

Freedom of Information Act and Open Records Law Handbook

Judicial Watch, Inc.

*Your Reference For Ensuring Transparency, Accountability
and Integrity in Government*

Because No One Is Above the Law
Judicial Watch Inc., 501 School Street, SW, Washington, DC 20024

Table of Contents

Introduction

Chapter 1 -The Freedom of Information Act Overview	3
Chapter 2 - Privacy Act of 1974 Overview	9
Chapter 3 - Federal Agencies' FOIA Web Sites	12
Chapter 4 – Exemptions	16
Chapter 5 - Exhausting Administrative Remedies	21
Chapter 6 – Sample FOIA Request Letter	25
Chapter 7 – Sample FOIA Appeal Letter	27
Chapter 8 – Sample PA Request Letter	28
Chapter 9 – Sample PA Appeal Letter	30
Chapter 10 – Frequently Asked Questions (FAQs)	31
Chapter 11 – References and Informational Links	35

Introduction

There is no other legal instrument routinely available to the general public that has allowed for greater accountability of government decisions and for the protection of individual privacy rights than the Freedom of Information Act (FOIA) and Privacy Act (PA). In this handbook, Judicial Watch Inc., the public interest group that investigates and prosecutes government corruption, seeks to put the knowledge of using federal FOIA and PA laws into the hands of families, churches, communities, organizations and all individuals interested in learning more about the decisions, operations and activities of their government, as well as to gain access to information the government may have that relates to them.

The centralization of power at the federal level over the past century and the sheer vastness of the federal bureaucracy has made it easy for officials to keep important decisions from public scrutiny. Small offices and agencies have been given decision-making authority of which many Americans have likely never heard. This handbook seeks to empower Americans with the ability to: (1) identify and request records; (2) submit timely administrative appeals; and (3) prepare to litigate FOIA and PA requests regarding information that they seek either for public benefit or information that pertains directly to them which they have a right to access.

Encouraging numbers show the American public does not take their rights of freedom of information under the FOIA and PA act for granted, as demonstrated by the growing use of both laws. According to the government's own numbers contained in a summary report put out by the Department of Justice Office of Information and Privacy (OIP), the number of FOIA and PA requests filed with federal agencies and departments is at an all time high for Fiscal Year 2003 -- 3,266,394. This represents a 36% increase from Fiscal Year 2002 and marks the first year in which the three-million-request level has been reached.

Do these requests for information accomplish anything to bring about more ethical conduct and accountability for decisions made by the Washington elite? Do they have an impact on the lives of real people? Yes! Through FOIA, Americans have learned about the selling of Commerce Department trade mission seats to Democratic Party and Clinton Administration campaign contributors, who happened to have connections to Chinese military intelligence and agents of espionage. They have learned about the Clinton Administration's efforts to use IRS audits to intimidate adversaries and detractors. Americans have obtained lists of almost 300 Saudi subjects, including members of the Bin Laden family, which the Bush administration allowed to leave the country shortly after 9/11 with little or no questioning by authorities. After the anthrax attacks in the fall of 2001, postal workers in the Washington DC area learned the United States Postal Service knew the Brentwood mail processing facility was contaminated with anthrax at least four days before they chose to close it. Over the years Americans have learned about the long-concealed health dangers of Agent Orange to Vietnam Veterans, the lack of security at nuclear laboratories, controversial details of the John F. Kennedy and Martin Luther King assassinations, and the government's foreknowledge of the bombing of Pearl Harbor all using

information received through FOIA. America's experience with its freedom of information laws can hardly be called a useless exercise.

Judicial Watch alone has filed over 400 public information or record requests under FOIA and PA, at all levels of government since its founding in 1994. It has set FOIA and PA legal precedent in the United States District Court for the District of Columbia several times. Today, with Congress having little or no desire to perform its constitutional obligation to control the functions of the executive branch, the burden of fighting for accountability and oversight are increasingly becoming a matter for individual citizens and local communities. It is the hope of Judicial Watch that the American people, their families, churches, and community groups will use this handbook to inform and defend themselves from the adverse power and corruption of government and bring about a renewal of ethics and good conduct in public life.

Chapter 1 -The Freedom of Information Act Overview

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, was enacted by Congress and signed into law by President Lyndon B. Johnson in 1966. The enactment of FOIA gave the public the right to obtain and access information from federal government agencies. Previously, the government placed a burden on the individual making a request to prove a right to examine the documents. The enactment of FOIA reversed this process by placing the burden upon the government to justify withholding the documents. While FOIA does not require the government to create any documents regarding an information request, it requires that the agency release any document, file or other record that already exists pertaining to the request. FOIA was amended in 1996 to include electronic information.

Only Executive Branch agencies of the federal government are subject to FOIA. It does not apply to Congress or any of the Federal Courts, including the Supreme Court, or to the White House, including the Office of the President and Vice-President, as they are constitutional officers, not agencies. Individual offices of the Executive Office of the President (EOP), such as the Office of National Drug Control Policy, which serve directly under the President, are subject to FOIA. Multinational organizations such as the United Nations (UN), the World Trade Organization (WTO), the International Monetary Fund (IMF), and the World Bank (WB), of which the United States is a member, are not subject to FOIA because they are not federal agencies. FOIA does not provide access to records held by state or local government agencies, private businesses or individuals. However, states have their own statutes regarding the access of state and local government records and individual state agencies should be contacted for further information.

FOIA applies to any federal agency records which are either created or obtained by an agency and under the agency's control at the time of the request. Under FOIA the term "record", and any other term used in reference to information, includes any information that would be an agency record subject to FOIA, including records in electronic format, maps, photos, digital data, handwritten notes, and video and audio tapes.

A FOIA request can be made by any individual, partnership, corporation, association or foreign government. Requests can also be made on behalf of any person by an attorney or representative. Federal agencies are excluded from making FOIA requests, however, states and state agencies may do so. There are two exceptions to the open eligibility standard for making FOIA requests. The first exception pertains to fugitives from justice, if the requested records relate to his or her fugitive status. Secondly, agencies of the intelligence community are precluded from disclosing records or information in response to a FOIA request to foreign governments or international governmental organizations. Both exclusions also apply to representatives of the requester.

A request must be made in writing and clearly describe the records sought, preferably in bulleted or numbered items. If possible, the request letter should cite a news report or other public evidence that the records requested exist and are in the possession of the agency. The request

should be sent by both facsimile (fax) and certified US mail, with the fax number and USPS certified tracking number listed on the letter below the mail address. For a sample FOIA request letter, see Chapter 6.

Fees

Frequently, a requester is intensely focused on obtaining the correct documents and crafting a precise request letter to achieve that goal. Many people may not realize that failure to ask for a fee waiver or writing a poor request for one could result in a substantial bill for search, duplication and review costs. Agencies typically require payment of fees prior to the production of records. By preemptively requesting a fee waiver and imposing a limit on the amount you are willing to pay, the request process is smoother. If you fail to stipulate the fee limit or fail to request notification before fees are incurred, you may be left with a large bill that is unaffordable. An inability to pay the costs could result in a denial of access to the requested records.

The Freedom of Information Act allows agencies to charge fees for duplication costs (photocopying or reproducing the records), costs of searching for documents (the staff time spent looking in agency offices or archives for the records), and document review costs (the staff time spent reviewing the records to see what information is responsive to the request and looking for exemptions).

For the purposes of FOIA, there are three categories of document requesters:

Members of the Media are formal print, broadcast, radio, or freelance reporters, or educational or non-commercial scientific institutions whose purpose is scholarly or scientific research. This category is most advantageous to a requester, entitling 2 free hours of search time and the first 100 pages of document duplication free.

Commercial requesters are individuals or groups who are involved in profit making activity or who have a for-profit business interest in the requested information. Requesters in this category can be charged reasonable standard fees.

All others are those not in one of the classifications above. Examples of the requesters who fall into this last category are people seeking information for personal use, public interest groups, and non-profit organizations. Standard fees can be charged for duplication and research, but not for review costs. The requester in this category is entitled to 2 free hours of search time and the first 100 pages of document duplication free.

With 2 free hours of search time and 100 pages of free duplication in the first and third requester categories – small, clearly defined and described requests that are easy for the staff to locate and retrieve, and amounting to only a few pages – likely will not incur fees. For requests made by

members of the media and all other categories further waiver of fees is possible, assuming their requests are more complicated, requiring a more complex search and involving a greater volume of records.

However, the category of a requester does not automatically mean they will be given a fee waiver. The requester must demonstrate a public interest in the release of the records. Fees can be waived or reduced if the information disclosure is in the public interest.

Courts applying the "public interest" fee waiver provision of FOIA typically take into account four factors in determining whether to grant a waiver: (1) whether the subject of the requested records concerns the operations or activities of government; (2) whether disclosure of the requested records is likely to contribute to an understanding of government operations or activities; (3) whether disclosure of the requested records will contribute to a "reasonably broad" audience and whether the requester has the "ability and intention" to disseminate the information to the public; and (4) whether disclosure of the requested record will contribute "significantly" to the public understanding. *See D.C. Technical Assistance Org. v. HUD*, 85 F. Supp. 2d 46, 48-49 (D.D.C. 2000); 28 C.F.R. §16.11(k)(2)(i)-(iv). Requests for "public interest" waivers are judged on a case-by-case basis. *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988).

Commercial requesters that have a financial interest in the information will find it difficult to get a fee waiver because information disclosures they seek are generally regarded as a matter of self interest, not the public interest at large. Additionally, if the disclosure is primarily for the commercial interests of the requester the waiver will likely be denied.

Requesters who seek a fee waiver should ask for it in the original request letter, even though a determination on the fee waiver request from the government agency could come much later in the administrative or litigation process. If the waiver is denied, requesters have the right to appeal.

The key factor in applying for a fee waiver in the original request letter is to demonstrate that the disclosure of information significantly enhances a broad public audience's understanding of the operations and activities of the government. When making the case for public interest release of records, it is important to be logical, factual, and resist emotional or personal attacks against government officials or agencies. That is not to say you cannot discuss the human element impacted by the government decisions of which you are seeking disclosure. This is best done by explaining that the public's well-being is affected by the decisions and there is a need for the public to be informed of these decisions that have an adverse effect on their lives. Emotional attacks will not help persuade officials that this request is in the public interest. Continue thinking of how this information would help people understand the decisions and operations of government.

The requester must demonstrate the ability and intention to disseminate this information to the public and should cite past examples of dissemination. For example, newspaper, columns or published reports written by the requester, appearances on radio and/or television shows, or productions of the same by the requester, etc. The requester should describe in the request letter what he or she intends to do with the information. Establishing a public interest in the subject matter is not enough to qualify for a fee waiver. The requester must show the ability and intention to publish the information.

Categorization as a 501(c)(3) non-profit organization by the Internal Revenue Service (IRS) alone is not enough to qualify for a fee waiver, although it can help demonstrate the requester does not have a commercial interest in the information. Prior fee waivers granted by the agency have no effect on the agency's analysis of the current request, although it is beneficial to cite past fee waivers and categorizations (such as previous classification as a member of the media); however, those assertions alone are not enough to qualify for a waiver.

Response Time:

Once an agency has received a FOIA request, the agency has 20 business days to respond. There are three appropriate responses to a FOIA request: (1) compliance with the request; (2) non-compliance and the reason for not doing so; and (3) the request of an extension of not more than 10 days due to "unusual circumstances." If an adverse response is received, requesters have the right to appeal and may file an administrative appeal within the agency. Failure to administratively appeal may result in an ability to litigate. If no response is received or if an administrative review upholds an adverse response, the requester has the right to sue in Federal Court. For further information about appeals see Chapter 5. The FOIA allows requesters to sue government officials who refuse to release information, but the requester can only obtain attorneys fees, awards of court costs, and a court order for the FOIA request to be answered.

Often groups and organizations have a compelling need to get to the full facts and truth of a government decision urgently and time is not on their side. The ability to get the full truth about a government action or decision quickly is needed in order to properly inform and protect the rights, life, and physical safety of the public. As some requesters know, FOIA requests can take years to be answered or completed, especially if the requester does not follow up or file a lawsuit over the request. This reality is of no use to those who need immediate answers for time sensitive problems. For example, a request about an official who made controversial decisions in the executive branch and who is now up for a high profile appointment for another sensitive position is an urgent need.

For these types of cases 5 U. S. C. § 552 (a)(6)(E) provides for "expedited processing" of FOIA requests. The statute requires 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 expeditious consideration of

administrative appeals of such determinations of whether to provide expedited processing.” Within 10 days of filing a FOIA request with a request for expedited processing, the agency is required to inform you if the request for expedited processing has been granted or denied. If the request is granted, your request will be put ahead of other requesters seeking information from that agency and will be given greater priority.

Occasionally when granted expedited processing, especially if the request is narrow with a clear description, the agency will respond in full with the records sought within the 10 working days. However, this is not usually the case and expedited processing simply results in having your request put ahead of others – which indeed will save some time. However, even if granted expedited processing, it is important to keep in contact with the agency FOIA office regarding the search progress and when you can expect to receive the requested documents. We suggest maintaining contact by placing frequent, but reasonable and courteous, phone calls to the staff person assigned to the request and following up with letters documenting phone conversations. If left alone, requests that have been given expedited treatment may not receive the records quickly enough to achieve the purpose of their request. Denial of an expedited processing request may be administratively appealed or litigation pursued if given an improper initial response or denial of administrative appeal. Furthermore, a demonstration of a compelling need by a requester making a request for expedited processing shall be made by a statement certified by such requester to be true and correct to the best of such requester’s knowledge and belief.

Every FOIA request is important to the requester; however, every request cannot be granted expedited processing. There is a definite and defined criterion for being granted expedited status. The requester must state, demonstrate and certify that:

- (1) Failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
- (2) 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.

To be granted this status it is necessary to show that failure to get these records in a timely manner will imminently threaten the life or physical safety of someone such as a person on death row needing urgent information for his appeal, or someone who needs facts about a nuclear waste plant that is alleged to be dangerous to a nearby town. Otherwise you must certify that you are a person or organization primarily in the business of disseminating information such as a news reporter, a publishing house, and you have an urgency to inform the public of the operations and activities of their government. One could request expedited processing under both provisions, if a requester’s circumstance and situation fall under both provisions.

Individual agencies may have additional provisions, options, or requirements for expedited processing. We advise potential requesters to check agency regulations and websites for additional criteria that individual agencies might have in addition to those mandated by FOIA itself. A list of agency FOIA websites with contact information can be found in Chapter 3.

Both provisions for expedited processing require a compelling need on the part of the requester. In particular, the person requesting is required to submit a “statement of certification” stating that: (1) they are a person or entity primarily engaged in dissemination of information (if this applies to them, as in the second provision above) and (2) to the best of their knowledge and belief, they have a “compelling need” for the information being sought. This “certification statement” can be as simple as a paragraph consisting of a few sentences in the request letter, or it can be attached to the letter itself. It does not need to be notarized by a Notary Public. The procedure for statement of certification may vary among agencies.

Chapter 2 - Privacy Act of 1974 Overview

Congress passed the Privacy Act of 1974, 5 U.S.C. § 552a, in the midst of the abuses of the Nixon White House and alleged abuse by the FBI and other government agencies with regard to the holding of, and dissemination of information on individuals and groups at that time. Particularly troubling was the growing trend of government agencies to store massive amounts of personal information in computerized data banks. The PA act allows a citizen to learn how records are collected, maintained, used and disseminated by federal agencies; it also allows individuals to access that information and seek correction of inaccurate, incomplete or irrelevant information.

The Privacy Act recognizes an individual's right to be left alone. It gives a citizen the right to inspect government files maintained on him or herself, prevent improper distribution and/or dissemination of those records, and the ability to challenge errors. The act forbids any government agency from releasing personal data kept on anyone as part of a "system of records" or transferring it to another federal agency or department for uses not compatible with the purposes for which the information was collected without the individual's written consent. Federal officials who improperly release these records may be sued for damages, court fees and attorney costs.

The only records subject to the PA are those that are maintained in a "system of records." Under the law a record includes most personal information maintained by an agency about an individual. A record contains individually identifiable information, including but not limited to information about education, financial transactions, medical history, criminal history or employment history. Whereas a system of records is a group of records that is retrieved by name, SSN or other identifying number assigned to an individual. Not all personal information is kept in a system of records, however, this information would be accessible by making a FOIA request.

The PA gives an individual citizen, including a person being investigated, persecuted or retaliated against for "blowing the whistle" on corruption, access to documents that could clear his or her name or provide evidence of retaliation. It can also provide a legal remedy to seek justice for the improper disclosure of government-held personal information by officials in an effort to discredit an individual.

Judicial Watch made legal history in March of 2000, in its class action lawsuit over the "Filegate" scandal. A U.S. District Court ruled that President Bill Clinton, his wife Hillary, and his staff had violated the Privacy Act by releasing information from the personnel file of Kathleen Willey to the press in an effort to discredit her charges of sexual assault. Clinton and his administration released personal letters that Mrs. Willey sent to President Clinton. Although Clinton as a constitutional officer might not have been subject to the PA, by disseminating such information without her consent he became the first sitting president to be convicted of a federal crime because the release of the information was done as a part of official business and not as a

private action.

Only United States citizens and aliens lawfully admitted for permanent residence are eligible to make a PA request. As a result of this provision, nonresident foreign nationals must use FOIA to request records about him or herself. A citizen or organization seeking information under the Privacy Act about another individual must get a release waiver signed by the individual the information regards to allow the government the ability to release the records.

The Privacy Act, like the Freedom of Information Act, applies only to the agencies and departments of the executive branch of government. Although the PA, like FOIA, does not apply to the White House penalties apply for any individual, journalist, government agency, official, or constitutional officer who knowingly releases PA protected material to others as in the case of former President Clinton. The PA was written to minimize its effect on FOIA. Many journalists and government watchdog groups consider the effect of the PA on their ability to collect information to be minimal, but they voice objections none the less.

Individuals seeking information on or about him or herself will find that similar rules apply to making a PA request that apply to making a FOIA request. The records sought should be clearly defined and identified and the offices or repositories within an agency or department that the requested records are located should be specified – unless you desire all relevant offices of the entire agency to be searched. A person's full name (including any past names or alias), date of birth (DOB), place of birth (POB), Social Security Number (SSN), and title, if appropriate, should be given in order to facilitate the search for records. See Chapter 8 for sample PA request letter.

If these records are to be sent to another party other than the requester, then the requester must give written consent to the transfer. For example, if an individual who is accused of a crime wishes to make a PA request for their FBI file and wishes the information to be sent directly to his or her attorney, the request letter must state that this individual is his or her counsel and give written consent for the agency to release the records to the attorney. The release must also include the address to which the information is to be sent and the notarized signature of the requester.

Likewise, if a citizen wanted to request information on another living person, that person must sign a waiver, provided by the PA office of an individual agency and often available online, or notarize a letter stating a desire to have the records released to the requester. Each agency has different rules for such waivers and releases. Records of the deceased are requestable. To request the records of a deceased individual you must provide the person's name, aliases, date and place of birth, a copy of the death certificate or newspaper obituary, and why you think the agency or department would have the requested records.

Under the PA, fees can only be charged for record copying costs. No fees are charged for the cost of search and review of the records to determine any applicable exemptions. Many agencies will not charge fees for making a copy of a PA file, especially small files, and an agency can waive fees if they pose a hardship.

There is no fixed time in which the agency must respond to a Privacy Act request; however, it is good agency practice to acknowledge receipt of the request in 10 days and provide the information requested in 30 days. At many agencies FOIA and PA requests are processed by the same personnel and are attended to in the order in which they are received.

The balance of protecting the individual's legitimate right to privacy versus transparency and the public's right to know often pits civil libertarians against journalists and vice versa. What is one person's claim to privacy can be another person's allegation of a "cover-up." [For an example, in an open record case Judicial Watch found the FBI using "privacy rights" as a justification to withhold the name of Osama Bin Laden from publicly available newspaper articles that were released under FOIA.]

The PA includes a number of exemptions which in many ways mirror the exemptions of the FOIA (See Chapter 4 for further information about exemptions.) These exemptions allow government agencies to transfer or release information on an individual without his consent for law enforcement purposes, for use by Congress, the Census Bureau and similar government agencies, as well giving agencies the ability to release information determined to be public under FOIA.

Similar rules apply when a PA requester has been denied information under one of the PA exemptions. Like requests made under the FOIA, an adverse determination must be appealed in a timely manor, respectfully refuting the claim of exemption. See Chapter 5 for more information about appeals and Chapter 9 for a sample PA appeal letter.

The PA has penalties for violations as well. An official who disclosures of too much personal information in response to a PA request can faces monetary penalties and sanctions.

Chapter 3 - Federal Agencies' FOIA Web Sites

Federal Departments

[Department of Agriculture](#)

[Department of Commerce](#)

[National Oceanic and Atmospheric Administration](#)

[Department of Defense](#)

[Air Force](#)

[Army](#)

[Defense Contract Audit Agency](#)

[Defense Contract Management Agency](#)

[Defense Finance and Accounting Service](#)

[Defense Information Systems Agency](#)

[Defense Intelligence Agency](#)

[Defense Logistics Agency](#)

[Defense Security Service](#)

[Defense Threat Reduction Agency](#)

[Marine Corps](#)

[National Geospatial-Intelligence Agency](#)

[National Reconnaissance Office](#)

[National Security Agency](#)

[Navy](#)

[Office of the Inspector General](#)

[Department of Education](#)

[Department of Energy](#)

[Department of Health and Human Services](#)

[Centers for Medicare & Medicaid](#)

[Food and Drug Administration](#)

[National Institutes of Health](#)

[Department of Homeland Security](#)

[United States Citizenship and Immigration Services](#)

[Bureau of Customs and Border Protection](#)

[Federal Emergency Management Agency](#)

[Transportation Security Administration](#)

United States Coast Guard
United States Secret Service
Department of Housing and Urban Development
Department of the Interior
Department of Labor
Department of State
Department of Transportation
Federal Aviation Administration
Department of the Treasury
Comptroller of the Currency
Internal Revenue Service
Office of Thrift Supervision
Department of Veterans Affairs

Federal Agencies

Agency for International Development
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 for the District of Columbia
Defense Nuclear Facilities Safety Board
Environmental Protection Agency
Equal Employment Opportunity Commission
Executive Office of the President
Council on Environmental Quality
Office of Administration
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 Retirement Thrift Investment Board
Federal Trade Commission
General Services Administration
Institute of Museum and Library Services
Inter-American Foundation
Legal Services Corporation
Library of Congress (Copyright Office)
Merit Systems Protection Board
National Aeronautics and Space Administration
National Archives and Records Administration
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 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 International Trade Commission
United States Postal Service
United States Trade and Development Agency

Chapter 4 – Exemptions

Freedom of Information Act

The Freedom of Information Act contains 9 exemptions to mandatory disclosure in the interest of protecting national security, individual and business interests and certain internal government practices. Records that fall within one of the exemptions can still be released at the discretion of the individual agency. Even a document containing exempt information can be released with the exempted information redacted. This is an important feature of FOIA because it prevents a request from being denied in whole because a single section or page falls within one of the exemption categories.

With the advent of technology it became difficult to determine what information, be it a word, paragraph, or pages, had been withheld. The 1996 amendment to FOIA mandates that agencies must identify the locations of deletions and show the deletion within the actual document when it is feasible to do so. In order to account for withheld documents, agencies are required to provide a Vaughn Index. The index must accomplish three things: (1) identify each document withheld; (2) state the statutory exemption claimed for each document; and (3) explain how disclosure would damage the interests protected by the claimed exemption for each document withheld. The purpose of the index is for an agency to justify any withholdings it has made and do so sufficiently enough to allow a court to decide if the withholdings were proper and the requester to challenge the withholdings.

The first FOIA exemption relates to national defense or foreign policy records that are properly classified according to an Executive Order. 5 U.S.C. § 552(b)(1). This exemption protects classified information and records on the basis of national security. The classification guidelines are established and maintained by the president. Classified documents may be requested under FOIA, however, they must be reviewed by the agency to determine if the record still requires classified status.

The second FOIA exemption safeguards the internal personnel rules and practices of an agency. 5 U.S.C. § 552(b)(2). There are two categories of documents which fall under this exclusion. The first is documents or information regarding personnel rules or internal agency practice that have no public interest, such as vacation policies. The second is information that if disclosed could lead to the circumventing of law or agency regulations. Material falling in this category has to regulate internal agency conduct, such as a procedure and practices manual. Information falling within this category is frequently seen as trivial administrative matters.

The third FOIA exemption allows agencies to withhold documents specifically exempted by other federal statutes. 5 U.S.C. § 552(b)(3). However, the statute must: (1) require the matter be wholly withheld from the public in a manner leaving no room for discretion; or (2) must establish particular criteria for withholding; or (3) refer to particular types of matters to be withheld. This exemption simply incorporates other statutes restricting information into FOIA. It is the agency's duty to demonstrate how the withheld record comes within the identified statute. Agencies are required to list the statutes they use that relate to Exemption 3 in their annual FOIA

report. Those reports are reviewed annually by the Office of Information and Privacy and are accessible on the Department of Justice's FOIA website.

The fourth FOIA exemption prevents disclosure of trade secrets and commercial or financial information obtained from a person and considered privileged or confidential. 5 U.S.C. § 552(b)(4). A trade secret is a commercially valuable plan, formula, process or device used in an industry that resulted from either innovation or substantial effort. Courts have determined that information qualifies as a trade secret if disclosure is likely to hurt the competitive position of the person or company who submitted it or if the disclosure would impair the government's ability to get such information at a future date. Commercial or financial information is easily identifiable without special provisions, however, its privileged or confidential nature must also be determined before disclosure. This exemption is intended to protect both the government and submitters of information as it protects sensitive trade, commercial or financial information while also assuring the information is reliable as a result of the safeguards.

The fifth FOIA exemption protects inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation. 5 U.S.C. § 552(b)(5). Exemption 5 is grossly overused by agencies to deny FOIA requests. The three primary privileges invoked in Exemption 5 are deliberative process privilege, attorney work-product privilege, and attorney-client privilege.

The deliberative process exemption was designed to give agencies privilege against discovery in order to protect agency decision making. Granting agencies privilege would encourage open and full policy debates, as well as prevent early release of working policy. The D.C. Appellate Court has stated that the language incorporates all civil discovery rules into FOIA. In order for the deliberative process privilege to be invoked, the communication must be both predecisional and deliberative in nature. Documents are predecisional when they are prepared prior to the adoption of agency policy. As such, Exemption 5 typically does not apply to post-decisional documents, however, it is applicable to the document's content rather than the date of production. Documents are deliberative when they "reflect the give-and-take of the consultative process." It is the responsibility of the agency to show the information satisfies both qualifications.

Exemption 5 also protects documents and other memoranda prepared by an attorney in contemplation of litigation. The work product privilege extends to civil and administrative proceedings, criminal matters and documents generated in preparation of an amicus brief. Work product privilege broadly extends to litigation that has not commenced, but is probable; materials prepared by non-attorneys under the supervision of attorneys, information shared with a party holding common interest of the agency; and factual material.

Attorney-client privilege is also protected under Exemption 5. This includes confidential communications between an attorney and client relating to a matter for which the client has sought professional advice, facts divulged by a client to an attorney, opinions given to clients and communications between attorneys regarding client supplied information. Attorney-client privilege extends to cover communications where the specific information is confidential, but the basic subject matter is known to others.

The sixth FOIA exemption safeguards personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. §552 (b)(6). The Department of Defense has broadly, and unlawfully, interpreted (b)(6) to include the names of all Department of Defense employees. They base this novel application of (b)(6) on a personnel memo citing the “Global War on Terror.” Judicial Watch is fighting to reverse this disturbing trend by the Department of Defense – one that obviously violates both the spirit and the letter of FOIA. This exemption protects the privacy of an individual’s personal information in government files, it does not protect the privacy of corporations or groups where there is no expectation of the protection of personal privacy. Protection of information provided by corporations or groups would be provided by Exemption 3. Agencies are expected to maintain a balance between the individual’s privacy right and the public’s right to the disclosure of information. Exemption 6 overlaps with the Privacy Act, however, information exempted by FOIA can be disclosed under the PA.

The seventh FOIA exemption protects information compiled for law enforcement purposes. 5 U.S.C. §552 (b)(7). The intention behind this exemption is to allow agencies to withhold law enforcement documents in order to prevent interference with the enforcement process. Exemption 7 has six subexemptions.

Exemption 7A protects information that could interfere with law enforcement proceedings, thus protecting active investigations. This exemption is applicable only if an investigation is pending or planned and the release of the information will compromise the investigation.

Exemption 7B allows an agency to withhold information that, if released, would deprive a person of the right to a fair and impartial trial. This exemption is aimed at preventing damaging pretrial publicity. In order for this exemption to be claimed, the trial must be truly pending or imminent and the release of the information would seriously interfere with the proceedings.

Exemption 7C protects records that, if disclosed, could constitute an unwarranted invasion of privacy. This exemption is very similar to Exemption 6 in that they both protect against invasion of privacy. However, Exemption 7C is used to withhold information that *could*, instead of *would*, constitute an unwarranted an invasion of personal privacy and is used only in the confines of law enforcement purposes.

Exemption 7D allows agencies to withhold information that could reasonably be expected to disclose the identity of a confidential source. Its purpose is to prevent the loss of confidential sources by protecting the source’s identity so the source is free from the fear of retaliation. The protection of this exemption stretches further than just individuals – a state, local or foreign agency or authority or any private institution who has furnished confidential information with the expectation of anonymity is protected under this exemption. However, not all sources in an investigation are considered confidential. Confidentiality is determined on a case-by-case basis.

Exemption 7E prevents the disclosure of information that would reveal techniques, procedures or guidelines for investigations or prosecutions. Disclosure of such information could lead to circumvention of the law.

Exemption 7F protects information that, if disclosed, could reasonably be expected to endanger an individual's life or physical safety. This exemption has been interpreted by courts as providing for the protection of names and identifying information of individuals who are connected to a request regarding a law enforcement matter. The protection of this exemption remains even after involved law enforcement officers have retired.

The eighth FOIA exemption prohibits the disclosure of 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. 5 U.S.C. § 552(b)(8). This exemption typically only applies to agencies such as the Federal Reserve or the Federal Deposit Insurance Corporation.

The ninth FOIA exemption protects geological and geophysical information and data, including maps, concerning wells. 5 U.S.C. § 552(b)(9). This exemption is rarely used and has yet to be clearly defined. This provision has been used to prevent the disclosure of information regarding natural resources, from groundwater to natural gas.

Privacy Act

The Privacy Act contains 10 exemptions. Unlike the Freedom of Information Act there are three categories of exemptions: special, general and specific. PA exemptions apply not to a record, but to a system of records.

There is one special exemption in the PA. The special exemption states that nothing in the PA requires an agency to grant access to any information compiled in reasonable anticipation of a civil action or proceeding, including administrative hearings. 5 U.S.C. § 552a(d)(5). This protects civil litigation files from access by individuals, but does not incorporate deliberative process or attorney-client privileges. This exemption is self-executing and does not require implementing regulation.

There are two general exemptions in the PA. The first exempts records maintained by the Central Intelligence Agency (CIA). 5 U.S.C. § 552a(j)(1). The second exempts records maintained by an agency or component thereof which: (1) performs as its principle function any activity pertaining to the enforcement of criminal laws; (2) consists of identifying data compiled for the purpose of a criminal investigation; (3) is associated with an identifiable individual; or (4) reports identifiable to an individual compiled at any stage of the process of enforcement of criminal laws. 5 U.S.C. § 552a(j)(2). There is no time limitation on this exemption and it applies even if there is no trial or the investigation is closed. Additionally, the exemption is to be applied to records, not agencies – if a law enforcement record is held by a non-law enforcement agency it is still exempt.

There are seven specific exemptions. The first specific exemption applies to records that relate to the national defense or foreign policy and are properly classified. 5 U.S.C. § 552a(k)(1). Classified information is also exempt under FOIA and normally is unavailable under both acts.

The second specific exemption applies to investigatory records that are compiled for law enforcement purposes. 5 U.S.C. § 552a(k)(2). The exemption is limited to cases where, as a result of the record maintenance, an individual is denied any right, privilege or benefit to which he or she would normally be entitled. In this case, disclosure of the record is required to that individual except when it would result in the revelation of a confidential source.

The third specific exemption applies to records pertaining to the protection of the President of the United States. 5 U.S.C. § 552a(k)(3). This exemption also applies to records of any individual receiving protection from the Secret Service.

The fourth specific exemption applies to records that are required by statute to be maintained and used solely as statistical records. 5 U.S.C. § 552a(k)(4).

The fifth specific exemption applies to investigatory records that are used for employee or contractor suitability determinations. 5 U.S.C. § 552a(k)(5). This exemption covers investigatory materials compiled solely to determine suitability, eligibility or qualifications for Federal civilian employment, military service, Federal contracts or access to classified information. The exemption only applies to the extent that the information released would compromise the identity of a confidential source who provided information to the Government under an express promise that the identity of the source would remain confidential.

The sixth specific exemption applies to the Federal service exam or test materials. 5 U.S.C. § 552a(k)(6). Records containing testing or examination material used solely to determine qualification for an appointment or promotion in Federal service are exempt when disclosure would result in compromising the objectivity or fairness of the process. This exemption essentially provides for the withholding of questions used in employment tests.

The seventh specific exemption applies to records that are used to determine potential for promotion in the armed services. 5 U.S.C. § 552a(k)(7). The information is only exempt to the extent that disclosure would reveal the identity of a confidential source who provided the government with the information under an express promise of confidentiality.

Chapter 5 - Exhausting Administrative Remedies

In order to file a legally proper FOIA lawsuit, it is imperative that all administrative remedies be exhausted before litigation is considered or begun. That is, did the requester do everything possible to obtain a favorable result from the agency before going to the courts?

Upon receipt of a FOIA request an agency has 20 business days to respond to the request. When a response is provided it can do one of three things: it can completely fulfill the request by providing the records in full, be partially adequate, or be completely unacceptable.

An inadequate response is a response in which the agency, in the form of a letter, does not fulfill the agency's required action under FOIA. Common examples of inadequate responses are the failure to respond with a written letter within 20 business days or a letter acknowledging receipt of the letter, but completely devoid of any details regarding the determination of the request, the fee waiver or of expedited processing.

Depending on the type of inadequate response, the requester has several options. A complete failure on the part of the agency to respond at all to the request within the statutory 20 days can be immediately litigated. There is no need to administratively appeal a complete failure to respond. The requester may wait longer for a response or follow up with a letter or phone call, but these steps are not necessary. A lawsuit can be filed on the twenty-first day if the agency has completely failed to respond in any way to the request.

An agency response that is timely but nonetheless inadequate due to a failure to address the actual merits of the request can also be litigated immediately. A response that fails to address the request or the fee waiver or to advise the requester of his or her FOIA rights, is not considered to be a substantive response under FOIA. A requester who has received a timely, but inadequate response, has the option of waiting longer for a more adequate response, following up with a letter or phone call requesting an update, or commencing with the filing of a lawsuit. If the requester is unsure whether the response qualifies as substantive, filing an official administrative appeal is the safe route as it protects his or her litigation ability in the event the court decides the response was substantive. It may be best to follow up with another letter or phone call, for several reasons. First, it demonstrates a prudent, "good faith" effort to resolve the issue before resorting to litigation. More importantly, the reason for the lack of response could be a clerical oversight, the first letter may have gotten lost in the mail or in the office. A follow up letter could compel a legitimately overworked staff person to respond to the requester with the requested records or a determination on a fee waiver or a time frame when a better response will be available. It is important to remember – the goal is for the requester to get the requested documents and not to have to file a lawsuit.

Unlike an inadequate response, an adverse determination is a decision or ruling by an agency regarding the request that, in some way or another, denies access to the records. Typically, the agency responds by stating the documents requested are covered by one or more FOIA exemptions or by claiming they searched all their files and no records responsive to the request were found. For more information about FOIA exemptions see Chapter 4. Such a determination is called a "no records response." These determinations, if done within the 20 days, do not

satisfy the request, but do satisfy the agency's statutory obligations, and, therefore require an administrative appeal.

In cases where the requester gets an adverse decision such as the withholding of records under an exemption, a response that no responsive records exist in possession of the agency, or a denial of a fee waiver or expedited processing request, the agency must, by law, provide the requester with administrative appeal rights.

Appeal rights give the requester the ability to send another letter to the agency, this time in an effort to get the adverse determination reversed by another authority in the agency. This authority has been designated to the FOIA appeals officer who accepts all such appeals from requesters.

The agency that issues the adverse determination must: (1) notify the requester of the right to appeal; (2) identify the appeals officer and the officer's contact information; and (3) state the date when the appeal letter must be received by the officer. If this appeal information is not given in the adverse response letter, the requester can automatically sue under the law. However, it would be more prudent to follow up with a phone call inquiring about the appeal rights and asking that the response to be put in writing.

Most agencies require the appeal be sent and received within 30 days of the date of the adverse determination letter. Agencies normally give a shorter appeal time of 10 days in cases of expedited processing. Administrative appeal deadlines are strictly enforced in most agencies and appeals received even one day late can be denied as being "untimely." Thus it is imperative that appeals be sent in a timely manner. If the requester has missed the deadline by a few days or weeks the request should be sent anyway, as some agencies will accept an appeal a few days late and some appeals officers are lenient.

If an appeal has been denied for being untimely the request would need to be resubmitted and upon receipt of an adverse determination a timely appeal can then be made. In the case of a requester who has received a partial disclosure and appeals the withholding of those documents and the appeal has been denied for being "untimely," a request can be filed seeking only the information that was withheld.

In the appeal letter, it is important to include all relevant facts for overturning the adverse determination including: (1) support for the further release of records withheld under any exemptions or reasons why the exemptions used by the agency do not apply to the record requested; (2) providing more details, or a rebuttal, about the requester's ability to disseminate information and public interest value of the records in order to overturn the denial of a fee waiver; and/or (3) provide more information, or a rebuttal, about the requester being primarily engaged in information dissemination or having a compelling need for the records in order to overturn a denial of expedited processing.

The appeals officer will only be able to consider the information and the record in front of him or her to make the determination on the requester's administrative appeal. Again, it is important to be respectful, not to personally attack the FOIA staff that made the adverse determination or the government officials whose decisions are the subject of the requested records.

Although adverse determinations and government citations of the FOIA exemptions are as different as the request themselves, some common adverse determinations have basic responses. For example, a requester seeks information on a 40 year old decision to prosecute a now deceased mobster. In response the agency asserts the FOIA exemption (b)(6) (privacy) claiming the release of the records would injure the privacy rights of those involved in the trial or preceding investigation. They also assert (b)(5) (deliberative process and attorney work product doctrine) claiming these records, if released, would expose the memos and drafts of prosecutors prepared to make the decision to prosecute. Disclosure of these documents could make current prosecutors unwilling to make similar decisions for fear their records would be opened up at a future date. And (b)(7)(E) (circumventing the law) claiming release would disclose the important details of deliberation or dialogue between law enforcement staff. In this case, the records would disclose the important deliberations between FBI investigators looking for evidence and Department of Justice prosecutors comparing the level of evidence with what is necessary for a conviction. Exposing this coordination of evidence seeking and preparation could give criminals an insight into what type of evidence they need to cover up in the future to avoid prosecution.

The appeal letter for this case could argue that the mobster has since died and retains no claim or expectation of privacy. Secondly, after 40 years, the investigators who collected the evidence and the prosecutors they shared it with have moved on to other jobs or retired. Additionally, there is no fear that current prosecutors would be afraid of disclosure of their notes in a case that is 40 years old. Lastly, it could be argued that the methods of collecting evidence and the evidential standards for seeking prosecution have changed substantially, as well as the government's systems for evaluating evidence being revolutionized by technology. Thus it could be argued that the claims of exemption are moot, but a public interest value in the disclosure remains – the public will be assured that justice was done. It may be difficult to get a fee waiver in a case like this because the information is historical and not likely to contribute to a significant understanding of government operations and activities because the operations and activities to be disclosed have changed.

The most difficult FOIA exemption to penetrate is (b)(1) – records which are currently and properly classified in the interests of national security or foreign policy. This includes many records held by the CIA and State Department. On occasion it is possible for the State Department or another agency to release further records withheld under (b)(1) after a FOIA appeal. However, after a denial of an administrative appeal the only further recourse for a requester who is fully dedicated to obtaining the records is to file a lawsuit, requiring a judge to view the records *in camera* (confidentially, behind closed, secure doors) to see if public interest warrants declassification. Most of these challenges do not succeed.

A response to an administrative appeal by the agency FOIA appeals officer is required within 20 business days of receipt of the appeal letter. If the appeal is denied, the agency is required to outline litigation rights in the letter – stating that under FOIA you now have the right to sue in the U.S. District Court for the District of Columbia, or the Federal District Court where the requester's principle place of business is located. If the requester gets no response to an administrative appeal within 20 working days he has the right to begin litigation because no response can be considered a denial of the requester's rights. However, before filing a lawsuit it is still advisable to follow up with a phone call or a letter inquiring about the status of the appeal.

Throughout this whole process it is important to have the advice of an attorney who is familiar with FOIA because unexpected twists and turns may occur. Hopefully the requester will be able to avoid litigation and be able to obtain the requested records without resorting to the court system. However, if a requester has gone through all administrative channels and still receives an unsatisfactory response, the courts are an option.

Chapter 6 – Sample FOIA Request Letter

VIA FACSIMILE AND CERTIFIED MAIL

Date

FOIA Officer

Agency

Address

Re: Freedom of Information Act Request

Dear Sir/Madam:

Pursuant to the Freedom of Information Act (5 U.S.C. § 552), I request that the [Agency] produce all correspondence, memoranda, documents, reports, records, statements, audits, lists of names, applications, diskettes, letters, expense logs and receipts, calendar or diary logs, facsimile logs, telephone records, call sheets, tape recordings, video/movie recordings, notes, examinations, opinions, folders, files, books, manuals, pamphlets, forms, drawings, charts, photographs, electronic mail, and other documents and things that refer or relate to the following in any way, within twenty (20) business days: [Insert detailed information about documents sought.]

If any responsive record or portion thereof is claimed to be exempt from production under FOIA, sufficient identifying information (with respect to each allegedly exempt record or portion thereof) must be provided to allow the assessment of the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir 1973), *cert denied*, 415 U.S. 977 (1974). Additionally any reasonably segregable portion of a responsive record must be provided after redaction of any allegedly exempt material to me, as the law requires. 5 U.S.C. § 552(b).

In order to help to determine my status for purposes of determining the applicability of any fees, you should know that I am [insert a suitable description of the requester and the purpose of the request]. I am willing to pay fees up to the amount of \$ _____. If the fees will exceed this amount, please inform me before fees are incurred. I can be contacted at [include preferred method of communication], if necessary to discuss any aspect of this request.

I look forward to receiving the requested documents and a full fee waiver within twenty (20) business days.

Sincerely,

[Signature]

[Name]

[Address]

[Telephone (optional)]

Chapter 7 – Sample FOIA Appeal Letter

VIA FACSIMILE (202) 555-1234 AND
US CERTIFIED MAIL

Date

FOIA Officer
Agency
Address

Re: Appeal of FOIA Request ###

Dear Sir/Madam:

On [Date], I filed a Freedom of Information Act (FOIA) request with [Agency], requesting [Describe requested documents.]

In a response letter dated [Date] [Official, Title] denied my request. [Insert detail from letter about why the request was denied]

This letter respectfully appeals the determination of [Name of Official]

The information requested under FOIA must be disclosed because... [Insert reason.]

I also appeal the decision to charge me for search and review costs. [Insert reason.]

Sincerely,

[Signature]
[Name]
[Address]
[Telephone (optional)]

Chapter 8 – Sample PA Request Letter

VIA FACSIMILE (202) 555-1234 AND
CERTIFIED MAIL No.: 1234 5678 9101 1121

Date

PA Officer
Name of Agency
Address of Agency

Re: Privacy Act Request

Dear [PA Officer]:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, I seek access to and copies of all records about me which you have in your possession within twenty (20) business days. [If seeking a specific document give as much detail as possible.]

To assist with your search for these records, I am providing the following additional information: [Include full name, social security number, date and place of birth. You may also provide additional information such as other names used or former places of residence.]

If any responsive record or portion thereof is claimed to be exempt from production under the PA, sufficient identifying information (with respect to each allegedly exempt record or portion thereof) must be provided to allow the assessment of the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir 1973), *cert denied*, 415 U.S. 977 (1974). Additionally any reasonably segregable portion of a responsive record must be provided to me after redaction of any allegedly exempt material, as the law requires. 5 U.S.C. § 552(b). I reserve the right to appeal any decision to withhold information.

I promise to pay reasonable fees incurred in the copying of these documents up to the amount of [Specify a dollar amount]. If the estimated fees will be greater than that amount, please contact me before such expenses are incurred.

If you have any questions regarding this request, please contact me at [Telephone Number Optional]. Please send the documents to: [Specify Address]

I will look forward to receiving the requested documents within twenty (20) business days.

Sincerely,

[Signature]
[Your Name]
[Address]

Chapter 9 – Sample PA Appeal Letter

VIA FACSIMILE (202) 555-1234 AND CERTIFIED MAIL

Date

PA Officer

Agency

Address

Re: Appeal of PA Request

Dear Sir/Madam:

This is an appeal under the Privacy Act and the Freedom of Information Act of the denial of my request for access to records.

On [Date], I requested access to records under the Privacy Act of 1974. My request was assigned the following identification number: _____.

On [Date], I received a response to my request in a letter signed by [Name of Official]. This letter respectfully appeals the determination of [Name of Official]

The records withheld should be disclosed to me because [Insert Reason] This appeal is also being made under FOIA and any additional information that would be disclosed under FOIA should be disclosed.

I can be contacted at [Insert Telephone Number], between the hours of __ and __, if there is need to discuss this appeal.

Sincerely,

[Signature]

[Name]

[Address]

[Telephone (optional)]

Chapter 10 – FOIA and PA FAQs

What is the Freedom of Information Act?

The Freedom of Information Act (5 U.S.C. Section 552) (FOIA) was enacted by Congress, in 1966, in order to give the public the right to obtain and access information from federal government agencies. While FOIA does not require the government to create any documents regarding an information request or answer questions posed in a request, it does require the agency to release any document, file or other record that exists pertaining to your request. FOIA was amended in 1974 to force greater agency compliance and in 1996 to include electronic information.

What is the Privacy Act?

The Privacy Act of 1974 (PA) provides safeguards against the invasion of privacy by the misuse of records and applies to personal information maintained by agencies in the executive branch of the Federal Government. The PA allows a citizen to learn how records are collected, maintained, used and disseminated by federal agencies; it also allows individuals to access that information and seek correction of inaccurate, incomplete or irrelevant information. Additionally the Privacy Act provides a safeguard against others accessing information about you that could constitute an unwarranted invasion of privacy. Agencies subject to the FOIA are also subject to the Privacy Act.

Who is eligible to make a FOIA or PA request?

A FOIA request can be made by any individual, partnership, corporation, association or foreign government. Requests can also be made on behalf of any person by an attorney or representative. Federal agencies are excluded from making FOIA requests; however, state and state agencies may do so.

Only United States citizens and legal permanent residents of the United States are eligible to make a Privacy Act request. Therefore, nonresident foreign nationals may only use the FOIA to request records about him or herself.

How do I make a request?

The first step in making a request is doing research. Determine if the information you are seeking has already been made available. This information may be available at online FOIA reading rooms, on electronic research databases or by requesting the documents from public interest groups. Your research will also inform you as to the key events and decision-makers on your topic, help you pinpoint documents and agencies in your requests, and keep you from requesting material extraneous to your interest.

FOIA or PA requests must be made in writing to the agency which holds the records. The letter should state that the request is being made under FOIA and/or the PA, identify the records that are being sought, and include the name and address of the requester. Inclusion of a telephone number can expedite the process by providing a means for the agency to quickly contact you. Fees vary with the status or purpose of the requester, so the letter should include the category to which you belong – commercial, educational, media or “other” – as well as a statement of your willingness to pay fees. Additionally, PA requests may require a statement or notarization to verify identity. Check with individual agencies for their policy.

Should I make a FOIA or a PA request?

The provisions of the FOIA and PA overlap in parts. The laws have differing procedures and exemptions, resulting in the ability of information to be exempted under one law and disclosable under the other. To take maximum advantage of the laws, both should be cited in the request; however, requests made for information that do not relate solely to the requester may only be made under FOIA. If you have doubts about which laws to utilize, cite both the FOIA and PA when making an information or document request.

What kind of information can I request?

FOIA applies to any federal agency records which are either created or obtained by an agency and under the agency’s control at the time of the request. Records can be in print or electronic format, maps, photos, digital data, handwritten notes, and video and audio tapes.

The only records subject to the Privacy Act are those maintained in a system of records. Under the law a record includes most personal information maintained by an agency about an individual. A record contains individually identifiable information, including, but not limited to, information about education, financial transactions, medical history, criminal history or employment history. Whereas a system of records is a group of records that is actually retrieved by name, SSN or other identifying number assigned to an individual. Not all personal information is kept in a system of records; however, this information is accessible by making a FOIA request.

How much will it cost to make a request?

FOIA requesters may have to pay fees covering some or all of the costs of processing their requests, which can possibly include search and review costs and the cost of photocopies. Fees vary with the status or purpose of the requester. However, if disclosure of the requested information would substantially benefit the public interest, the laws generally require a waiver or reduction of such fees. Additionally, if the cost of responding to your request is so small that it falls below a certain level, most agencies automatically waive assessment of the fees.

Under the Privacy Act, fees may only be charged for record copying costs. No fees are charged for the cost of search and review of the records to determine any applicable exemptions. Many agencies will not charge fees for copying of a record, especially with small files, and an agency can waive fees if they pose a financial hardship.

How long will a request take?

Once an agency has received a FOIA request, that agency has 20 business days to respond to the request. There are three appropriate responses: compliance with the request; non-compliance and the reason for not doing so; and the request of an extension of not more than 10 days due to “unusual circumstances.”

Under the Privacy Act there is no fixed time in which the agency must respond; however, it is good agency practice to acknowledge receipt of the request in 10 days and provide the information requested in 30 days. At many agencies FOIA and PA requests are processed by the same personnel and are attended to in the order in which they are received.

What happens if my request is denied?

Not all records are available to be released; some records may be withheld to protect important government interests such as national security or law enforcement. If an agency determines it will not comply with the request or you have received an adverse response, you may appeal the decision. You must submit an appeal postmarked within 30 days of the denial letter. The agency is required to respond to the appeal within 20 days. If the appeal is denied, then the agency must inform you of the provisions for judicial review.

What kind of information is exempt under the Freedom of Information Act?

The nine FOIA exemptions (5 U.S.C. § 552(b)(1)-(9)) are:

- records currently and properly classified in the interest of national security;
- records related solely to internal personnel rules and practices, which, if released, would allow circumvention of an agency function;
- records protected by another law that specifically exempts the information from public release;
- trade secrets and commercial or financial information obtained from a private source which would cause substantial competitive harm to the source if disclosed;
- internal records that are deliberative in nature and are part of the decision making process that contain opinions and recommendations;
- records which, if released, would result in a clearly unwarranted invasion of personal privacy;
- investigatory records or information compiled for law enforcement purposes;
- records for the use of any agency responsible for the regulation or supervision of financial institutions; and

- records containing geological and geophysical information (including maps) concerning wells.

What kind of information is exempt under the Privacy Act?

The Privacy Act contains similar exemptions. They are:

- (d)(5) information compiled in anticipation of civil action or proceeding, including administrative hearings;
- (j)(1) records maintained by the CIA;
- (j)(2) records maintained by an agency which performs as its principle function any activity pertaining to the enforcement of criminal laws and which consists of identifying data compiled for the purpose of a criminal investigation, associated with an identifiable individual; or reports identifiable to an individual compiled at any stage of the process of enforcement of criminal laws;
- (k)(1) records relating to the national defense or foreign policy which are properly classified;
- (k)(2) records that are investigatory and compiled for law enforcement purposes;
- (k)(3) records pertaining to the protection of the President of the United States;
- (k)(4) records that are required by statute to be maintained and used solely as statistical records;
- (k)(5) records that are investigatory and used for employee or contractor suitability determinations;
- (k)(6) records that are Federal service exam or test materials;
- (k)(7) records that are armed services promotion evaluation materials.

Chapter 11 – References and Informational Links

[Text of the FOIA](#)

[Text of the Privacy Act](#)

[FOIA Contacts at Federal Agencies](#)

[Citizen’s Guide to FOIA](#)

[“Your Right to Federal Records”](#)

[Justice Dept. FOIA Guide](#)

[Justice Dept. Privacy Act Overview](#)

[Justice Dept. FOIA Electronic Reading Room](#)

[State-by-State Open Records/FOIA Resource](#)

[Federal Agency FOIA Web Sites](#)

[Justice Dept. FOIA Policy Manual](#)

[Annual FOIA Reports of Federal Agencies](#)

[Justice Dept. *FOIA Post* \(web updates\)](#)

[Department of Defense FOIA Handbook](#)