

The Freedom of Information Act: A User's Guide—From Public Citizen, 2005.
<http://www.citizen.org/documents/FOIABrochureWEB.pdf>

Aids for Drafting FOIA Requests
http://www.citizen.org/litigation/free_info/foic_aids/index.cfm

Significant Judicial Decisions Interpreting the FOIA
http://www.citizen.org/litigation/free_info/foic_lr/foiacases/index.cfm

Resources for FOIA Legal Research on the Internet

http://www.citizen.org/litigation/free_info/foic_lr/index.cfm

National Freedom of Information Coalition (NFOIC)—A network of state FOIA advocates that awards grants, holds events, and provides state and federal FOIA resources.

<http://www.nfoic.org/>

Sunshine in Government Initiative—Coalition of media groups committed to promoting policies that ensure the government is accessible, accountable, and open.

<http://www.sunshineingovernment.org/>

Collaboration on Government Secrecy—Project based at the Washington College of Law of American University devoted to openness in government, which provides extensive resources on FOIA legislation, litigation, and news.

<http://www.wcl.american.edu/lawandgov/cgs/>

Sunshine Week—National initiative led by the American Society of Newspaper Editors to open a dialogue about the importance of open government and freedom of information. Web site provides information about annual events as well as FOIA resources.

<http://www.sunshineweek.org/>

Secrecy News—A publication of the Federation of American Scientists' Project on Government Secrecy which provides informal coverage of new developments in secrecy, security, and intelligence policies, as well as links to new acquisitions on its Web site.

E-mail newsletter – <http://www.fas.org/sgp/news/secrecy/index.html>

Blog format – <http://www.fas.org/blog/secrecy/>

FOI Listserv—E-mail discussion group focusing on access to public records, closure of governmental meetings, trends in legislation, and other issues about the public's access to government records and meetings.

<http://www.nfoic.org/resources/foil.html>

MDR AND CLASSIFICATION RESOURCES

Interagency Security Classification Appeals Panel—The Interagency Security Classification Appeals Panel (ISCAP) provides the public and users of the classification system with a forum for further review of classification decisions and handles appeals from MDR requests.

<http://www.archives.gov/isoo/oversight-groups/iscap/index.html>

Information Security Oversight Office—The Information Security Oversight Office (ISO) is a component of NARA that is responsible to the president for policy and oversight of the government-wide security classification system and the National Industrial Security Program.

<http://www.archives.gov/isoo/>

GENERAL GOVERNMENT INFORMATION RESOURCES

Federal Register—The *Federal Register* is the official daily publication containing rules, proposed rules, and notices of federal agencies and organizations, as well as executive orders and other presidential documents.

<http://www.gpoaccess.gov/fr/index.html>

National Archives and Records Administration—Independent federal agency charged with preserving and providing public access to government and historical records, including those from executive branch agencies as well as Congress and the courts.

<http://www.archives.gov/>

Government and Public Libraries—List of national, federal agency, and local libraries as well as online library databases operated by the US government.

http://www.usa.gov/Topics/Reference_Shelf/Libraries.shtml

National Security Archive—An independent nongovernmental research institute and library located at The George Washington University, the Archive collects and publishes declassified documents obtained through the Freedom of Information Act.

<http://www.nsarchive.org>

Project on Government Secrecy, Federation of American Scientists—Project working to challenge excessive government secrecy and promote public oversight by publishing declassified records and extensive resources about government secrecy.

<http://www.fas.org/sgp/index.html>

governmentdocs.org—This site allows users to browse, search, and review hundreds of thousands of pages of government documents acquired through FOIA and other public disclosure laws.

<http://governmentdocs.org/>

Governmentattic.org—Provides electronic copies of hundreds of interesting federal government documents obtained under the Freedom of Information Act.

<http://www.governmentattic.org>

The Memory Hole—A Web site dedicated to preserving material that is in danger of being lost, is hard to find, or is not widely known, including government files, court documents, congressional reports, and other governmental and non-governmental documents.

<http://www.thememoryhole.org>

The Freedom of Information Act

5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

- (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
- (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
 - (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
 - (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
 - (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
 - (E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

- (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
- (C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of an index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when

such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

- (i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or
- (ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

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 newsmedia 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.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if 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.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(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.
[Effective December 31, 2008]

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records

improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause is shown.

[(D) Repealed. Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(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.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(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).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

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. [Effective December 31, 2008]

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall

notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. 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. [Effective December 31, 2008]. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

- (I) 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;
- (II) 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
- (III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of

requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means—

- (I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
 - (II) 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.
- (vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.
- (F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(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.
- [Effective December 31, 2008]

(b) This section does not apply to matters that are—

- (1)(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;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute (other than section 552b of this title), 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;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) 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;

- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) 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;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (9) geological and geophysical information and data, including maps, concerning wells.

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.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

- (A) the investigation or proceeding involves a possible violation of criminal law; and
- (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) 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 this section.

(2) 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 this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international

terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize the withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(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;
- (N) the total amount of fees collected by the agency for processing requests; and
- (O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

- (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.
- (3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.
- (4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and

ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(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.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

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

(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.

(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.

Executive Order 12958 (as amended)

Classified National Security Information

This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security remains a priority.

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

PART 1--ORIGINAL CLASSIFICATION

Sec. 1.1. Classification Standards. (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

- (1) an original classification authority is classifying the information;
 - (2) the information is owned by, produced by or for, or is under the control of the United States Government;
 - (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
 - (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.
- (b) Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.
- (c) The unauthorized disclosure of foreign government information is presumed to cause damage to the national security.

Sec. 1.2. Classification Levels. (a) Information may be classified at one of the following three levels:

- (1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

(2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.

(3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.

(b) Except as otherwise provided by statute, no other terms shall be used to identify United States classified information.

Sec. 1.3. Classification Authority. (a) The authority to classify information originally may be exercised only by:

- (1) the President and, in the performance of executive duties, the Vice President;
- (2) agency heads and officials designated by the President in the Federal Register; and
- (3) United States Government officials delegated this authority pursuant to paragraph (c) of this section.

(b) Officials authorized to classify information at a specified level are also authorized to classify information at a lower level.

(c) Delegation of original classification authority.

(1) Delegations of original classification authority shall be limited to the minimum required to administer this order. Agency heads are responsible for ensuring that designated subordinate officials have a demonstrable and continuing need to exercise this authority.

(2) "Top Secret" original classification authority may be delegated only by the President; in the performance of executive duties, the Vice President; or an agency head or official designated pursuant to paragraph (a)(2) of this section.

(3) "Secret" or "Confidential" original classification authority may be delegated only by the President; in the performance of executive duties, the Vice President; or an agency head or official designated pursuant to paragraph (a)(2) of this section; or the senior agency official described in section 5.4(d) of this order, provided that official has been delegated "Top Secret" original classification authority by the agency head.

(4) Each delegation of original classification authority shall be in writing and the authority shall not be redelegated except as provided in this order. Each delegation shall identify the official by name or position title.

(d) Original classification authorities must receive training in original classification as provided in this order and its implementing directives. Such training must include instruction on the proper safeguarding of classified information and of the criminal, civil, and administrative sanctions that may be brought against an individual who fails to protect classified information from unauthorized disclosure.

(e) Exceptional cases. When an employee, government contractor, licensee, certificate holder, or grantee of an agency who does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with this order and its implementing directives. The information shall be transmitted promptly as provided

under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within 30 days whether to classify this information. If it is not clear which agency has classification responsibility for this information, it shall be sent to the Director of the Information Security Oversight Office. The Director shall determine the agency having primary subject matter interest and forward the information, with appropriate recommendations, to that agency for a classification determination.

Sec. 1.4. Classification Categories. Information shall not be considered for classification unless it concerns:

- (a) military plans, weapons systems, or operations;
- (b) foreign government information;
- (c) intelligence activities (including special activities), intelligence sources or methods, or cryptology;
- (d) foreign relations or foreign activities of the United States, including confidential sources;
- (e) scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism;
- (f) United States Government programs for safeguarding nuclear materials or facilities;
- (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism; or
- (h) weapons of mass destruction.

Sec. 1.5. Duration of Classification. (a) At the time of original classification, the original classification authority shall attempt to establish a specific date or event for declassification based upon the duration of the national security sensitivity of the information. Upon reaching the date or event, the information shall be automatically declassified. The date or event shall not exceed the time frame established in paragraph (b) of this section.

(b) If the original classification authority cannot determine an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority otherwise determines that the sensitivity of the information requires that it shall be marked for declassification for up to 25 years from the date of the original decision. All information classified under this section shall be subject to section 3.3 of this order if it is contained in records of permanent historical value under title 44, United States Code.

(c) An original classification authority may extend the duration of classification, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under this order are followed.

(d) Information marked for an indefinite duration of classification under predecessor orders, for example, marked as "Originating Agency's Determination Required," or information classified under predecessor orders that contains no declassification instructions shall be declassified in accordance with part 3 of this order.

Sec. 1.6. Identification and Markings. (a) At the time of original classification, the following shall appear on the face of each classified document, or shall be applied to other classified media in an appropriate manner:

- (1) one of the three classification levels defined in section 1.2 of this order;
 - (2) the identity, by name or personal identifier and position, of the original classification authority;
 - (3) the agency and office of origin, if not otherwise evident;
 - (4) declassification instructions, which shall indicate one of the following:
 - (A) the date or event for declassification, as prescribed in section 1.5(a) or section 1.5(c);
 - (B) the date that is 10 years from the date of original classification, as prescribed in section 1.5(b); or
 - (C) the date that is up to 25 years from the date of original classification, as prescribed in section 1.5 (b); and
 - (5) a concise reason for classification that, at a minimum, cites the applicable classification categories in section 1.4 of this order.
- (b) Specific information described in paragraph (a) of this section may be excluded if it would reveal additional classified information.
- (c) With respect to each classified document, the agency originating the document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are unclassified. In accordance with standards prescribed in directives issued under this order, the Director of the Information Security Oversight Office may grant waivers of this requirement. The Director shall revoke any waiver upon a finding of abuse.
- (d) Markings implementing the provisions of this order, including abbreviations and requirements to safeguard classified working papers, shall conform to the standards prescribed in implementing directives issued pursuant to this order.
- (e) Foreign government information shall retain its original classification markings or shall be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the entity that furnished the information. Foreign government information retaining its original classification markings need not be assigned a U.S. classification marking provided that the responsible agency determines that the foreign government markings are adequate to meet the purposes served by U.S. classification markings.
- (f) Information assigned a level of classification under this or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings. Whenever such information is used in the derivative classification process or is reviewed for possible declassification, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings.
- (g) The classification authority shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document.

(h) Prior to public release, all declassified records shall be appropriately marked to reflect their declassification.

Sec. 1.7. Classification Prohibitions and Limitations. (a) In no case shall information be classified in order to:

- (1) conceal violations of law, inefficiency, or administrative error;
- (2) prevent embarrassment to a person, organization, or agency;
- (3) restrain competition; or
- (4) prevent or delay the release of information that does not require protection in the interest of the national security.

(b) Basic scientific research information not clearly related to the national security shall not be classified.

(c) Information may be reclassified after declassification and release to the public under proper authority only in accordance with the following conditions:

- (1) the reclassification action is taken under the personal authority of the agency head or deputy agency head, who determines in writing that the reclassification of the information is necessary in the interest of the national security;
- (2) the information may be reasonably recovered; and
- (3) the reclassification action is reported promptly to the Director of the Information Security Oversight Office.

(d) Information that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of section 3.5 of this order only if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order.

(e) Compilations of items of information that are individually unclassified may be classified if the compiled information reveals an additional association or relationship that: (1) meets the standards for classification under this order; and (2) is not otherwise revealed in the individual items of information. As used in this order, "compilation" means an aggregation of pre-existing unclassified items of information.

Sec. 1.8. Classification Challenges. (a) Authorized holders of information who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status of the information in accordance with agency procedures established under paragraph (b) of this section.

(b) In accordance with implementing directives issued pursuant to this order, an agency head or senior agency official shall establish procedures under which authorized holders of information are encouraged and expected to challenge the classification of information that they believe is improperly classified or unclassified. These procedures shall ensure that:

- (1) individuals are not subject to retribution for bringing such actions;

- (2) an opportunity is provided for review by an impartial official or panel; and
- (3) individuals are advised of their right to appeal agency decisions to the Interagency Security Classification Appeals Panel (Panel) established by section 5.3 of this order.

PART 2--DERIVATIVE CLASSIFICATION

Sec. 2.1. Use of Derivative Classification. (a) Persons who only reproduce, extract, or summarize classified information, or who only apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority.

(b) Persons who apply derivative classification markings shall:

- (1) observe and respect original classification decisions; and
- (2) carry forward to any newly created documents the pertinent classification markings. For information derivatively classified based on multiple sources, the derivative classifier shall carry forward:
 - (A) the date or event for declassification that corresponds to the longest period of classification among the sources; and
 - (B) a listing of these sources on or attached to the official file or record copy.

Sec. 2.2. Classification Guides. (a) Agencies with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information. These guides shall conform to standards contained in directives issued under this order.

(b) Each guide shall be approved personally and in writing by an official who:

- (1) has program or supervisory responsibility over the information or is the senior agency official; and
- (2) is authorized to classify information originally at the highest level of classification prescribed in the guide.

(c) Agencies shall establish procedures to ensure that classification guides are reviewed and updated as provided in directives issued under this order.

PART 3--DECLASSIFICATION AND DOWNGRADING

Sec. 3.1. Authority for Declassification. (a) Information shall be declassified as soon as it no longer meets the standards for classification under this order.

(b) It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure. This provision does not:

- (1) amplify or modify the substantive criteria or procedures for classification; or
- (2) create any substantive or procedural rights subject to judicial review.

(c) If the Director of the Information Security Oversight Office determines that information is classified in violation of this order, the Director may require the information to be declassified by the agency that originated the classification. Any such decision by the Director may be appealed to the President through the Assistant to the President for National Security Affairs. The information shall remain classified pending a prompt decision on the appeal.

(d) The provisions of this section shall also apply to agencies that, under the terms of this order, do not have original classification authority, but had such authority under predecessor orders.

Sec. 3.2. Transferred Records. (a) In the case of classified records transferred in conjunction with a transfer of functions, and not merely for storage purposes, the receiving agency shall be deemed to be the originating agency for purposes of this order.

(b) In the case of classified records that are not officially transferred as described in paragraph (a) of this section, but that originated in an agency that has ceased to exist and for which there is no successor agency, each agency in possession of such records shall be deemed to be the originating agency for purposes of this order. Such records may be declassified or downgraded by the agency in possession after consultation with any other agency that has an interest in the subject matter of the records.

(c) Classified records accessioned into the National Archives and Records Administration (National Archives) as of the effective date of this order shall be declassified or downgraded by the Archivist of the United States (Archivist) in accordance with this order, the directives issued pursuant to this order, agency declassification guides, and any existing procedural agreement between the Archivist and the relevant agency head.

(d) The originating agency shall take all reasonable steps to declassify classified information contained in records determined to have permanent historical value before they are accessioned into the National Archives. However, the Archivist may require that classified records be accessioned into the National Archives when necessary to comply with the provisions of the Federal Records Act. This provision does not apply to records being transferred to the Archivist pursuant to section 2203 of title 44, United States Code, or records for which the National Archives serves as the custodian of the records of an agency or organization that has gone out of existence.

(e) To the extent practicable, agencies shall adopt a system of records management that will facilitate the public release of documents at the time such documents are declassified pursuant to the provisions for automatic declassification in section 3.3 of this order.

Sec. 3.3. Automatic Declassification. (a) Subject to paragraphs (b)-(e) of this section, on December 31, 2006, all classified records that (1) are more than 25 years old and (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. Subsequently, all classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of its original classification, except as provided in paragraphs (b)-(e) of this section.

(b) An agency head may exempt from automatic declassification under paragraph (a) of this section specific information, the release of which could be expected to:

(1) reveal the identity of a confidential human source, or a human intelligence source, or reveal information about the application of an intelligence source or method;

(2) reveal information that would assist in the development or use of weapons of mass destruction;

- (3) reveal information that would impair U.S. cryptologic systems or activities;
- (4) reveal information that would impair the application of state of the art technology within a U.S. weapon system;
- (5) reveal actual U.S. military war plans that remain in effect;
- (6) reveal information, including foreign government information, that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States;
- (7) reveal information that would clearly and demonstrably impair the current ability of United States Government officials to protect the President, Vice President, and other protectees for whom protection services, in the interest of the national security, are authorized;
- (8) reveal information that would seriously and demonstrably impair current national security emergency preparedness plans or reveal current vulnerabilities of systems, installations, infrastructures, or projects relating to the national security; or
- (9) violate a statute, treaty, or international agreement.

(c) An agency head shall notify the President through the Assistant to the President for National Security Affairs of any specific file series of records for which a review or assessment has determined that the information within that file series almost invariably falls within one or more of the exemption categories listed in paragraph (b) of this section and which the agency proposes to exempt from automatic declassification. The notification shall include:

- (1) a description of the file series;
- (2) an explanation of why the information within the file series is almost invariably exempt from automatic declassification and why the information must remain classified for a longer period of time; and
- (3) except for the identity of a confidential human source or a human intelligence source, as provided in paragraph (b) of this section, a specific date or event for declassification of the information.

The President may direct the agency head not to exempt the file series or to declassify the information within that series at an earlier date than recommended. File series exemptions previously approved by the President shall remain valid without any additional agency action.

(d) At least 180 days before information is automatically declassified under this section, an agency head or senior agency official shall notify the Director of the Information Security Oversight Office, serving as Executive Secretary of the Panel, of any specific information beyond that included in a notification to the President under paragraph (c) of this section that the agency proposes to exempt from automatic declassification. The notification shall include:

- (1) a description of the information, either by reference to information in specific records or in the form of a declassification guide;
- (2) an explanation of why the information is exempt from automatic declassification and must remain classified for a longer period of time; and

(3) except for the identity of a confidential human source or a human intelligence source, as provided in paragraph (b) of this section, a specific date or event for declassification of the information. The Panel may direct the agency not to exempt the information or to declassify it at an earlier date than recommended. The agency head may appeal such a decision to the President through the Assistant to the President for National Security Affairs. The information will remain classified while such an appeal is pending.

(e) The following provisions shall apply to the onset of automatic declassification:

(1) Classified records within an integral file block, as defined in this order, that are otherwise subject to automatic declassification under this section shall not be automatically declassified until December 31 of the year that is 25 years from the date of the most recent record within the file block.

(2) By notification to the Director of the Information Security Oversight Office, before the records are subject to automatic declassification, an agency head or senior agency official designated under section 5.4 of this order may delay automatic declassification for up to 5 additional years for classified information contained in microforms, motion pictures, audiotapes, videotapes, or comparable media that make a review for possible declassification exemptions more difficult or costly.

(3) By notification to the Director of the Information Security Oversight Office, before the records are subject to automatic declassification, an agency head or senior agency official designated under section 5.4 of this order may delay automatic declassification for up to 3 years for classified records that have been referred or transferred to that agency by another agency less than 3 years before automatic declassification would otherwise be required.

(4) By notification to the Director of the Information Security Oversight Office, an agency head or senior agency official designated under section 5.4 of this order may delay automatic declassification for up to 3 years from the date of discovery of classified records that were inadvertently not reviewed prior to the effective date of automatic declassification.

(f) Information exempted from automatic declassification under this section shall remain subject to the mandatory and systematic declassification review provisions of this order.

(g) The Secretary of State shall determine when the United States should commence negotiations with the appropriate officials of a foreign government or international organization of governments to modify any treaty or international agreement that requires the classification of information contained in records affected by this section for a period longer than 25 years from the date of its creation, unless the treaty or international agreement pertains to information that may otherwise remain classified beyond 25 years under this section.

(h) Records containing information that originated with other agencies or the disclosure of which would affect the interests or activities of other agencies shall be referred for review to those agencies and the information of concern shall be subject to automatic declassification only by those agencies, consistent with the provisions of subparagraphs (e)(3) and (e)(4) of this section.

Sec. 3.4. Systematic Declassification Review. (a) Each agency that has originated classified information under this order or its predecessors shall establish and conduct a program for systematic declassification review. This program shall apply to records of permanent historical value exempted from automatic

declassification under section 3.3 of this order. Agencies shall prioritize the systematic review of records based upon the degree of researcher interest and the likelihood of declassification upon review.

(b) The Archivist shall conduct a systematic declassification review program for classified records: (1) accessioned into the National Archives as of the effective date of this order; (2) transferred to the Archivist pursuant to section 2203 of title 44, United States Code; and (3) for which the National Archives serves as the custodian for an agency or organization that has gone out of existence. This program shall apply to pertinent records no later than 25 years from the date of their creation. The Archivist shall establish priorities for the systematic review of these records based upon the degree of researcher interest and the likelihood of declassification upon review. These records shall be reviewed in accordance with the standards of this order, its implementing directives, and declassification guides provided to the Archivist by each agency that originated the records. The Director of the Information Security Oversight Office shall ensure that agencies provide the Archivist with adequate and current declassification guides.

(c) After consultation with affected agencies, the Secretary of Defense may establish special procedures for systematic review for declassification of classified cryptologic information, and the Director of Central Intelligence may establish special procedures for systematic review for declassification of classified information pertaining to intelligence activities (including special activities), or intelligence sources or methods.

Sec. 3.5. Mandatory Declassification Review. (a) Except as provided in paragraph (b) of this section, all information classified under this order or predecessor orders shall be subject to a review for declassification by the originating agency if:

- (1) the request for a review describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort;
- (2) the information is not exempted from search and review under sections 105C, 105D, or 701 of the National Security Act of 1947 (50 U.S.C. 403-5c, 403-5e, and 431); and
- (3) the information has not been reviewed for declassification within the past 2 years. If the agency has reviewed the information within the past 2 years, or the information is the subject of pending litigation, the agency shall inform the requester of this fact and of the requesters appeal rights.

(b) Information originated by:

- (1) the incumbent President or, in the performance of executive duties, the incumbent Vice President;
- (2) the incumbent Presidents White House Staff or, in the performance of executive duties, the incumbent Vice Presidents Staff;
- (3) committees, commissions, or boards appointed by the incumbent President; or
- (4) other entities within the Executive Office of the President that solely advise and assist the incumbent President is exempted from the provisions of paragraph (a) of this section. However, the Archivist shall have the authority to review, downgrade, and declassify papers or records of former Presidents under the control of the Archivist pursuant to sections 2107, 2111, 2111 note, or 2203 of title 44, United States Code. Review procedures developed by the Archivist shall provide for consultation with agencies having primary subject matter interest and shall be

consistent with the provisions of applicable laws or lawful agreements that pertain to the respective Presidential papers or records. Agencies with primary subject matter interest shall be notified promptly of the Archivists decision. Any final decision by the Archivist may be appealed by the requester or an agency to the Panel. The information shall remain classified pending a prompt decision on the appeal.

(c) Agencies conducting a mandatory review for declassification shall declassify information that no longer meets the standards for classification under this order. They shall release this information unless withholding is otherwise authorized and warranted under applicable law.

(d) In accordance with directives issued pursuant to this order, agency heads shall develop procedures to process requests for the mandatory review of classified information. These procedures shall apply to information classified under this or predecessor orders. They also shall provide a means for administratively appealing a denial of a mandatory review request, and for notifying the requester of the right to appeal a final agency decision to the Panel.

(e) After consultation with affected agencies, the Secretary of Defense shall develop special procedures for the review of cryptologic information; the Director of Central Intelligence shall develop special procedures for the review of information pertaining to intelligence activities (including special activities), or intelligence sources or methods; and the Archivist shall develop special procedures for the review of information accessioned into the National Archives.

Sec. 3.6. Processing Requests and Reviews. In response to a request for information under the Freedom of Information Act, the Privacy Act of 1974, or the mandatory review provisions of this order, or pursuant to the automatic declassification or systematic review provisions of this order:

(a) An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.

(b) When an agency receives any request for documents in its custody that contain information that was originally classified by another agency, or comes across such documents in the process of the automatic declassification or systematic review provisions of this order, it shall refer copies of any request and the pertinent documents to the originating agency for processing, and may, after consultation with the originating agency, inform any requester of the referral unless such association is itself classified under this order or its predecessors. In cases in which the originating agency determines in writing that a response under paragraph (a) of this section is required, the referring agency shall respond to the requester in accordance with that paragraph.

Sec. 3.7. Declassification Database. (a) The Director of the Information Security Oversight Office, in conjunction with those agencies that originate classified information, shall coordinate the linkage and effective utilization of existing agency databases of records that have been declassified and publicly released.

(b) Agency heads shall fully cooperate with the Director of the Information Security Oversight Office in these efforts.

PART 4--SAFEGUARDING

Sec. 4.1. General Restrictions on Access. (a) A person may have access to classified information provided that:

(1) a favorable determination of eligibility for access has been made by an agency head or the agency heads designee;

(2) the person has signed an approved nondisclosure agreement; and

(3) the person has a need-to-know the information.

(b) Every person who has met the standards for access to classified information in paragraph (a) of this section shall receive contemporaneous training on the proper safeguarding of classified information and on the criminal, civil, and administrative sanctions that may be imposed on an individual who fails to protect classified information from unauthorized disclosure.

(c) Classified information shall remain under the control of the originating agency or its successor in function. An agency shall not disclose information originally classified by another agency without its authorization. An official or employee leaving agency service may not remove classified information from the agencys control.

(d) Classified information may not be removed from official premises without proper authorization.

(e) Persons authorized to disseminate classified information outside the executive branch shall ensure the protection of the information in a manner equivalent to that provided within the executive branch.

(f) Consistent with law, directives, and regulation, an agency head or senior agency official shall establish uniform procedures to ensure that automated information systems, including networks and telecommunications systems, that collect, create, communicate, compute, disseminate, process, or store classified information have controls that:

(1) prevent access by unauthorized persons; and

(2) ensure the integrity of the information.

(g) Consistent with law, directives, and regulation, each agency head or senior agency official shall establish controls to ensure that classified information is used, processed, stored, reproduced, transmitted, and destroyed under conditions that provide adequate protection and prevent access by unauthorized persons.

(h) Consistent with directives issued pursuant to this order, an agency shall safeguard foreign government information under standards that provide a degree of protection at least equivalent to that required by the government or international organization of governments that furnished the information. When adequate to achieve equivalency, these standards may be less restrictive than the safeguarding standards that ordinarily apply to United States "Confidential" information, including modified handling and transmission and allowing access to individuals with a need-to-know who have not otherwise been cleared for access to classified information or executed an approved nondisclosure agreement.

(i) Except as otherwise provided by statute, this order, directives implementing this order, or by direction of the President, classified information originating in one agency shall not be disseminated outside any other agency to which it has been made available without the consent of the originating agency. An agency head or senior agency official may waive this requirement for specific information originated within that agency. For purposes of this section, the Department of Defense shall be considered one agency. Prior consent is not required when referring records for declassification review that contain information originating in several agencies.

Sec. 4.2. Distribution Controls. (a) Each agency shall establish controls over the distribution of classified information to ensure that it is distributed only to organizations or individuals eligible for access and with a need-to-know the information.

(b) In an emergency, when necessary to respond to an imminent threat to life or in defense of the homeland, the agency head or any designee may authorize the disclosure of classified information to an individual or individuals who are otherwise not eligible for access. Such actions shall be taken only in accordance with the directives implementing this order and any procedures issued by agencies governing the classified information, which shall be designed to minimize the classified information that is disclosed under these circumstances and the number of individuals who receive it. Information disclosed under this provision or implementing directives and procedures shall not be deemed declassified as a result of such disclosure or subsequent use by a recipient. Such disclosures shall be reported promptly to the originator of the classified information. For purposes of this section, the Director of Central Intelligence may issue an implementing directive governing the emergency disclosure of classified intelligence information.

(c) Each agency shall update, at least annually, the automatic, routine, or recurring distribution of classified information that they distribute. Recipients shall cooperate fully with distributors who are updating distribution lists and shall notify distributors whenever a relevant change in status occurs.

Sec. 4.3. Special Access Programs. (a) Establishment of special access programs. Unless otherwise authorized by the President, only the Secretaries of State, Defense, and Energy, and the Director of Central Intelligence, or the principal deputy of each, may create a special access program. For special access programs pertaining to intelligence activities (including special activities, but not including military operational, strategic, and tactical programs), or intelligence sources or methods, this function shall be exercised by the Director of Central Intelligence. These officials shall keep the number of these programs at an absolute minimum, and shall establish them only when the program is required by statute or upon a specific finding that:

- (1) the vulnerability of, or threat to, specific information is exceptional; and
- (2) the normal criteria for determining eligibility for access applicable to information classified at the same level are not deemed sufficient to protect the information from unauthorized disclosure.

(b) Requirements and limitations.

(1) Special access programs shall be limited to programs in which the number of persons who will have access ordinarily will be reasonably small and commensurate with the objective of providing enhanced protection for the information involved.

(2) Each agency head shall establish and maintain a system of accounting for special access programs consistent with directives issued pursuant to this order.

(3) Special access programs shall be subject to the oversight program established under section 5.4(d) of this order. In addition, the Director of the Information Security Oversight Office shall be afforded access to these programs, in accordance with the security requirements of each program, in order to perform the functions assigned to the Information Security Oversight Office under this order. An agency head may limit access to a special access program to the Director

and no more than one other employee of the Information Security Oversight Office, or, for special access programs that are extraordinarily sensitive and vulnerable, to the Director only.

(4) The agency head or principal deputy shall review annually each special access program to determine whether it continues to meet the requirements of this order.

(5) Upon request, an agency head shall brief the Assistant to the President for National Security Affairs, or a designee, on any or all of the agencys special access programs.

(c) Nothing in this order shall supersede any requirement made by or under 10 U.S.C. 119.

Sec. 4.4. Access by Historical Researchers and Certain Former Government Personnel. (a) The requirement in section 4.1(a)(3) of this order that access to classified information may be granted only to individuals who have a need-to-know the information may be waived for persons who:

(1) are engaged in historical research projects;

(2) previously have occupied policy-making positions to which they were appointed by the President under section 105(a)(2)(A) of title 3, United States Code, or the Vice President under 106(a)(1)(A) of title 3, United States Code; or

(3) served as President or Vice President.

(b) Waivers under this section may be granted only if the agency head or senior agency official of the originating agency:

(1) determines in writing that access is consistent with the interest of the national security;

(2) takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with this order; and

(3) limits the access granted to former Presidential appointees and Vice Presidential appointees to items that the person originated, reviewed, signed, or received while serving as a Presidential appointee or a Vice Presidential appointee.

PART 5--IMPLEMENTATION AND REVIEW

Sec. 5.1. Program Direction. (a) The Director of the Information Security Oversight Office, under the direction of the Archivist and in consultation with the Assistant to the President for National Security Affairs, shall issue such directives as are necessary to implement this order. These directives shall be binding upon the agencies. Directives issued by the Director of the Information Security Oversight Office shall establish standards for:

(1) classification and marking principles;

(2) safeguarding classified information, which shall pertain to the handling, storage, distribution, transmittal, and destruction of and accounting for classified information;

(3) agency security education and training programs;

(4) agency self-inspection programs; and

(5) classification and declassification guides.

(b) The Archivist shall delegate the implementation and monitoring functions of this program to the Director of the Information Security Oversight Office.

Sec. 5.2. Information Security Oversight Office. (a) There is established within the National Archives an Information Security Oversight Office. The Archivist shall appoint the Director of the Information Security Oversight Office, subject to the approval of the President.

(b) Under the direction of the Archivist, acting in consultation with the Assistant to the President for National Security Affairs, the Director of the Information Security Oversight Office shall:

(1) develop directives for the implementation of this order;

(2) oversee agency actions to ensure compliance with this order and its implementing directives;

(3) review and approve agency implementing regulations and agency guides for systematic declassification review prior to their issuance by the agency;

(4) have the authority to conduct on-site reviews of each agency's program established under this order, and to require of each agency those reports, information, and other cooperation that may be necessary to fulfill its responsibilities. If granting access to specific categories of classified information would pose an exceptional national security risk, the affected agency head or the senior agency official shall submit a written justification recommending the denial of access to the President through the Assistant to the President for National Security Affairs within 60 days of the request for access. Access shall be denied pending the response;

(5) review requests for original classification authority from agencies or officials not granted original classification authority and, if deemed appropriate, recommend Presidential approval through the Assistant to the President for National Security Affairs;

(6) consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the program established under this order;

(7) have the authority to prescribe, after consultation with affected agencies, standardization of forms or procedures that will promote the implementation of the program established under this order;

(8) report at least annually to the President on the implementation of this order; and

(9) convene and chair interagency meetings to discuss matters pertaining to the program established by this order.

Sec. 5.3. Interagency Security Classification Appeals Panel.

(a) Establishment and administration.

(1) There is established an Interagency Security Classification Appeals Panel. The Departments of State, Defense, and Justice, the Central Intelligence Agency, the National Archives, and the Assistant to the President for National Security Affairs shall each be represented by a senior-level representative who is a full-time or permanent part-time Federal officer or employee designated to serve as a member of the Panel by the respective agency head. The President shall select the Chair of the Panel from among the Panel members.

(2) A vacancy on the Panel shall be filled as quickly as possible as provided in paragraph (a)(1) of this section.

(3) The Director of the Information Security Oversight Office shall serve as the Executive Secretary. The staff of the Information Security Oversight Office shall provide program and administrative support for the Panel.

(4) The members and staff of the Panel shall be required to meet eligibility for access standards in order to fulfill the Panels functions.

(5) The Panel shall meet at the call of the Chair. The Chair shall schedule meetings as may be necessary for the Panel to fulfill its functions in a timely manner.

(6) The Information Security Oversight Office shall include in its reports to the President a summary of the Panels activities.

(b) Functions. The Panel shall:

(1) decide on appeals by persons who have filed classification challenges under section 1.8 of this order;

(2) approve, deny, or amend agency exemptions from automatic declassification as provided in section 3.3 of this order; and

(3) decide on appeals by persons or entities who have filed requests for mandatory declassification review under section 3.5 of this order.

(c) Rules and procedures. The Panel shall issue bylaws, which shall be published in the Federal Register. The bylaws shall establish the rules and procedures that the Panel will follow in accepting, considering, and issuing decisions on appeals. The rules and procedures of the Panel shall provide that the Panel will consider appeals only on actions in which:

(1) the appellant has exhausted his or her administrative remedies within the responsible agency;

(2) there is no current action pending on the issue within the Federal courts; and

(3) the information has not been the subject of review by the Federal courts or the Panel within the past 2 years.

(d) Agency heads shall cooperate fully with the Panel so that it can fulfill its functions in a timely and fully informed manner. An agency head may appeal a decision of the Panel to the President through the Assistant to the President for National Security Affairs. The Panel shall report to the President through the Assistant to the President for National Security Affairs any instance in which it believes that an agency head is not cooperating fully with the Panel.

(e) The Panel is established for the sole purpose of advising and assisting the President in the discharge of his constitutional and discretionary authority to protect the national security of the United States. Panel decisions are committed to the discretion of the Panel, unless changed by the President.

(f) Notwithstanding paragraphs (a) through (e) of this section, whenever the Panel reaches a conclusion that information owned or controlled by the Director of Central Intelligence (Director) should be declassified, and the Director notifies the Panel that he objects to its conclusion because he has determined that the information could reasonably be expected to cause damage to the national security

and to reveal (1) the identity of a human intelligence source, or (2) information about the application of an intelligence source or method (including any information that concerns, or is provided as a result of, a relationship with a cooperating intelligence element of a foreign government), the information shall remain classified unless the Director's determination is appealed to the President, and the President reverses the determination.

Sec. 5.4. General Responsibilities. Heads of agencies that originate or handle classified information shall:

- (a) demonstrate personal commitment and commit senior management to the successful implementation of the program established under this order;
- (b) commit necessary resources to the effective implementation of the program established under this order;
- (c) ensure that agency records systems are designed and maintained to optimize the safeguarding of classified information, and to facilitate its declassification under the terms of this order when it no longer meets the standards for continued classification; and
- (d) designate a senior agency official to direct and administer the program, whose responsibilities shall include:
 - (1) overseeing the agency's program established under this order, provided, an agency head may designate a separate official to oversee special access programs authorized under this order. This official shall provide a full accounting of the agency's special access programs at least annually;
 - (2) promulgating implementing regulations, which shall be published in the Federal Register to the extent that they affect members of the public;
 - (3) establishing and maintaining security education and training programs;
 - (4) establishing and maintaining an ongoing self-inspection program, which shall include the periodic review and assessment of the agency's classified product;
 - (5) establishing procedures to prevent unnecessary access to classified information, including procedures that:
 - (A) require that a need for access to classified information is established before initiating administrative clearance procedures; and
 - (B) ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs;
 - (6) developing special contingency plans for the safeguarding of classified information used in or near hostile or potentially hostile areas;
 - (7) ensuring that the performance contract or other system used to rate civilian or military personnel performance includes the management of classified information as a critical element or item to be evaluated in the rating of:
 - (A) original classification authorities;
 - (B) security managers or security specialists; and

- (C) all other personnel whose duties significantly involve the creation or handling of classified information;
- (8) accounting for the costs associated with the implementation of this order, which shall be reported to the Director of the Information Security Oversight Office for publication; and
- (9) assigning in a prompt manner agency personnel to respond to any request, appeal, challenge, complaint, or suggestion arising out of this order that pertains to classified information that originated in a component of the agency that no longer exists and for which there is no clear successor in function.

Sec. 5.5. Sanctions. (a) If the Director of the Information Security Oversight Office finds that a violation of this order or its implementing directives has occurred, the Director shall make a report to the head of the agency or to the senior agency official so that corrective steps, if appropriate, may be taken.

(b) Officers and employees of the United States Government, and its contractors, licensees, certificate holders, and grantees shall be subject to appropriate sanctions if they knowingly, willfully, or negligently:

- (1) disclose to unauthorized persons information properly classified under this order or predecessor orders;
- (2) classify or continue the classification of information in violation of this order or any implementing directive;
- (3) create or continue a special access program contrary to the requirements of this order; or
- (4) contravene any other provision of this order or its implementing directives.

(c) Sanctions may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation.

(d) The agency head, senior agency official, or other supervisory official shall, at a minimum, promptly remove the classification authority of any individual who demonstrates reckless disregard or a pattern of error in applying the classification standards of this order.

(e) The agency head or senior agency official shall:

- (1) take appropriate and prompt corrective action when a violation or infraction under paragraph (b) of this section occurs; and
- (2) notify the Director of the Information Security Oversight Office when a violation under paragraph (b)(1), (2), or (3) of this section occurs.

PART 6--GENERAL PROVISIONS

Sec. 6.1. Definitions. For purposes of this order:

- (a) "Access" means the ability or opportunity to gain knowledge of classified information.
- (b) "Agency" means any "Executive agency," as defined in 5 U.S.C. 105; any "Military department" as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into the possession of classified information.

(c) "Automated information system" means an assembly of computer hardware, software, or firmware configured to collect, create, communicate, compute, disseminate, process, store, or control data or information.

(d) "Automatic declassification" means the declassification of information based solely upon:

- (1) the occurrence of a specific date or event as determined by the original classification authority; or
- (2) the expiration of a maximum time frame for duration of classification established under this order.

(e) "Classification" means the act or process by which information is determined to be classified information.

(f) "Classification guidance" means any instruction or source that prescribes the classification of specific information.

(g) "Classification guide" means a documentary form of classification guidance issued by an original classification authority that identifies the elements of information regarding a specific subject that must be classified and establishes the level and duration of classification for each such element.

(h) "Classified national security information" or "classified information" means information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

(i) "Confidential source" means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation that the information or relationship, or both, are to be held in confidence.

(j) "Damage to the national security" means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information.

(k) "Declassification" means the authorized change in the status of information from classified information to unclassified information.

(l) "Declassification authority" means:

- (1) the official who authorized the original classification, if that official is still serving in the same position;
- (2) the originator's current successor in function;
- (3) a supervisory official of either; or
- (4) officials delegated declassification authority in writing by the agency head or the senior agency official.

(m) "Declassification guide" means written instructions issued by a declassification authority that describes the elements of information regarding a specific subject that may be declassified and the elements that must remain classified.

(n) "Derivative classification" means the incorporating, paraphrasing, restating, or generating in new form information that is already classified, and marking the newly developed material consistent with

the classification markings that apply to the source information. Derivative classification includes the classification of information based on classification guidance. The duplication or reproduction of existing classified information is not derivative classification.

(o) "Document" means any recorded information, regardless of the nature of the medium or the method or circumstances of recording.

(p) "Downgrading" means a determination by a declassification authority that information classified and safeguarded at a specified level shall be classified and safeguarded at a lower level.

(q) "File series" means file units or documents arranged according to a filing system or kept together because they relate to a particular subject or function, result from the same activity, document a specific kind of transaction, take a particular physical form, or have some other relationship arising out of their creation, receipt, or use, such as restrictions on access or use.

(r) "Foreign government information" means:

(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) information produced by the United States Government pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence; or

(3) information received and treated as "foreign government information" under the terms of a predecessor order.

(s) "Information" means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government. "Control" means the authority of the agency that originates information, or its successor in function, to regulate access to the information.

(t) "Infraction" means any knowing, willful, or negligent action contrary to the requirements of this order or its implementing directives that does not constitute a "violation," as defined below.

(u) "Integral file block" means a distinct component of a file series, as defined in this section, that should be maintained as a separate unit in order to ensure the integrity of the records. An integral file block may consist of a set of records covering either a specific topic or a range of time such as presidential administration or a 5-year retirement schedule within a specific file series that is retired from active use as a group.

(v) "Integrity" means the state that exists when information is unchanged from its source and has not been accidentally or intentionally modified, altered, or destroyed.

(w) "Mandatory declassification review" means the review for declassification of classified information in response to a request for declassification that meets the requirements under section 3.5 of this order.

(x) "Multiple sources" means two or more source documents, classification guides, or a combination of both.

- (y) "National security" means the national defense or foreign relations of the United States.
- (z) "Need-to-know" means a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.
- (aa) "Network" means a system of two or more computers that can exchange data or information.
- (bb) "Original classification" means an initial determination that information requires, in the interest of the national security, protection against unauthorized disclosure.
- (cc) "Original classification authority" means an individual authorized in writing, either by the President, the Vice President in the performance of executive duties, or by agency heads or other officials designated by the President, to classify information in the first instance.
- (dd) "Records" means the records of an agency and Presidential papers or Presidential records, as those terms are defined in title 44, United States Code, including those created or maintained by a government contractor, licensee, certificate holder, or grantee that are subject to the sponsoring agency's control under the terms of the contract, license, certificate, or grant.
- (ee) "Records having permanent historical value" means Presidential papers or Presidential records and the records of an agency that the Archivist has determined should be maintained permanently in accordance with title 44, United States Code.
- (ff) "Records management" means the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.
- (gg) "Safeguarding" means measures and controls that are prescribed to protect classified information.
- (hh) "Self-inspection" means the internal review and evaluation of individual agency activities and the agency as a whole with respect to the implementation of the program established under this order and its implementing directives.
- (ii) "Senior agency official" means the official designated by the agency head under section 5.4(d) of this order to direct and administer the agency's program under which information is classified, safeguarded, and declassified.
- (jj) "Source document" means an existing document that contains classified information that is incorporated, paraphrased, restated, or generated in new form into a new document.
- (kk) "Special access program" means a program established for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.
- (ll) "Systematic declassification review" means the review for declassification of classified information contained in records that have been determined by the Archivist to have permanent historical value in accordance with title 44, United States Code.
- (mm) "Telecommunications" means the preparation, transmission, or communication of information by electronic means.

(nn) "Unauthorized disclosure" means a communication or physical transfer of classified information to an unauthorized recipient.

(oo) "Violation" means:

- (1) any knowing, willful, or negligent action that could reasonably be expected to result in an unauthorized disclosure of classified information;
- (2) any knowing, willful, or negligent action to classify or continue the classification of information contrary to the requirements of this order or its implementing directives; or
- (3) any knowing, willful, or negligent action to create or continue a special access program contrary to the requirements of this order.

(pp) "Weapons of mass destruction" means chemical, biological, radiological, and nuclear weapons.

Sec. 6.2. General Provisions. (a) Nothing in this order shall supersede any requirement made by or under the Atomic Energy Act of 1954, as amended, or the National Security Act of 1947, as amended. "Restricted Data" and "Formerly Restricted Data" shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and regulations issued under that Act.

(b) The Attorney General, upon request by the head of an agency or the Director of the Information Security Oversight Office, shall render an interpretation of this order with respect to any question arising in the course of its administration.

(c) Nothing in this order limits the protection afforded any information by other provisions of law, including the Constitution, Freedom of Information Act exemptions, the Privacy Act of 1974, and the National Security Act of 1947, as amended. This order is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its departments, agencies, officers, employees, or agents. The foregoing is in addition to the specific provisos set forth in sections 3.1(b) and 5.3(e) of this order.

(d) Executive Order 12356 of April 6, 1982, was revoked as of October 14, 1995.

Sec. 6.3. Effective Date. This order is effective immediately, except for section 1.6, which shall become effective 180 days from the date of this order.