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“A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury.”

President Lyndon Johnson’s statements upon signing the Freedom of Information Act (July 4, 1966).

versus

“The Freedom of Information Act: a federal regulation obliging government agencies to release all information they had to anyone who made application for it, except information they had that they did not want to release.

And because of this one catch in the Freedom of Information Act, Yossarian had subsequently found out, they were technically not compelled to release any information at all . . .”

Joseph Heller, “Closing Time” (1994) at 61.

There is an unavoidable tension between President Johnson’s above quoted aspirational challenge upon signing the Freedom of Information Act (“FOIA”) into law¹ and a bureaucracy’s inherent tendency to keep its secrets to itself as reflected by Yossarian’s cynical evaluation of FOIA. Today’s discussion will explore methods to maximize your effectiveness in using FOIA and to avoid time-consuming diversions and dead-end tactics often employed by agencies to thwart the public’s access to information.

¹ Johnson’s words righteously affirming the public’s right to know were belied by his behind the scene recalcitrance regarding FOIA’s enactment. His true opinion of the law is reflected by his refusal to allow a public signing ceremony. See Johnson’s “no ceremony” margin note at bottom of the June 24, 1966 signing memo, Attachment A.

Issues For Consideration

1. When to make a FOIA request / When not to make FOIA request?

- A. Is the information you want already publicly available?
 - i. FOIA's first sections, 5 U.S.C. §§ 552(a)(1)-(2), require affirmative publication of many documents.
 - ii. NEPA, NFMA and other statutes require public access to planning documents. *E.g.* 40 C.F.R. § 1506.6(f).
 - iii. Many governmental actions generate the same, or associated documents, that are in possession of state or local agencies. These may already be in public domain.
- B. Can you get the information informally, *e.g.*, by calling friendly agency staff?
- C. Even if the answer to either of the above questions is "yes," is there a strategic reason that you'd like to make a formal FOIA request?
 - i. Do you want to generate a "no document exists" response for affirmative use in substantive litigation? *E.g.*, "proving a negative."
 - ii. Do you want to engage an agency in FOIA process to establish reason to seek extension of some other deadline (comment deadline, etc.)?
- D. Do you expect that the administrative record of a decision you intend to challenge will be inadequate, padded or otherwise improper?
- E. Does your case evaluation require pre-complaint investigation or confirmation?
- F. Will making a FOIA request divert a cooperating agency's resources from its substantive work?
- G. Has agency staff asked you to make a FOIA request as cover to release information they want to share but cannot?

2. How to get the most out of your FOIA request (managing the agency's response).

- A. Front end of the request process.
 - i. Establish best place to send request; best access to records/fastest response/least obdurate FOIA staffers.

- ii. Draft a concise request conforming to all agency requirements. If seeking a fee waiver (*see below*), make sure to document it *thoroughly*. Cursory fee waiver requests are an invitation for agency to seek “clarifying” information and toll its response deadline. Moreover, judicial review of fee waiver disputes is limited to the record before the agency and cannot be supplemented in court. 5 U.S.C. § 552(a)(4)(vii).
- iii. If you are seeking a broad scope of information, break it down into discrete categories of information that you enumerate in your request. This will make your discussions with agency staff much easier and facilitate either the narrowing of your request or establishing a system of rolling release (*see below*).
- iv. Send request via either email or FAX and use confirmation technology to establish date of receipt (unless agency regs say otherwise). If possible avoid using internet-based request portals for all but the most basic requests.
- v. Make a call to FOIA officer shortly after sending to confirm receipt, establish relationship (this can be VERY important), establish estimated completion date and find out if she requires any additional information or has any concerns. Ask if she objects to you periodically checking in regarding status of your request (“pinging the system”).
- vi. Send email/letter memorializing your conversation. Primary intended reader is a federal judge. Establish your eminent reasonableness.
- vii. In a couple of weeks, ping the system, remind staff of outstanding request and ask for an estimated completion date (“ECD”).
- viii. Any request that requires more than ten days to process triggers an affirmative agency duty to provide an ECD. 5 U.S.C. § 552(a)(7)(B)(ii). However, agencies almost never provide an ECD or offer a range of time. An agency’s repeated failure to provide an ECD, even if within a single FOIA request, can give rise to an actionable pattern or practice of FOIA violation. *Muttitt v. US Central Command*, 813 F. Supp. 2d 221, 230-31 (D.C. 2011). Therefore, request an ECD each and every time you interact with an agency to build your record.
- ix. Be a (politely) squeaky wheel.
- x. Ping the system again.
- xi. If agency misses its 20 working-day decision deadline, 5 U.S.C. § 552(a)(6)(A)(i), immediately initiate a series of letters entitled “Notice of Deadline Violation/Offer to Assist.” *See, e.g.*, Attachment B. Again, the intended reader is a federal judge. Three such letters should suffice to establish to any court your reasonableness should you be forced into litigation.

- xii. “Rolling Releases.” Inform the agency that you do not wish for it to wait to assemble everything responsive to your request before it sends you anything. Instead, ask that it release information on a rolling basis as available. You can prioritize and/or narrow the scope of your request to obtain the highest priority information first.

B. Broad vs. targeted request pros/cons.

- i. Narrow requests can be formally fast tracked, 5 U.S.C. § 552(a)(6)(D) or informally processed faster but may miss things. A narrow request is less likely to incur significant response costs.
- ii. Large/broad requests may be put on the “complex” track and processed more slowly. However, as noted above, the use of information subcategories in a request can facilitate rolling release and/or the narrowing of a request. Large requests can be targeted by FOIA staff for improperly high fee assessments as a tool for force narrowing.

C. Expedited processing of requests under 5 U.S.C. § 552(a)(6)(E). Add representative of the media as basis for seeking?

3. FOIA Fees & Fee Waivers. See section V of main outline below. This is a key area to focus on during administrative phase; many requesters have been thwarted by a large fee assessment not waived due to an inadequate waiver record. Note that although the standard of judicial review of fee waiver denials is *de novo*, the scope of review (unlike that relating to disclosure exemptions) “shall be limited to the record before the agency.” 5 U.S.C. § 552(a)(4)(vii). In other words, “use it or lose it.” An example is provided as Attachment C.

4. FOIA’s disclosure exemptions. See section VI(5) of main outline below.

5. FOIA Appeals. See section VII of main outline below.

6. Litigation considerations. See generally section VII of main outline below. A few factors to consider:

- i. Inverted burden of proof; judicial review is *de novo* and “the burden is on the agency to sustain its action.” 5 U.S.C. § 552(a)(4)(B). Some judges must be educated regarding the lack of judicial deference accorded the agency’s decision.
- ii. Very liberal venue provision = Forum shopping. 5 U.S.C. § 552(a)(4)(B) (establishing venue “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”).
- iii. 30-day, not standard 60-day, answer deadline. 5 U.S.C. § 552(a)(4)(C). Many court clerks not aware and “helpfully” change dates in summons. Be aware.

- iv. FOIA cases may be given expedited priority on civil docket for “good cause shown.” 28 U.S.C. § 1657.
- v. Don’t need to establish standing via “use/enjoyment/return for same” type injury, simply that the plaintiff submitted the FOIA request.
- vi. Discovery is disfavored in FOIA litigation so use complaint as quasi-RFA, use fact, not notice, pleading. This helps to set up your summary judgment motion.
- vii. Constructive exhaustion; agency failure to comply with decision deadlines 5 U.S.C. § 552(a)(6)(C)(i) (a requester “shall be deemed to have exhausted his administrative remedies” if agency misses decision deadlines).
- viii. Almost all FOIA cases resolved via summary judgment.
- ix. Because the burden is on the agency, it makes sense to use a staggered MOSJ briefing with agency going first, requester filing a combined cross-motion/-response followed by agency reply and concluding with requester’s reply.
- x. Always consider pleading an APA-based claim for relief for any case that is not limited to an explicit denial of a FOIA request, *e.g.* missed deadlines, pattern & practice violation, etc. Some judges read FOIA’s judicial review provision very narrowly to exclude such claims under the statute and thus relief under the APA may be the only way to obtain a remedy. However, some judges have found co-extensive FOIA/APA jurisdiction for violations such as missed deadlines. *See, e.g., Oregon Natural Desert Ass’n v. Gutierrez*, 409 F.Supp.2d 1237, 1248 (D.Or. 2006), affirmed in part, reversed on other grounds by *Oregon Natural Desert Ass’n v. Locke*, 572 F.3d 610 (9th Cir. 2009).
- xi. FOIA’s attorney fee provision was amended in 2007 to ensure that *Buckhannon* does not apply. A plaintiff has “substantially prevailed” in its case if there is “a voluntary or unilateral change in position by the agency, [and] if the complainant’s claim is not insubstantial.” 5 U.S.C. § 552(a)(4)(E)(II)(ii).

7. FOIA contrasted to formal discovery.

- A. Discovery is limited to information that is “relevant to any party’s claim or defense” or that “appears reasonably calculated to lead to the discovery of admissible evidence.” FRCP 26(b)(1).
- B. The FOIA provides a general right of access to any non-exempt federal records. The FOIA may be used by “any person” to seek access to “reasonably described” records maintained by any federal agency. 5 U.S.C. § 552(a)(3)(A).
- C. Use of FOIA if already in litigation.

- i. DOJ's Office of Information Policy ("OIP") recognizes that "Under present law there is no statutory prohibition to the use of FOIA as a discovery tool." FOIA Update Vol. III, No. 1 at 10 (1981).²
- ii. Moreover, a requester's rights are not diminished by his or her status as a litigant. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975).
- iii. However, *see* admonishments from SCOTUS. *E.g.*, *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801-02 (1984) (rejecting construction of FOIA that would allow FOIA to be used to supplement discovery); *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982) (the "primary purpose of the FOIA was not . . . to serve as a substitute for civil discovery"); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("FOIA was not intended to function as a private discovery tool"); *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("discovery for litigation purposes is not an expressly indicated purpose of the Act").
- iv. Such statements of judicial disapproval of FOIA use in pending litigation are a reflection of the judicial prerogative of control over its cases and are not based on any language in the Act itself precluding such use. *See, e.g.*, *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1264 (2011) ("Statutory construction [of FOIA] must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). FOIA is a statutory right accruing to "any person" that should not be abrogated simply because a party is engaged in litigation. Moreover, such protests have much less relevance in record review cases where discovery is generally not available.
- v. Use of FOIA in regard to contact with a represented party. *See, e.g.*, Oregon Ethics opinion allowing Oregon Public Records Act requests to represented parties - OSB Formal Ethics Opinion 2005-144 (revised 2007). Attachment D.

² Available at: http://www.justice.gov/oip/foia_updates/Vol_III_1/page5.htm.

I. **INTRODUCTION TO FOIA: WHAT CAN FOIA DO FOR YOU?**

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, makes almost every record possessed by a federal agency disclosable to the public unless it is specifically exempted from disclosure or excluded from the Act's coverage. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). The Act provides that any person has a right which is enforceable in federal court, to maintain access to records of any federal agency, except for those documents which are exempt from disclosure by one of nine specific exemptions. The FOIA creates the presumption that records in the possession of agencies and departments of the executive branch of the U.S. Government are accessible. Before the FOIA became law on July 4, 1966, the burden was on the requester to establish a right to examine government records. Moreover, there were no statutory guidelines or procedures in place to help a person seeking information as were there no provision for judicial review for those denied access. When FOIA was signed into law, the burden of proof shifted from the individual to the government. Those seeking information were no longer required to show a need for information. Instead, the "need to know" standard was replaced by a "right to know" doctrine. The government now has the burden to justify a need for secrecy in order to withhold requested information. The FOIA sets standards for determining which records must be disclosed and which records may be withheld. The law also provides administrative and judicial remedies for those denied access to records. Above all, the law requires Federal agencies to provide the fullest possible disclosure of information to the public.

Congress intended that FOIA make Federal agencies accountable for information disclosure policies and practices. While the Act does not grant an absolute right to examine government documents, it does establish the right to request records and to receive a response to the request. If a record cannot be released, the requester is entitled to be formally advised of the reason for the denial. The requester also has a right to appeal the denial and, if necessary, to challenge it in court. Consequently, access to information of the Federal Government can no longer be controlled by arbitrary or unreviewable actions of a hidden bureaucracy.

I always suggest to clients that their first contact with a FOIA staffer should be premised on an assumption that the person is there to help and will respond reasonably to reasonable requests. I further counsel that if they are confronted by an obstructionist bureaucrat who is clearly not going to provide them with materials to which they are lawfully entitled, they should not argue or quarrel. Rather, in such a situation the best retort (because it is the response most likely to ensure your ultimate access to the desired information) is to do everything possible to ensure that they have created an adequate record for review at the next level as afforded by FOIA. A requester is not likely to accomplish anything productive if they fall into an argumentative posture with the agency and will probably tarnish the administrative record require to win on appeal or in court.

To be fair, the role of the agency FOIA staffer is not always as straightforward as one would hope. As reflected in "FOIA Update," a publication of the U.S. Department of Justice:

Administering FOIA requires making determinations of fact, law, and policy. To do this adequately is sometimes a large or complex task, especially when requests are for records that may be numerous or sensitive. Difficulties are often magnified by new or conflicting court decisions; by gaps in an agency's knowledge, resources, organization, or training; by a need to involve other agencies; or by a need to reconcile divergent policies.

FOIA Update, Vol. I, No. 1, Autumn 1979 at 1 (http://www.justice.gov/oip/foia_updates/Vol_I_1/page2.htm). Correspondingly, it is usually appropriate to give the agency the benefit of the doubt the first time you encounter a problem in regard to your request. In that situation, we recommend that you do what you can to work with the agency to facilitate resolution of the problem. However, if you continue to encounter resistance, it is probably safe to assume that the real obstacle is intentional agency opposition to disclosure and you should then do everything you can to make a good record for review.

Keep in mind that a successful FOIA requester will always remember and incorporate the following simple rules:

- Whenever you speak with agency personnel on the telephone, *get their name* and make sure that they know you are writing it down (e.g. ask for proper spellings, etc.),
- Whenever you speak with agency personnel on the telephone, send them a quick letter memorializing the points covered and request that they immediately inform you in writing if your recollection of the conversation is incorrect, and
- Make, and hang on to, copies of *all* correspondence (dated and with signatures) involving your case.

These surprisingly elementary points are fundamental to establishing the groundwork of a successful FOIA request but are often surprisingly overlooked by otherwise savvy activists. The result being that documents which should be disclosed are not, cases which should be won, are lost.

A. FOIA, 5 U.S.C. § 552, *et seq.*, enacted on July 4, 1966, the Act established for the first time, a statutory right of access to almost all federal agency records.

1. FOIA is unique in the world for effectuating the concept of public disclosure of internal governmental operations.
2. FOIA allows “any person” to request materials. 5 U.S.C. § 552(a)(3). “Person” includes any “individual, partnership, corporation, association, or public or private organization other than an agency.” 5 U.S.C. § 551(2).
3. FOIA applies to any “agency records” which are documents which are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989). The 1996 amendments to FOIA explicitly indicate that the term “record” and any other term used in FOIA in reference to information, should “include 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.” 5 U.S.C. § 552(f)(2).
 - (a) Note that the second prong of this analysis means that the agency is not required to affirmatively produce documents which do not exist at the time of the FOIA request, *e.g.*, an agency is not required to draft a summary of data which it may possess, even though the data itself might be disclosable under FOIA.
 - (b) The expansion of the use of computer technology has prompted courts to explore the inclusion of computer software, as opposed to the data stored and organized by the software, within the defini-

tion of “agency records.” Cleary, Gottleib, Steen & Hamilton v. HHS, 844 F. Supp. 770, 782 (D.D.C. 1993) (“These [computer] programs preserve information and ‘perpetuate knowledge.’” (quoting DeViaio v. Kelly, 571 F.2d 538, 542 (10th. Cir. 1978)). See also FOIA Update Winter 1994, at 3.

“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”

NLRB v. Robbins Tire Co., 437 U.S. 214, 242 (1978).

B. Uses of FOIA.

One of the goals implemented by the passage of the Act in 1966 was to ensure transparency in the governance of our country. The only mechanism by which we can assure governmental integrity is to have a clear understanding of what government is doing. Getting documents and other valuable information from the government is usually a crucial component in the resolution of any problem involving the operations or activities of the federal bureaucracy or those it does business with. The FOIA is the our best manner of access to significant resources of information which would not otherwise be available to the public. For example, activists Paul Merrell and Carol Van Strum broke the story for Greenpeace that paper mills using chlorine to bleach their pulp were discharging dioxin into the waters of our country and the fact that the EPA was aware of this, yet remained silent.

1. The FOIA can be used to illuminate, and to subject to public scrutiny, those records which concern controversial political and policy issues.

(a) EPA v. Mink, 410 U.S. 73, 75 (1973). Members of Congress sought public disclosure of documents transmitted to President relating to underground nuclear testing. Request failed because of “secret” nature of documents.

(b) Center for National Security Studies v. CIA, 711 F. 2d. 409, 410 (D.C. Cir. 1983). Public interest group uses FOIA to stimulate discussion of activities and functions of CIA.

2. The FOIA can be used to ensure agency performance of statutory responsibilities or expose governmental wrongdoing.

(a) FBI v. Abramson, 456 U.S. 615, 618 (1982). Journalist requested materials to disclose extent to which Nixon may have used the FBI to obtain derogatory information about political opponents of the White House.

(b) Int’l B. Elec. Workers Local 41 v. HUD, 763 F2d 435 (D.C. Cir. 1985). Union requested payroll reports submitted by nonunion contractor to protect its members from unfair and unlawful competition. Court stated, “the purpose of FOIA is to permit the public to decide *for itself* whether government action is proper.” (emphasis in original).

(c) Allen v. CIA, 636 F.2d 1287, 1288-1300 (D.C. Cir. 1980). Request for CIA records to determine extent to which agency may have had a role in either the assassination of President Kennedy or obstructed investigations into the assassination.

(d) Miller v. Reilly, Civ. No. 91-6357-JO (D. Or. 1991). Successful request for database maintained by EPA which documented agency's non-compliance with nondiscretionary duties imposed by each of the federal environmental statutes.

3. The FOIA can be used to invalidate agency action.

(a) Similar to Administrative Procedure Act, 5 U.S.C. § 553 et seq., in that FOIA requires agency to follow specific procedures when performing rulemaking functions, in this instance, publication in Federal Register.

(b) Agency must publish in Federal Register “substantive rules of general applicability . . . statements of general policy or interpretations of general applicability formulated and adopted by the agency. . . . 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.” 5 U.S.C. § 552(a)(1)(D), (E).

(c) Examples of use of FOIA publishing requirement to invalidate agency action:

(1) Morton v. Ruiz, 415 U.S. 199, 232-235 (1974). BIA rules establishing standards of eligibility for general assistance to Native Americans struck down for failure to publish in Federal Register.

(2) Anderson v. Butz, 550 F. 2d. 459, 462 (9th. Cir. 1977). Secretary of Agriculture's directive amending eligibility standards for food stamp program struck for failure to publish in Federal Register.

4. In preparation of litigation. Remember, sometimes a “no record exists” response is the “smoking gun” you need if you are trying to prove that an agency acted arbitrarily in some objectionable decision. For example, if the law requires the government to have considered certain facts or undertaken a particular action which would necessarily have left a paper trail, the absence of such a trail can be used as evidence that the agency failed in the performance of its statutory duties. We have used this tactic very successfully to paint an agency into a corner from which they could not escape after litigation began.

5. The use of FOIA with which most people are aware is to apply it to obtain agency records for: investigative reporting; obtain records for historical or academic research; discover evidence for use in proceedings before an agency or to challenge agency rulemaking; determine if agency has obtained information through an investigation of requester; and, to use as an alternative, or supplement, to civil or criminal discovery.

**“Knowledge will forever govern ignorance.
And people who mean to be their own governors, must arm themselves with
the power knowledge gives. A popular government without popular infor-
mation or the means of acquiring it, is but a prologue
to a farce or a tragedy, or perhaps both.”**

James Madison, letter to W.T. Barry (August 4, 1822), *reprinted in* G.P. HUNT, ED., IX THE WRITINGS OF
JAMES MADISON 103 (1910).

II. The “Open Government Amendments to FOIA of 2007”

On December 31, 2007, president George W. Bush signed into law the “Openness Promotes Effectiveness in our National Government Act of 2007,” more popularly known as the “OPEN Government Act of 2007.” This bill substantively amended FOIA for the first time in eleven years.

Section 3 of the OPEN Government Act provides for the Protection of Fee Status for News Media. It amends § 552(a)(4)(A)(ii) of the FOIA by providing a definition of “a representative of the news media” directly in the statute. The provision:

- (1) defines the term “news;”
- (2) gives examples of news-media entities such as “television or radio stations broadcasting to the public at large;”
- (3) recognizes the evolution of “methods of news delivery” through, for example, “electronic dissemination” and notes that news-media entities might make their products available by “free distribution to the general public;” and
- (4) includes provisions for a “freelance journalist.”

Section 4 of the Open Government Act amends 5 U.S.C. § 552(a)(4)(E) by adding two new elements to the attorney fees provision of the FOIA. The FOIA’s pre-existing attorney fees provision provides that a court “may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred” in cases in which the “complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E). It adds a provision that states that for purposes of this subparagraph, a FOIA complainant has “substantially prevailed” if the complainant “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.”

Section 5 amends 5 U.S.C. § 552(a)(4)(F) by adding reporting requirements for the Attorney General and the Special Counsel. The pre-existing provision of the FOIA provides that where a “court orders the production of any agency records improperly withheld . . . and assesses against the United States reasonable attorney fees and other litigation costs, and . . . 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.”

Section 5 of the Open Government Act requires that the Attorney General notify the Special Counsel of each civil action described under this provision and submit a report to Congress on the number of such civil actions in the preceding year.

Section 6 of the Open Government Act has two provisions that address time limits for complying with FOIA requests, and the consequences of failing to do so. Significantly, this section does not take effect until one year after the date of enactment and will apply to FOIA requests “filed on or after that effective date.” Accordingly, agencies have until December 31, 2008 to take any necessary steps to prepare for the implementation of this Section.

First, section 6(a) of the Open Government Act amends 5 U.S.C. § 552(a)(6)(A) which gives the statutory time period for processing FOIA requests, and includes criteria for when that time period begins to run and when that time period may be suspended or “tolled.” Specifically, section 6(a) provides that the statutory time period commences “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.” This provision addresses the situation where a FOIA request is received by a component of an agency that is designated to receive FOIA requests, but is not the proper component for the request at issue. In such a situation, the component that receives the request in error – provided it is a component of the agency that is designated by the agency’s regulations to receive requests – has ten working days within which to forward the FOIA request to the appropriate agency component for processing. Once the FOIA request has been forwarded and received by the appropriate agency component – which must take place within ten working days – the statutory time period to respond to the request commences

Section 6(a) further provides for those circumstances when an agency may toll the statutory time period. Specifically, an agency “may make one request to the requester for information and toll” the statutory time period “while it is awaiting such information that it has reasonably requested from the requester.” The agency may also toll the time period “if necessary to clarify with the requester issues regarding fee assessment.” There is no limit given for the number of times an agency may go back to a requester to clarify issues regarding fee assessments – which sometimes may need to be done in stages as the records are being located and processed. In both situations, section 6(a) specifies that the requester’s response to the agency’s request “ends the tolling period.”

Second, section 6(b) addresses compliance with the FOIA’s time limits by amending 5 U.S.C. § 552(a)(4)(A), the provision addressing fees. Section 6(b) adds a clause to that provision providing that “[a]n agency shall not assess search fees (or in the case of a [favored] requester [i.e., one who qualifies as an educational or noncommercial scientific institution, or as a representative of the news media] duplication fees) . . . 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 (6)(B) and (C), respectively) apply to the processing of the request.”

As noted in the language of the new provision, the terms “unusual circumstances” and “exceptional circumstances” are existing terms in the FOIA. “Unusual circumstances” occur when there is a need to

search or collect records from field offices, or other establishments; when there is a need to search for and examine a voluminous amount of records; or when there is a need for consultation with another agency or with more than two components within the same agency. Unlike “unusual circumstances,” “exceptional circumstances” are not affirmatively defined in the FOIA, but the FOIA does provide that “exceptional circumstances” cannot include “a delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.” 5 U.S.C. § 552(a)(6)(C)(ii). In addition, the statute provides that the “[r]efusal by a person to reasonably modify the scope of a request, or arrange an alternative time frame for processing the request . . . shall be considered as a factor in determining whether exceptional circumstances exist.” *Id.* at § 552(a)(6)(C)(iii).

Finally, section 6(b) amends 5 U.S.C. § 552(a)(6)(B)(ii), which discusses notification to requesters regarding the time limits and the option of arranging an alternative time frame for processing, by directing agencies “[t]o aid the requester” by making “available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency.” This provision incorporates an existing aspect of Executive Order 13,392.

Section 7 amends 5 U.S.C. § 552(a) by requiring agencies to assign a tracking number for each request that will require more than ten days to process. This section further requires agencies to establish a phone number or an Internet site to enable requesters to inquire about the status of their request. This section codifies existing requirements set forth in Executive Order 13,392.

Like section 6, this section does not take effect until one year after the date of enactment of the Open Government Act and will apply to requests “filed on or after that effective date.”

Section 8 amends 5 U.S.C. § 552(e)(1) by requiring that new statistics and data be included in the FOIA annual reports that agencies are required to submit to the Attorney General. The FOIA requires that agencies submit the reports to the Attorney General by February 1 of each year and that the reports “cover the preceding fiscal year.” 5 U.S.C. § 552(e)(1). The current fiscal year, Fiscal Year 2008, is already into its second quarter. Agencies will therefore need to begin collecting the new statistics required by section 8 so that they can be included in the annual report covering this fiscal year, which will be due on February 1, 2009. The Department of Justice, in conjunction with the Office of Management and Budget (OMB), will issue supplemental guidance on these new reporting requirements in the near future. This is not unlike what occurred in 1997 when the FOIA was last amended, and when the establishment of new reporting requirements resulted in a partial year report compiled under the pre-existing requirements.

Section 9 amends 5 U.S.C. § 552(f), the definitions provision of the FOIA, by including in the definition of “record” any information “maintained for an agency by an entity under Government contract, for the purposes of records management.” This provision makes clear that records, in the possession of Government contractors for purposes of records management, are considered agency records for purposes of the FOIA.

III. “THE ELECTRONIC FREEDOM OF INFORMATION ACT AMENDMENTS OF 1996”

On October 2, 1996, President Clinton signed into law “The Electronic Freedom of Information Act Amendments of 1996.” The Congressional findings which accompanied the Amendments set forth a large

number of proud sounding recitations focusing both on past successes of the Act as well as upon aspirations for the future:

Findings.-- The Congress finds that --

- (1) the purpose of section 552 of title 5, United States Code, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose;
- (2) since the enactment of the Freedom of Information Act in 1966, and the amendments enacted in 1974 and 1986, the Freedom of Information Act has been a valuable means through which any person can learn how the Federal Government operates;
- (3) the Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government;
- (4) the Freedom of Information Act has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards;
- (5) Government agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information; and
- (6) Government agencies should use new technology to enhance public access to agency records and information.

See P.L. No. 104-231, 101 Stat. 2422, Sec. 2(a)(1996)

Moreover, the “purposes” section of the Amendments presents some very nice sounding goals for federal agencies:

Purposes. the purposes of this Act are to --

- (1) foster democracy by ensuring public access to agency records and information;
- (2) improve public access to agency records and information;
- (3) ensure agency compliance with statutory time limits; and
- (4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government.

See P.L. No. 104-231, 101 Stat. 2422, Sec. 2(b)(1996)

While not legally binding, these recitations make for nice reading. Moreover, they can help to remind a reviewing judge—should you be required to file suit—that the agency is supposed to do more than merely

tolerate your presence; your invoking of FOIA is an act which summons forth some of the most basic principals of our democratic society, Congress said so. Consequently, always remember to cite these passages to the government when you are confronted by a less than forthcoming agency response, they will always look good in the record you are making for review.

The 1996 FOIA Amendments break down into three general categories. One, the Amendments impose a number of mandates to enhance public access to agency records by requiring that agencies provide indexes to help requesters best craft their requests and to ensure that previously requested records are available without the filing of a request. Two, the Amendments enhance the public's ability to obtain records in electronic format by confirming that records in electronic form are subject to FOIA. Accordingly, agencies must honor requesters' preference for special format—if reasonably feasible—and agencies are now required to make more information available on the internet. And three, the Amendments slightly extended the deadlines in which to respond to an initial FOIA request while modifying the procedures for reviewing FOIA requests to allow for faster processing while requiring agencies to reduce backlogs and delays.

A summary of the major components of the Amendments is set out below:

- A. **Electronic Records**—5 U.S.C. § 552(a)(2)(D)—Records which are subject to FOIA shall be made available under the Act when the records are maintained in electronic format. This clarifies existing practice by making the statute explicit on this point.
- B. **Format Requests**—5 U.S.C. § 552(a)(3)(B)-(D)—Requesters may ask for data in any form or format in which the agency maintains those records. Agencies must make a “reasonable effort” to comply with requests to furnish records in other formats.
- C. **Redaction**—5 U.S.C. § 552(b)—Agencies redacting electronic records (deleting part of a record to prevent disclosure of material covered by an exemption) must note the location and the extent of any deletions made on a record.
- D. **Expedited Processing**—5 U.S.C. § 552(a)(6)(E)—Certain categories of requesters would receive priority treatment of their requests if failure to obtain information in a timely manner would pose a significant harm. The first category of requesters entitled to this special processing includes those who could reasonable expect that delay could pose an imminent threat to the life or physical safety of an individual. The second category includes requests made by a person primarily engaged in the dissemination of information to the public, and involving compelling urgency to inform the public. The term “primarily engaged” requires that information dissemination be the main activity of the requester, though it need not be their sole occupation. The specified categories for compelling need are to be narrowly applied.
- E. **Multitask Processing**—5 U.S.C. § 552(a)(6)(D)—Agencies will be able to establish procedures for processing requests of various sizes on different tracks. Because of this procedure, larger numbers of requests for smaller amounts of material will be completed more quickly. Requesters will also have an incentive to frame narrower requests.
- F. **Deadlines**—5 U.S.C. § 552(a)(6)(A)—The deadline for responding to a FOIA request is extended to 20 working days from the current 10 working day requirement for initial determinations.

- G. Agency Backlogs**—5 U.S.C. § 552(a)(6)(B)-(C)—Agencies can no longer delay responding to FOIA requests because of “exceptional circumstances” simply as a result of predictable request workload. This strengthens the requirement that agencies respond to requests on time. This single provision has the potential to have the greatest impact upon FOIA requests and litigation. Of a total of 75 agencies responding to a Department of Justice request for backlog information in February 1994, only 28 agencies could report that they had no backlog. Agencies have consistently failed to comply with FOIA’s response deadline, and courts have allowed this. Congress has seemingly tried to put some teeth into the newly expanded 20 day response deadline by explicitly limiting the basis by which an agency can excuse a delay in the processing of a FOIA request.
- H. Reporting Requirements**—5 U.S.C. § 552(e)—The amendments expands certain reporting requirements, e.g. agency reports to Congress regarding their levels of FOIA compliance, and requires agencies to make more information available through electronic means.

These amendments, because there has been little opportunity for reviewing courts to evaluate them, present an unknown commodity to the FOIA requester. Historically, the courts have shown a willingness to extend a sympathetic ear to agency complaints of “exceptional circumstances” as justification for delinquent responses to FOIA requests. It remains to be seen how the courts will now receive such complaints. Additionally, the mechanisms to manipulate and release electronic data in its original format presents the potential to significantly speed release of the requested materials while also allowing a requester access to data which can be more easily searched and manipulated than paper. On the whole, these changes present the promise to make the FOIA progressively more responsive to the public; we shall see in the fullness of time.

“The words of a statute are, of course, dead weights unless animated by the purpose of the statute. The purpose of this statute is to shed light “on an agency's performance of its statutory duties.”

United States Department of Justice v. Reporters Committee For Freedom Of The Press, 489 U.S. 749, 772-73 (1989)

IV. HOW TO MAKE A FOIA REQUEST

The first thing to do when making a request under the FOIA is to identify which agency (or branch of the agency) has the records you seek. A FOIA request must be addressed to a specific agency, there is no central government records office that services FOIA requests. Accordingly, take the time required to locate the office appropriate for your request. If you’re not sure, you can consult a government directory such as the United States Government Manual. This manual has a complete list of all Federal agencies, a description of agency functions, and the address of each agency. An electronic version of the Manual may be found on the Office of the Federal Register website at <http://www.usgovernmentmanual.gov>. Also, it may help you to review a website which serves as a web-based gateway to all public internet sites of the United States government: <http://firstgov.gov>. If still not sure, you can always make FOIA requests to more than one agency.

Your FOIA request must be in writing. Keep in mind that your letter requesting information can be short and simple and in plain English; you don't need to have a lawyer to make a FOIA request. (Please refer to <http://www.foiadvocates.com/samples/1.html> for examples of FOIA request letters). The request letter should be addressed to the agency's FOIA officer or to the head of the agency (or to the local FOIA officer if you know the information is located in a particular place). The envelope containing the written request should be marked "Freedom of Information Act Request" in the lower left-hand corner.

The Act requires three basic elements in all request letters. First, the letter should specifically state that it is being made under the Freedom of Information Act (so it is properly routed to facilitate the fastest response time). Second, the request should identify the records that are being sought *as specifically as possible* (so that the agency need not guess what you are seeking or engage in a time consuming back and forth with you to figure out what you're looking for). Third, your name and address must be included (so the agency can respond to you, though not required by law, you should also include your phone number to ensure fastest possible communications with the agency).

For the purposes of an information request, FOIA does not require that you indicate the reasons you are seeking the information. However, the law allows agencies to charge fees in conjunction with the status or purpose of the requester. Different fees can be charged to commercial users, representatives of the news media, educational or noncommercial scientific institutions, and individuals. Additionally, you can seek a waiver or reduction of fees associated with your request, if you can demonstrate to the agency that the disclosure of the records you seek with substantially benefit the public interest. Also, if some of FOIA's disclosure exemptions are implicated by a request, *e.g.* Exemptions 6 of 7(C) for personal privacy, there is a balancing test by which the private interests of confidentiality are weighed against the public interests in disclosure. Consequently, in some limited circumstances a requester *may* be required to provide additional information to allow for agency determination the appropriate fees.

Some general points to recall for a successful FOIA request.

1. There is a general presumption of disclosure under FOIA. The Act mandates that agencies publish "substantive rules of general applicability" in the Federal Register as part of rulemaking process. 5 U.S.C. § 552(a)(1). It also requires the government to make available for public inspection and copying, final opinions (including dissenting opinions), issued in the adjudication of cases before the agency, as well as policy and interpretation statements and manuals and staff instructions which affect the public. These materials are to be located in agency "Reading Rooms" (either on the Internet or the old-fashioned kind) and must be available to the public without the need for a formal FOIA request. 5 U.S.C. § 552(a)(2). Finally, all records not covered by § 552(a)(1) or (a)(2), or exempted from mandatory disclosure by one of the nine exemptions noted at § 552(b) are to be disclosed upon submission of a request which complies with the rules established by the agency. 5 U.S.C. § 552(a)(3). This final section addresses what is commonly known as a "FOIA request."
2. "[A]né person" may make a FOIA request. 5 U.S.C. § 552(a)(3). "Person" includes any "individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). Note that this definition includes citizens of countries other than the United States. We've been able to assist people from around the world gain access to information about activities (with both private and governmental actors) in their own countries because relevant information was possessed by agencies of the United States' government.

3. FOIA allows document requests to be made only of an “agency.” 5 U.S.C. § 552(a). “Agency” specifically excludes: Congress; the federal courts; the governments of the District of Columbia, territories, or possessions of the U.S. 5 U.S.C. § 551(1). The 1996 amendments explicitly state that “‘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.” 5 U.S.C. § 552(f)(1). **Remember** that FOIA applies only to federal agencies, state and local governments are not covered by its provisions (nor are the federal courts or Congress) . However, state and local governments are usually subject to state public records laws.

4. An agency is required to make a “determination” on the merits of a FOIA request within **20 working days of receipt**. 5 U.S.C. § 552(a)(6)(A)(i). The agency must “immediately notify the person making such request of such determination and the reasons therefore, and the right of the person to appeal to the head of the agency an adverse determination.” *Id.* A “determination” **must** resolve **all** components of the request, i.e. it must fully conclude all disclosure and fee waiver issues. If the agency provides any less, or if a response is not timely, unless the agency can present one of the grounds for extension discussed below, the agency has violated FOIA.

(a) An agency may unilaterally extend the response deadline by up to 10 working days in “unusual circumstances,” but only upon giving written notice to the requester. 5 U.S.C. § 552(a)(6)(B). However, “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.” 5 U.S.C. § 552(a)(6)(B)(i). The “clause (ii)” referred to above allows the agency to ask the requester if it is possible to limit the scope of the request and/or if an alternative schedule might be arranged. As a general rule, it is always good to work with an agency to narrow the scope of your request to the fullest extent possible while ensuring that you get what you seek. This is true for two reasons. First, you can then better argue to a judge that you did everything reasonable to expedite your request. Second, the goal is to get information you need, not make an agency do more work than necessary.

(b) Historically, courts have allowed agencies to habitually ignore this deadline as long as the FOIA office can allege that it is applying “due diligence” to the processing of the request in the face of “exceptional circumstances.” 5 U.S.C. § 552(a)(6)(C). This standard is often established by agency use of the “first-in, first-out” (FIFO) processing system. Two seminal cases in this area of the law are: Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976), and Exner v. FBI, 542 F.2d 1121 (9th Cir. 1976); *see also* Haycock v. Nelson, 938 F.2d 1006, 1008 (9th Cir. 1991). However, in light of the recent amendments to FOIA, the courts may no longer be as solicitous of agency delays for “exceptional circumstances” which can not be readily identified as “exceptional.” “The term ‘exceptional circumstances’ does not include a delay that results from a predictable agency workload or requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.” 5 U.S.C. § 552(a)(6)–(C)(ii).

(1) Open America: The court in this case held that an agency without sufficient resources which is dealing with massive backlog of FOIA requests may, in fact, be experiencing “exceptional circumstances” which could justify additional time in which to respond to a FOIA request. The use of a FIFO system was held to be an adequate agency response to such circumstances.

(2) Exner: In Exner, the court, while upholding the due diligence exception, noted that a court could order a requester moved up in the FIFO line were the requester to establish an urgent need. Such a showing has been very difficult to establish with only the most desperate circumstances justifying such action. See e.g., Cleaver v. Kelly, 427 F. Supp. 80 (D.D.C. 1976)(plaintiff's need for access to documents to be used in his imminent murder trial was sufficient to move up in line).

(c) Consequently, it is always prudent, if possible, to make a good-faith argument that your request should be expedited based on emergency circumstances, e.g. the imminent extinction of a species and the need to inform the public about the government's role. The Act now mandates agencies to promulgate regulations setting forth explicitly how a requester is to qualify for expedited processing. Congress has set forth two basic groups of requesters who qualify for such treatment because of a "compelling need." 5 U.S.C. § 552(a)(6)(E)(v). The first category of requesters entitled to this special processing includes those who could reasonable expect that delay could pose an "imminent threat to the life or physical safety of an individual." 5 U.S.C. § 552(a)(6)(E)(v)(I). The second category covers requests "made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II). The term "primarily engaged" requires that information dissemination be the main activity of the requester, though it need not be their sole occupation. See HOUSE REPORT NO. 104-795, p. 26. The specified categories for compelling need are to be narrowly applied. Id. Demonstration of compelling need for expedited processing must be made "by a statement certified by such person to be true and correct to the best of such person's knowledge and belief." 5 U.S.C. § 552(a)(6)(E)(vi). Consequently, a successful requester is likely to be a group (as opposed to an individual) who can articulate that a "primary" purpose of their existence is the public dissemination of information regarding the subject matter of the requested data. Governmental "watchdog" groups, e.g. Public Citizen, and public interest advocacy groups, e.g. the Sierra Club, may have an easier time with this than individual requesters.

(d) The request should explicitly state that you expect a reply within the statutory time limits. This is not required, it merely puts the agency on notice that you are aware of their legal obligations and may serve to expedite their response.

(e) If the agency does not provide a determination within the appropriate time, pin them down on a specific date by which they can promise they will provide such determination, and **get it in writing**. Additionally, if the agency tells you that your request will be processed pursuant to their "FIFO" system, insist that they provide you with the "priority number" (the number which states your position in line relative to all of the other FOIA requests) which has been assigned to your request, and **get it in writing**. If you can not get them to write you a letter establishing a certain response date, send them a letter which sets forth the agreed upon date to memorialize your understanding for the administrative file. I repeat: **get it in writing**. This will accomplish two things. First, it may serve to put the agency's feet to the fire so that they will be more inclined to provide the requested materials promptly. Second, the ability to point to an agency's commitment to date certain which has been accelerated by the filing of a law suit dramatically improves your chances to establish yourself as the "prevailing party" in litigation and thus recover attorney fees.

(f) Failure of the agency to comply with a response deadline constitutes “exhaustion” of one’s administrative options and the requester may then elect to either sue or file an administrative appeal. 5 U.S.C. § 552(a)(6)(C).

5. **Always** comply with **all** “published rules stating the time, place, fees (if any) and procedures to be followed.” 5 U.S.C. § 552(a)(3)(A). In other words, do what the agency’s rules tell you to do. Our experience has been that many agencies hate the burden imposed by FOIA and love to avoid compliance whenever presented with non-conforming requests. Do **not** give them this opportunity to avoid their obligations under FOIA.

6. Make your request as specific as possible, i.e. do **not** ask for “all documents within the agency’s files relating to the extinction of animals in North America.” FOIA requires that a request “reasonably describe” the materials sought, 5 U.S.C. § 552(a)(3)(A), thus, courts have held that agencies need not disclose documents sought by such overly-broad requests. Marks v. Dept. of Justice, 578 F. 2d 261, 263 (9th. Cir. 1977). It is advisable to include as much identifying information as possible: subject, date, title, author, addressee, point of origin, press reports relating to the documents (include photocopies of such reports), etc. Your request will be delayed if the agency must try to work with you to narrow the scope of your request. If you do have a legitimately huge request, break it down into its component parts so that they may each be addressed within the context of the request.

7. Generally, a requester is not required to state a reason for the request. Department of Defense v. F.L.R.A., 114 S.Ct. 1006, 1013 (1994) (“the identity of the requesting party [and the reasons behind the request] has no bearing on the merits of his or her FOIA request.”) However, if you desire a waiver of fees for duplication costs, you will be required to provide pertinent information relating to reasons that the disclosure of the requested material warrants such a waiver.

8. Make sure to send the request to the appropriate office for your specific request; the response deadlines imposed by FOIA do not start to run until the proper office actually **receives** the request. The proper address may be found by reference to the agency’s Car’s regarding FOIA.

9. Always use an envelope clearly marked “Attention: FOIA Officer.” While not all agency rules require this, it will expedite processing upon receipt by the agency. The same rule applies to the letter itself, always entitle it “FOIA REQUEST.”

10. Always use certified mail-return receipt requested. This way, for the small investment of a couple of bucks, you know **exactly** the date the agency office received your request — and the agency knows that you know.

11. Evaluate whether to file your request with a local or regional office rather than the agency headquarters. If your request is for site specific material or working files, the local office is more likely to actually have custody of the documents. The headquarters are more likely to maintain the generalized policy materials. Call the agency’s local office to find out the exact address for the FOIA officer appropriate to your request.

12. **Request a waiver of all costs associated with providing copies of the requested materials.** Such public interest fees waivers are mandatory, that is, they “shall be furnished” upon a showing that disclosure furthers 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)(iii). However, the mandatory provision only kicks in upon a showing by the requester that disclosure of the desired records will, in fact, further the “public interest.” The initial burden is on the requester to make this showing. This is an area which is currently being intensively litigated by the government. Agencies must maintain a de minimis (a Latin phrase for *really* small) fee waiver threshold for billings for which collection of the fee exceeds the amount requested (currently about \$25.00) and for document searches under two hours and copies of less than 100 pages. 5 U.S.C. § 552(a)(4)(A)(iv)(I), (II).

(a) Include in your request a statement regarding the extent of your willingness to pay duplication fees associated with your request, e.g. “In the event a fee waiver is not granted, I am willing to pay \$50.00 to cover the costs of duplication, reserving, of course, my right to appeal the denial of my fee waiver request.” This is important even if you intend to demand a fee waiver. Because a denial of a fee waiver can be appealed or litigated, even after you pay the contested fees, a willingness to pay such fees up front may significantly speed the disclosure of the desired materials while also narrowing any appeal/litigations issues. Letting the agency know in your initial FOIA request removes the need for them to ask you if you are willing to pay any fees assessed, thus speeding the process of getting the desired information to you.

(b) Note that disclosure of the requested materials will not serve the “commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

13. Let the agency know that you expect that if any of your request falls within one of the nine exemptions to mandatory disclosure, you expect them to release all **reasonably segregable portions** which are not themselves exempt. 5 U.S.C. § 552(b).

14. Ask that the agency exercise its discretionary release powers to disclose the materials, notwithstanding the fact that some of the requested documents may fall within one of the nine exemptions. Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979).

15. Inform the agency of your awareness of your appeal rights, even though it is required to inform you of these in any denial of your request. 5 U.S.C. § 552(a)(6)(A)(i). If they agency is aware it is dealing with a FOIA savvy requester, it may be more likely respond within the statutory mandates.

16. An indication that a denial of the request will likely lead to litigation may improve the chances that the agency will properly respond to your request.

17. In all correspondence with the agency, explicitly state your willingness to answer any questions or address any concerns which may be raised by the agency. This is particularly relevant in the area of fee waivers where the FOIA requester carries the burden of producing the evidence of entitlement to the waiver.

18. Avoid “updating” your request in any situation where is not absolutely clear that you will promptly receive the documents you are requesting, it can only confuse matters should you need to appeal or litigate. This situation commonly arises when a requester either thinks of—or learns of—new information which she desires after submitting a FOIA request. Thinking that she can “piggy-back” on the pre-existing FOIA request, she “updates” her request by asking for additional documents. This seriously

complicates an accurate determination of applicable response deadlines and should always be avoided as it then affords the agency another basis to delay the processing of the initial request. It is a simple matter to file a new FOIA request for the desired information.

Reviewing courts should undertake their analysis of FOIA requests by “recognizing the enduring beliefs underlying freedom of information laws: that an informed public is desirable, that access to information prevents governmental abuse and helps secure freedom, and that, ultimately, government must answer to its citizens.”

Pansy v. Borough of Stroudsburg, 23 F.3d 772, 792 (3rd Cir. 1994).

Where to find an agency’s rules relating to FOIA.

1. The Code of Federal Regulations (CFR), is a series of books which contain the general and permanent rules published in the Federal Register under which the federal executive branch agencies operate. They are organized into 50 titles which are in turn divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas. For example, regulations pertaining to the U.S. Fish & Wildlife Service’s FOIA Office, a branch of the Department of the Interior, are located in Title 43, Chapter II, part 2. These rules are cited as: 43 CFR § 2.
2. Following is a partial listing of some of the federal agencies and the CFR citations of their FOIA regulations which may be of interest to you:

Animal Damage Control (Dept. of Agriculture): 7 CFR § 1.1. (U.S.F.S. FOIA regs.)
Army Corps of Engineers (Dept. of Defense): 32 CFR §§ 518 (U.S. Army FOIA regs.)
Bonneville Power Administration (Dept. of Energy): 10 CFR § 1004.
Bureau of Land Management (Dept. of Interior): See generally, 43 CFR § 2 (DOI FOIA regs.)
Bureau of Reclamation (Dept. of Interior): See generally, 43 CFR § 2 (DOI FOIA regs.)
Department of Agriculture: 7 CFR § 1.1.
Department of Defense: 32 CFR §§ 285, 286.
Department of Interior: 43 CFR § 2.
Environmental Protection Agency: 40 CFR § 2.
Export-Import Bank: 12 CFR § 404.
Fish & Wildlife Service (Dept. of Interior): See generally, 43 CFR § 2 (DOI FOIA regs.)
Forest Service (Dept. of Agriculture): 36 CFR § 200 ≤ 7 CFR § 1.1. (U.S.F.S. FOIA regs.)
International Pacific Halibut Commission: 50 CFR § 301.1 ≤ 15 CFR § 4 (Dept. of Commerce FOIA regs.).
International Whaling Commission: 50 CFR § 351.1 ≤ 15 CFR § 4 (Dept. of Commerce FOIA regs.).
International Boundary & Water Commission (U.S. & Mexico): 22 CFR § 1102.
Marine Mammal Commission: 50 CFR § 520.
Minerals Management Service (Dept. of Interior): See generally, 43 CFR § 2 (DOI FOIA regs.)

Outer Continental Shelf Oil and Gas Information: 30 CFR § 252.6.
Oil, Gas, and Sculpture Operations on the Outer Continental Shelf: 30 CFR § 250.18.
Geological & Geophysical Explorations of the Outer Continental Shelf: 30 CFR § 251.14.
National Oceanic and Atmospheric Administration: 15 CFR § 903 ≤ 15 CFR § 4.
National Park Service (Dept. of Interior): See generally, 43 CFR § 2 (DOI FOIA regs.)
National Aeronautics and Space Administration: 14 CFR § 1206.
Pacific Salmon Commission: 50 CFR § 351.1 ≤ 15 CFR § 4 (Dept. of Commerce FOIA regs.).
Regional Fisheries Management Councils (Including the Pacific and N. Pacific Regional Councils)(Dept. of Commerce): 15 CFR § 4.
Soil Conservation Service (Dept. of Agriculture): 7 CFR § 661 ≤ 7 CFR § 1.1 (U.S.F.S. FOIA regs.).

“[O]fficial information that sheds light on an agency’s performance of its statutory duties falls squarely within [FOIA’s] statutory purpose.”

United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

V. HOW TO REQUEST FOIA FEE WAIVERS: INTRODUCTION TO FOIA FEES

In our experience, it is common for FOIA requesters to assign their requests for fee waivers a secondary status in the request letters, making it appear to be almost an afterthought. This may not be a problem if one is requesting a document of only a few pages. However, if you seek materials which run into thousands of pages in length—with associated search and/or duplication costs running into the thousands of dollars—a denial of a fee waiver request may be tantamount to a denial of access to the documents themselves. For this reason, it is *crucial* to put as much energy into your fee waiver requests as you put into the document request itself.

In 1986 the FOIA was amended to identify three types of fees which may be charged. Although the 1986 amendments make the process of determining the applicable fees more complicated, they reduced or eliminated entirely the cost for small, noncommercial requests.

In the initial category, fees can be assessed to cover document duplication costs. All agencies have a fixed price for making copies using copying machines. You are supposed to be charged the actual cost of copying computer tapes, photographs, and other nonstandard documents.

In the second classification, fees may also be imposed to recover the costs of searching for documents. This includes the time spent looking for material responsive to a request. The FOIA defines “search” as a “review, manually or by automated means,” of “agency records for the purpose of locating those records responsive to a request.” Under the FOIA, an agency need not create documents that do not exist. Computer records found in a data base rather than a file cabinet may require the application of codes or some form of programming to retrieve the information. Under the definition of “search” in the amendments, the review of computerized records would not amount to the creation of records. Otherwise, it would be almost impossible to get records maintained completely in an electronic format, like computer data base information, because some manipulation of the information would likely be necessary to search the records. You can minimize search charges by making clear, narrow requests for identifiable documents whenever possible.

In the final category, fees can be charged to recover review costs. Review is the process of examining documents to determine whether any portion is exempt from disclosure. Before the 1986 amendments took effect, no review costs were charged to any requester. Now, review costs may be charged to commercial requesters only. Review charges include only costs incurred during the initial examination of a document. An agency may not charge for any costs incurred in resolving issues of law or policy which may arise while processing a request.

Moreover, different types of fees may be assessed against different categories of requesters. The Act stipulates that there be three categories of document requesters. The first includes representatives of the news media, and educational or noncommercial scientific institutions whose purpose is scholarly or scientific research. A requester in this category who is not seeking records for commercial use can only be billed for reasonable standard document duplication charges. So favored is this category that a request for information from a representative of the news media is not considered to be for commercial use if the request is in support of a news gathering or dissemination function even though such activity may generate a financial benefit for the requesting party. Accordingly, it is always a good idea to attempt to coordinate your information gathering activities with the research efforts of a member of the news media.

The second category includes FOIA requesters seeking records for commercial use. Commercial use is not defined in the law, but it generally includes profit making activities. A commercial user can be charged reasonable standard charges for document duplication, search, and review.

The third category of FOIA requesters includes everyone not included in the first two categories. People seeking information for personal use, public interest groups, and nonprofit organizations are examples of requesters who fall into the third group. Charges for these requesters are limited to reasonable standard charges for document duplication and search. Note that review costs may not be charged. The 1986 amendments did not change the fees which may be assessed to these requesters.

Small requests are free for a requester in the first and third categories. This includes all requesters except commercial users. There is no charge for the first 2 hours of search time and for the first 100 pages of documents. A noncommercial requester who limits a request to a small number of easily found records will not pay any fees at all. However, the Act also prohibits a requester from breaking a big request down into many small requests for the sole purpose of avoiding paying fees. In addition, the law also prevents agencies from charging fees if the cost of collecting the fee would exceed the amount collected. This limitation applies to all requests, including those seeking documents for commercial use. Thus, if the allowable charges for any FOIA request are small, no fees are imposed.

The FOIA amendments of 1986 also changed the law on fee waivers. Fees now *must* be waived or reduced 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. However, these amendments on fees and fee waivers created some confusion. Keep in mind that the initial determinations regarding the appropriate fee categorization is separate and distinct from determinations regarding fee waiver requests. By way of example, a requester who can demonstrate that he or she is a news reporter may only be charged duplication fees. However, a requester found to be a reporter is *not* automatically entitled to a waiver of those fees. A reporter who seeks a waiver must demonstrate that the request also meets the standards for waivers.

Typically, only after a requester has been categorized to determine the applicable fees does the issue of a fee waiver arise. A requester who seeks a fee waiver should *always* ask for a waiver in the original request letter. Although a request for a waiver can be made at a later time during the administrative phase of your requests, it is always the best practice to request it early; why delay the final resolution of your requests unnecessarily? You should always describe how disclosure will contribute to public understanding of the operations or activities of the government. The sample request letters elsewhere in this site demonstrate fee waiver language for your review.

Any of the three categories of requester may seek a fee waiver. Some will find it easier to qualify than others. For example, a news reporter who is charged only duplication costs may still ask that the charges be waived because of the public benefits that will accrue from disclosure of the requested information. A representative of the news media, a scholar, or a public interest group are more likely to qualify for a waiver of fees. A commercial user will usually find it difficult to qualify for waivers.

The eligibility of other requesters will vary. A *crucial* aspect of qualifying for a fee waiver is the relationship of the information to public understanding of the operations or activities of government. Another important factor is the ability of the requester to convey that information to other interested members of the public. Also note that requester is not eligible for a fee waiver solely because of indigence, nor are you qualified merely because your group has been certified as “non-profit” by the IRS. You will also not qualify for a fee waiver simply because you’ve been granted one in the past.

“Disclosure, not secrecy, is the dominant objective of the Act.”

Dept. of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

Specific Points To Remember As You Formulate Your Fee Waiver Request

A. FOIA’s fee standard *mandates* a waiver or reduction of fees associated with a request 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)(iii). Remember, this mandatory provision only applies upon a showing by a requester that disclosure of the desired records will, in fact, further the “public interest.” **The initial burden is always upon the requester to make this showing.**

1. Describe in a clear and concise manner, with as much specificity as possible, those ways in which you or your group is qualified to *digest* (fully comprehend and analyze) and *disseminate* (distribute to a larger audience) the requested information to the public’s benefit. Areas of unique expertise and experience, past actions undertaken relevant to the subject matter of the requested material (e.g. publicity campaigns, direct actions, administrative involvement, litigation, etc.), these are the things which should be noted in laying a foundation for a successful fee waiver request.
2. Describe in a clear and concise manner, with as much specificity as possible, those ways in which you or your group intend to benefit the public by use of the material requested. If you intend to use the information as the basis for litigation, say so, don’t be afraid to cite to prior suits filed by you or your group as evidence of the ability to do so, this cannot be used as a basis for denial. NLRB v. Sears, Roebuck & Co.

buck & Co., 421 U.S. 132, 143 n. 10 (1975). If you are working on a campaign to ban sport fishing, say so. Likewise for publication of analysis in a newsletter or single-issue publication. Always look for ways to distinguish the benefit accruing to the public interest from the free disclosure of the materials to you, from the situation which exists in the status quo.

3. The Ninth Circuit has recently—and neatly—summarized what it takes to make a prima facie case for fee waiver:

“[plaintiffs] identified why they wanted the administrative record, what they intended to do with it, [and] to whom they planned on distributing it. . . .”

Friends of the Coast Fork v. U.S. Dept. of Interior, 110 F 3d. 53, 55 (9th Cir. 1997).

Once this initial case is made, the burden then shifts to the agency to justify its denial. Further, the agency must stick to the reasons given at the administrative level to prove their case, they cannot later employ post hoc rationales.

“True, requesters bear the initial burden of satisfying the statutory and regulatory standards for a fee waiver, McClellan Ecological Seepage Situation v. Carlucci, 835 F. 2d 1282, 1284-85 (9th Cir. 1987) (MESS), but the government's denial letter must be reasonably calculated to put the requester on notice as to the deficiencies in the requester's case. On judicial review, we cannot consider new reasons offered by the agency not raised in the denial letter. Independence Mining Co., Inc. v. Babbitt, No. 95-16112, slip op. 649, 668 (9th Cir. Jan. 23, 1997) (citing Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 631 n. 31 (1980)). Taken together, these principles lead us to the following conclusion: on judicial review, the agency must stand on whatever reasons for denial it gave in the administrative proceeding. If those reasons are inadequate, and if the requesters meet their burden, then a full fee waiver is in order.”

Friends of the Coast Fork v. U.S. Dept. of Interior, 110 F 3d. at 55.

B. As noted above, in 1986, Congress amended the criterion of judicial review of FOIA's fee waiver section, replacing the restrictive “arbitrary and capricious” threshold of review, by which courts are required to grant agencies great deference, with the more liberal de novo review standard. By thus enacting the fee waiver provision of FOIA, “Congress explicitly recognized the importance and the difficulty of access to governmental documents for under-funded organizations and individuals.” Coalition for Safe Power v. U.S. Dep't of Energy, Civ. No. 87-1380PA, slip op. at 7 (D.Or. July 22, 1988) (citing Better Gov't Ass'n v. Department of State, 780 F.2d 86, 94 (D.C. Cir. 1986)).

1. Congress was particularly concerned that agencies were using search and copying costs to prevent critical monitoring of their activities:

“Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information

which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information....”

132 Cong. Rec. S14298 (Sen. Leahy).

2. Addressing this concern, FOIA's newly expanded fee waiver provision was intended specifically to facilitate access to agency records by citizen “watchdog” organizations, which utilize FOIA to monitor and mount challenges to governmental activities. See Better Gov't Ass'n v. Department of State, 780 F.2d 86, 88-89 (D.C. Cir. 1986)(fee waiver intended to benefit public interest watchdogs). Fee waivers are essential to such groups, which:

“rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions....”

“The waiver provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” in a clear reference to requests from journalists, scholars and, most importantly for our purposes, non-profit public interest groups.”

Better Gov't Ass'n, 780 F.2d at 93-94.

3. One of the favored goals of FOIA is to promote the active oversight roles of watchdog public advocacy groups, organizations which actively challenge agency actions and policies, especially in the courts:

“A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.” 132 Cong. Rec. H9464 (Reps. English and Kindness).

Better Government Association arrived at a comparable conclusion:

“The waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,’ in a clear reference to requests from journalists, scholars and, most importantly for our purposes, non-profit public interest groups.”

Better Gov't Ass'n, 780 F.2d at 94 (emphasis added).

C. Courts have noted approvingly the legislative history of the Act to find that a fee waiver request is likely to pass muster “if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or,

otherwise confirms or clarifies data on past or present operations of the government.” McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284-1286 (9th. Cir. 1987). Frame your fee waiver request accordingly.

D. However, merely establishing a public interest in the subject matter of the requested materials is not enough to qualify for a fee waiver, indeed, “inability to disseminate the information to the public . . . alone is a sufficient basis for denying the fee waiver request.” Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988). Likewise, the mere recitation that a requesting party is a non-profit group in the eyes of the IRS, or that it has been granted public interest fee waivers in the past will carry no dispositive weight in fee waiver analysis. Do **not** rely upon such assertions alone to qualify your request for a fee waiver; you will lose.

E. Practice Tips:

1. Any reviewing court is limited in its fee waiver deliberations to considering only those facts contained in the administrative record. 5 U.S.C. § 552(a)(4)(vii). Thus, it is of paramount importance to get *all* facts which you feel support your waiver request into the agency record, everything; if it’s not before the agency decision-maker, the judge can not consider it.

2. Because the 1986 fee waiver amendments significantly liberalized reviewing courts’ powers to reverse agency waiver denials, pre-1986 case-law cited by the government in support of their denial decisions may be easily distinguished, and thus rendered irrelevant, on this ground.

3. Our FOIA requests often include a statement such as the following: “The requesters plan to make these documents available to the public at the [your state university’s] Law Library. As this is a facility open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Further, as the library is a Federal Repository, its Congressionally certified status as a resource to foster openness in government, as well is its role in facilitating the teaching and research occurring at the University, will be well served.” A statement of this type does not, by itself, ensure a public interest fee waiver, but there is some legislative history which suggests the importance Congress placed on this means of disseminating information into the public realm. Government agencies “should recognize the vital contributions that libraries and depositories of public records make to the public’s understanding of the operations of government. All federal agencies should implement the intended favorable treatment of these organizations under the FOIA.” 135 Cong. Rec. S8466 (daily ed. July 20, 1989) (debate colloquy, Senator Leahy responding to Senator Kerry’s questions about State Dept. policy of denying fee waivers to libraries).

F. The government is currently fighting fee waiver requests with vigor. For you to prevail, you must lay out a very good basis for the granting of the waiver. Too often, it appears that groups add their waiver requests as an afterthought, devoting a few cursory sentences to this component of their request. Such requests are almost always denied. Do not let this happen to you. Fee waiver request should be viewed as a significant part of a FOIA request. It will provide you or your group little benefit for an agency to agree to disclose the requested records, but to charge a fee so high that you cannot afford access to the records you have fought so hard to review.

“An informed electorate “must stand ready to sound the alarm when necessary to point out the actions in any pernicious project.”

Alexander Hamilton

“For more than a quarter century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.”

President Clinton’s Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993).

VI. EXEMPTIONS

A. FOIA maintains nine statutory exemptions to the general rule of mandatory disclosure. 5 U.S.C. § 552(b)(1)-(9). These exemptions may be construed as discretionary, not mandatory. Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979). Consequently, even if a requested document falls within one of the nine exemptions, the agency should be asked to release it anyway as an exercise of its discretionary powers. Moreover, [t]hese exemptions are specifically made exclusive . . . and must be narrowly construed. Dept. of the Air Force v. Rose, 425 U.S. 352, 361 (1976). The exemptions are set forth below.

1. National defense or foreign policy information properly classified pursuant an Executive Order. 5 U.S.C. § 552(b)(1).
2. Documents “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2).
3. Documents “specifically exempted from disclosure by statute” other than FOIA, but only if the other statute’s disclosure prohibition is absolute. 5 U.S.C. § 552(b)(3).
4. Documents which would reveal “[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4).

(a) Exemption 4 of FOIA, 5 U.S.C. s 552(b)(4), exempts from disclosure commercial or financial information that is “privileged or confidential.” Generally, the commercial nature of a document is not difficult to ascertain, consequently, the main issue in contest is whether the information is privileged or confidential.

(b) The leading case on Exemption 4 sets out the test for exempting commercial information from FOIA disclosure as follows:

“Commercial or financial matter is “confidential” for purposes of [Exemption 4] if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C.Cir. 1974); see also Frasee v. U.S. Forest Service, 97 F.3d 367, 371 (9th Cir. 1996).

This review has been further bifurcated in the analysis set forth in Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871 (D.C.Cir. 1992) (en banc). In Critical Mass:

“the D.C. Circuit reaffirmed the two-prong National Parks confidentiality test, holding that the substantial competitive harm test was to be applied to information *mandatorily* provided to the government. The court then established a separate test to be applied to information *voluntarily* submitted to the government. The court concluded that information that is voluntarily provided to the Government is ‘confidential’ for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.”

Frasee v. U.S. Forest Service, 97 F.3d at 372. However, the Ninth Circuit has expressly refused to incorporate this two level test as precedent. Id. Consequently, the more difficult to satisfy (for the agency) “substantial competitive harm” test remains the law applicable to this Circuit.

5. Documents which are “inter-agency or intra-agency memorandum or letters” which would be privileged in civil litigation. 5 U.S.C. § 552(b)(5).

(a) Exemption 5 is the exemption most frequently invoked against public interest requesters because the nature of such party’s intended uses are usually to get information regarding the agency’s processes and conclusions. The exemption was intended to incorporate common-law privileges against discovery. Of all such privileges, the one most frequently encountered by public interest requesters is based on the concept of “executive” privilege which protects recommendations and advice which are part of the “deliberative process” involved in governmental decision-making. The rationale being to protect the integrity of agency decision-making by encouraging both full and frank discussions of policy proposals and to prevent premature disclosure of policies under review.

(b) Courts have resolved to distinguish “pre-decisional” documents, which fall within the protections of Exemption 5, and “post-decisional” documents, which must be disclosed. F.T.C. v. Warner Comm. Inc., 742 F.2d 1156, 1161 (9th Cir. 1984); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-153 (1975) (memos directing agency counsel criteria and actions involved in decision to file complaints are not final dispositions of issue, and are thus protected, while final opinions or dispositions can never be protected by Exemption 5).

(c) However, even if a document is pre-decisional, some courts have upheld a distinction between “materials reflecting deliberative or policy-making process on the one hand, and purely factual, investigative matters on the other,” the exemption protects the former, not the latter. EPA v. Mink,

410 U.S. 73, 89 (1973). Those portions of a document which are not exempt must be disclosed unless they are “inextricably intertwined” with the exempt portions. Ryan v. Dept. of Justice, 617 F.2d 781, 790-91 (D.C. Cir. 1980).

(d) Unfortunately, in the part of the federal court system which controls our region, the Ninth Circuit, the court has rejected a major component of the fact/opinion distinction by embracing a “process-oriented” rule that “to the extent that they reveal the mental process of decisionmakers,” factual materials are not automatically outside the ambit of exemption 5. National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114, 1119 (9th. Cir. 1988); see also Assembly of the State of California v. U.S. Dept. of Comm., 968 F.2d. 916, 921 (9th. Cir. 1992). As almost all agency fact-finding may be construed in some manner to reveal aspects of the decision-making process, this fuzzy rationale creates an exception which threatens to swallow the rule.

6. Documents which are “personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

(a) The Supreme Court has reviewed the application of this exemption. It noted:

“First, in evaluating whether a request for information lies within the scope of a FOIA exemption, such as Exemption 6, that bars disclosure when it would amount to an invasion of privacy that is to some degree ‘unwarranted,’ a court must balance the public interest in disclosure against the interest Congress intended the [e]xemption to protect.” Department of Defense v. F.L.R.A., 114 S.Ct. 1006, 1012 (1994).

(b) The Court continued:

“Second, the only relevant “public interest in disclosure” to be weighed in this balance is the extent to which disclosure would serve the “core purpose of the FOIA,” which is “contribut[ing] significantly to public understanding of the operations or activities of the government.” Id.

In other words, the requested materials must in some way illuminate “what the government is ‘up to’” in order to justify disclosure. A request for information from the government which illustrates what you neighbor, or business competitor, is “up to” will not meet the public interest balancing test under exemption 6.

7. Documents which are “records or information compiled for law enforcement purposes,” but only if one or more of six specified types of harm would result. 5 U.S.C. § 552(b)(7).

8. Documents which are related to specified reports prepared by, on behalf of, or for the use of agencies which regulate financial institutions. 5 U.S.C. § 552(b)(8).

9. Documents which would reveal oil well data. 5 U.S.C. § 552(b)(9).

B. Upon confronting an exemption based denial of disclosure, the requester should demand an index of all materials so withheld along with enough of a description to enable a reasoned appeal of the denial. FOIA does not expressly require an agency to provide such a log during the administrative phase, but it may be

convinced to do so if a requester explains that the information provided by a withholding index might help avoid subsequent litigation.

“The processes of Government touch almost every aspect of our lives, every day. . . .The [FOIA] guarantees citizen access to Government information and provides the key for unlocking the doors to a vast storeroom of information.”

Sen. Kennedy, *FOIA and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents* (Joint Comm. Print 1975) at 284-85.

VII. FOIA APPEALS & LITIGATION

FOIA APPEALS

If your FOIA request is denied, the agency must inform the you of the reasons for the denial and the your right to appeal the denial to the head of the agency. You may appeal the denial—in whole or in part—of a either a document or a fee waiver request. You may also contest the type or amount of fees which you were charged. Moreover, you can appeal any other type of adverse determination, including a rejection of a request for failure to describe adequately the documents being requested or a response indicating that no requested records were located. You can also appeal because the agency failed to conduct an adequate search for the documents that you requested. The filing of an appeal does not affect or delay the release of documents which the agency ruled should be disclosed in response to your initial FOIA request. In other words, a partial “win” at the first administrative level is not put at risk if you decide to appeal. There is no charge for filing an appeal.

PRACTICE TIPS:

A. If the agency rules against your fee waiver request at the administrative level the agency is bound to adhere to the reasons it provides at that stage; it cannot raise new issues later if litigation is required. “Taken together, these principles lead us to the following conclusion: on judicial review, the agency must stand on whatever reasons for denial it gave in the administrative proceeding.” Friends of the Coast Fork v. U.S. Dept. of the Interior, 110 F.3d 53, 55 (9th. Cir 1997). This rule is not as clearly enforced regarding an agency’s decision to invoke a disclosure exemption. Regardless, it is important to try to understand as early as possible in your request process if you have a reasonable chance to get the requested materials at the administrative level, or if you are merely going through the motions to exhaust your administrative remedies in order to get into court. If you are in the former context; go ahead and make your best argument. Try to work with the agency to best inform it of your needs and the correct application of the law to your request. If you are in the latter realm—for some reason you are sure that you are going to get hosed at the administrative level—it is important not to do anything to help the agency make its best arguments during the administrative phase. In this situation, you want the agency to ignore you, to make unreasonable and unlawful arguments; they will be stuck with them once you are in court. You will win.

B. An administrative appeal may be undertaken upon either, the denial of an initial FOIA request, or an agency's failure to issue a determination within the statutory 20-day time deadline. 5 U.S.C. §§ 552(a)(6)(A)(i), 552(a)(6)(C).

C. An appeal should outline **all** facts which you think are relevant to your request. Reviewing courts, while not limited to the record before the agency (except for fee waivers, for which they are limited to review on the administrative record), do tend to consider what a reasonable agency decisionmaker would do when confronted with the facts before it. In other words, if you fail to mention an important fact at the administrative level, it will work against you when raising it at the litigation stage. This is a frequent problem we encounter which can severely limit one's options in court.

D. Deadlines for the filing of an appeal are noted in each agency's FOIA regulations located in CFRs (the FOIA does not itself establish appeal deadlines). They are often as short as 20 working days, so it is important to act promptly when a denial of your initial request is issued. Although, if you miss your appeal deadline you could always refile your another FOIA request, it would just add to the delay in reaching the ultimate resolution of your information request.

E. Appeals need not include reference to statutory, regulatory, or case law, but it helps. Even if you are not comfortable with legal research, simply citing the agency's rules which have been violated can make the appeal much more effective.

F. An agency is required to make a "determination" on the merits of a FOIA appeal within **20 working days of receipt**. 5 U.S.C. § 552(a)(6)(A)(ii). The agency must "immediately notify the person making such request of the provisions for judicial review of that determination." Id.

1. An agency may unilaterally extend the response deadline by up to 10 working days in "unusual circumstances," but only upon giving written notice to the requester. 5 U.S.C. § 552(a)(6)(B)(i). This right may not be exercised if the agency has already exceeded its 10 day response deadline for the initial request. Id.

2. FOIA requires any denial of a request to list the "names and titles or positions of each person responsible for the denial." 5 U.S.C. § 552(a)(6)(C).

G. Avoid impassioned prose ("you are killing all of the animals in the ocean, I must know why!"), it may make you feel better, but it will not convince the reviewer that you are right and may cloud the issues.

H. Remember that you are not only trying to convince the agency to release the requested materials, you are also creating a record for a judge to review should legal action be required. If you think of additional issues or arguments which have not been included in either the initial request or the appeal, draft a letter (not a phone call-you want a paper trail) which sets them out. **Make a record for review, make a record for review, make a record for review.**

FOIA LITIGATION

As one appellate court has frankly acknowledged: "Freedom of Information Act cases are peculiarly difficult." Miscavige v. IRS, 2 F.3d 366, 367 (11th Cir. 1993); see also Summers v. Department of Justice, 140

F.3d 1077, 1080 (D.C. Cir. 1998) (noting “peculiar nature of the FOIA”). What follows is a very brief overview of what you should expect if you retain an attorney to litigate a FOIA claim - and some of the pitfalls to avoid. Remember; the issue of whether you will win or lose your FOIA litigation will have been largely determined by the time you have exhausted the administrative phase of your case by the documentation which has been submitted to the agency’s administrative record. This is particularly true regarding fee waiver issues because the court’s review, while de novo, is limited to the administrative record. 5 U.S.C. § 552(a)(4)(vii).

A. Remember the golden rule of FOIA: “An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption.” GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994); see also Lewis v. IRS, 823 F.2d 375, 378 (9th Cir.1987). This favorable burden of proof provides rarefied air indeed for a plaintiff’s attorney to breathe.

B. Federal courts have jurisdiction to “enjoin the agency from withholding agency records” 5 U.S.C. § 552(a)(4)(B). But before going to court, a FOIA requester must “exhaust” their administrative remedies, that is, they must use every option available at the agency level if they expect the court to review their case. 5 U.S.C. § 552(a)(6)(B). This can occur when the agency takes too long to respond to a request or appeal, or if the agency denies an appeal. If you file your suit before one of these things occurs, your case will be dismissed.

C. The action may be filed in the federal district court in the district where the complainant resides, has a principal place of business, in which the agency records are located, or in the District of Columbia. 5 U.S.C. § 552(a)(4)(B).

D. The court may review the case de novo, that is, the court may create its own record of events without depending on the agency’s administrative record. 5 U.S.C. § 552(a)(4)(B). Thus, courts reviewing FOIA cases are required to grant somewhat less deference to an agency interpretation than would normally be the case when a court reviews and administrative action.

E. In most circumstances, a FOIA complaint should also plead an Administrative Procedures Act, 5 U.S.C. § 701 et. seq., (APA) claim because a violation of the terms of FOIA can also usually be framed as either “arbitrary and capricious” or an “abuse of discretion.”

F. The complaint, in addition to demanding the release of the records at issue, and/or the granting of a fee waiver, could further seek:

1. A request for an order enjoining the agency from relying on an invalid regulation or practice in all future FOIA undertakings. Cf. McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983).
2. An order declaring the agency’s actions to be violative of FOIA.
3. An award of attorney’s fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E). Attorney fees may be awarded when the plaintiff has “substantially prevailed.” Id.

4. If the actions of the agency were so flagrant to be arbitrary and capricious, ask that the court make a specific finding of that fact and refer the matter to the Merit System Protection Board for investigation. 5 U.S.C. § 552(a)(4)(F).

G. Generally, FOIA cases are well suited for resolution by summary judgment pursuant to Federal Rule of Civil Procedure 56. There are usually few material facts in dispute and the conflict is often based on divergent interpretations of the relevant law. Thus FOIA cases may often be litigated relatively cheaply (in comparison to other types of federal litigation).

“The statute is a commitment to ‘the principle that a democracy cannot function unless the people are permitted to know what their government is up to.’”

Favish v. Office of Independent Council, 217 F.3d 1168, 1171 (9th Cir., 1999).

VIII. BIBLIOGRAPHY

FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW (INDIVIDUAL CHAPTERS PERIODICALLY UPDATED)

Updated by the U.S. Department of Justice every year, this is an excellent, comprehensive depiction of the current law of FOIA and it is extremely well documented (lots of footnotes). Helpful also because it will be a frequent reference point used by the government attorneys who will be your worthy adversaries; it helps you to know what the other side is using for ammunition. Occasionally limited by its biases, some analysis incorrectly asserts a stronger position for the government than the statute or case law would indicate. The entire text is available online at: <http://www.justice.gov/oip/foia-guide.html>).

Litigation Under The Federal Open Government Laws 2010

Earlier editions of this venerable handbook were published by the American Civil Liberties Union Foundation. Organized in an annotated outline format, it is very easy to use while providing a very complete foundation for working the government access laws. An outstanding reference which is very accessible to those without any legal training. If you can't find it in your law library, it is well worth checking out. It can be purchased for \$75 from Access Reports at:

1624 Dogwood Lane
Lynchburg, VA 24503
(434) 384-5334
<http://www.accessreports.com/sub.html#lit>

FOIA POST (DOJ Blog)

A quick, easy read put out by the U.S. Department of Justice Office of Information and Privacy, which keeps you current on the latest DOJ thinking on many cutting edge FOIA issues, legislative actions affecting public records law, and recent court decisions. Available at: <http://blogs.justice.gov/oip/> It is important in that it provides government-wide guidance for implementation of FOIA as well as (non-binding) "best practices." The guidance may be cited as persuasive authority.

FOIA Update (DOJ Newsletter)

This was the predecessor of FOIA Post and archived copies are located at: <http://www.justice.gov/oip/foi-upd.htm>. It is useful as a source of DOJ FOIA guidance (much of which is still in effect) as well as discussions of legislative history. *See, e.g., FOIA Update*, Vol. XIX, No. 1, at 5 (listing primary reference materials pertaining to Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048).

ACCESS REPORTS,

A (roughly) biweekly newsletter published (together with [Access Reports Reference File](#)) by Access Reports, Inc., Lynchburg, VA 24503: www.accessreports.com.

June 21, 1966

MRS. ROBERTS:

The "Information Bill", S. 1160, was received at the White House June 22, which means that the President has through July 4 to take action on it.

The Reports coming in through the Bureau of the Budget have not yet been received. Budget indicates they will be here Tuesday, June 28th, at the latest and possibly a little earlier. As you know, in the normal course they are reviewed by the Special Council before submission to the President.

William J. Hopkins

P. S. I get the impression that Budget is "negative" on a ceremony.

(2)

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

June 24, 1966
11:30 a.m. Friday

~~CONFIDENTIAL~~ MEMORANDUM FOR THE PRESIDENT

SUBJECT: Signing of Information Bill

1. You will remember that Bob Fleming suggested, in the event the President signs the Freedom of Information Bill, that you hold a public signing ceremony, with an affirmative talk on freedom of information with representatives of broadcasting, newspaper publishers, newspaper editors, American Bar Association, etc. invited. The President disapproved such a ceremony.

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2. Congressman Moss phoned me at 10:30 a.m. to urge you in the event that you sign the bill, to capitalize on it and hold a public signing.

3. Congressman 'Moss' theory is as follows:

The President has unjustly been criticized on the credibility gap; his opponents have built up an image of the President as being unwilling or uninterested in giving information to the public, etc. Here, according to Congressman Moss, is an opportunity to show the President's desire to inform the public through a bill signing.

Congressman Moss believes that if the President signs the bill, an affirmative statement by him would remove what he called "public distortion and false impressions" as to the desire of the President to inform the public.

Robert E. Kintner

No Ceremony

CONFIDENTIAL

Determined to be an administrative marking
By 7/22 On 6-25-87

BAHR LAW OFFICES, P.C.

1035 ½ Monroe Street
Eugene, OR 97402
(541) 556-6439

August 5, 2013

Office of Information Programs and Services
A/GIS/IPS/RL
U. S. Department of State
Washington, D. C. 20522-8100

Via Email Attachment to: FOIAstatus@state.gov

Re: Notice of deadline violation and request for estimated decision date for National Wildlife Federation FOIA request F-2012-30162/Offer to Assist.

Dear FOIA Officer:

I have been retained to represent the interests of the National Wildlife Federation (“NWF”) regarding the above noted information request. I ask that you send all communications pertaining to this matter directly to me. However, I ask that you send all documents responsive to the request to James Murphy at National Wildlife Federation, 149 State Street Montpelier, VT 05602.

As background to this letter, I recount that by letter dated June 14, 2012, NWF submitted to your office, a request under the federal Freedom of Information Act (“FOIA”). *See* Exhibit A, attached hereto. By form letter dated September 26, 2012, your office replied to NWF. *See* Exhibit B, attached hereto. The form letter assigned Case Control Number F-2012-30162 and further informed NWF that “[u]nusual circumstances (including the number and location of Department components involved in responding to your request, the volume of requested records, etc.) *may* arise that would require additional time to process your request.” *Id.* (emphasis added). Notably, the form letter did not *actually assert* that “unusual circumstances” existed in this matter, it simply noted in passing the possibility that they might at some future date. Additionally, your letter did not provide the date that you received the request or an estimated decision date.

I am sure that you are aware that the FOIA requires an agency to make a determination on a request within 20 workdays after its receipt. 5 U.S.C. § 552(a)(6)(A)(i). This deadline elapsed long ago. Further, FOIA’s limited provision allowing an extension of a decision deadline beyond 20 days requires an agency to provide explicit “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. . . .” 5 U.S.C. § 552(a)(6)(B)(i). As noted above, State Department’s form letter provided neither a specific assertion of an “unusual circumstance” that would delay a decision on this request nor did it include an estimated decision date. Moreover, we are now well beyond the additional presumptive extension of ten working days allowed by 5 U.S.C. § 552(a)(6)(B)(i). Indeed, your September 26, 2012 form letter was itself sent long after the expiration of that extended deadline.

Attachment B

Regardless, I am notifying you that my clients are not at this time exercising their legal option under the FOIA to file suit to compel compliance with the FOIA's time limits. 5 U.S.C. § 552(a)(6)(C). However, be informed that time is of the essence in this matter and our patience is not without limits. As NWF informed you in its request letter, the requested information is for use as part of NWF's review of the transportation of controversial Canadian tar sands oil into the United States and NWF intends to use the requested information to better understand the history of the proposed pipeline, the Presidential permitting process, and to educate the public on these matters. Exhibit A at 4. Canadian tar sands oil is a controversial fuel source because of its impacts of the environment and climate and the public is very interested in learning more about this pipeline and the Presidential permitting process. *Id.* The rationale driving this information request is to inform the public dialogue regarding these issues and NWF's need for access to the requested data is therefore very time sensitive.

That being said, my clients do not wish to initiate litigation at this point because they feel a cooperative approach is better suited to resolving this situation. Therefore, I am offering to assist your office in any way possible to facilitate the prompt release of the requested document.

Additionally, beyond the estimated decision date mandate imposed by 5 U.S.C. § 552(a)(6)(B)(i) noted above, for any request taking longer than ten days to process, the Agency must inform the requester "(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." *Id.* at § 552(a)(7)(B). Accordingly, we ask that you immediately inform us of the date you received this request. We further ask that you provide an estimated date by which we can expect completion of the Agency's unlawfully delayed response to our FOIA request.

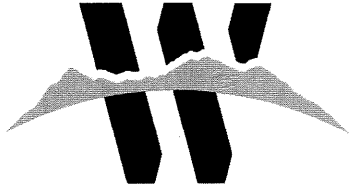
It would be useful as we evaluate the need to seek judicial review of this matter if you could inform us if you have implemented a "first-in/first-out" system for processing a backlog of FOIA requests and — if so — how many requests are in line ahead of this one. Although we do not resort to litigation at this time, because of the time sensitive nature of the requested data, legal action will be required if a determination is not promptly forthcoming. Should you have any questions whatsoever, please do not hesitate to contact me at the address listed above or you may use my phone number (541) 556-6439 or my email address: davebahr@mindspring.com.

Sincerely,



David Bahr, Requester's Attorney

Enclosures: Exhibits A, B.



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Western Environmental Law Center

Defending the West Wildlands, Water, and Western Communi

March 9, 2006

Mark E. Rey, Under Secretary
Natural Resources & Environment
U.S. Department of Agriculture
Whitten Building, Room 217E
1400 Independence Avenue, S.W.
Washington, D.C. 20250

FREEDOM OF INFORMATION ACT REQUEST

VIA CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Re: Request for information pertaining to the "Donato Report."

Dear Under Secretary Rey:

This is a request under the Freedom of Information Act. 5 U.S.C. § 552 *et. seq* I am making this request on behalf of our clients, the Oregon Natural Resources Council ("ONRC"), the Siskiyou Regional Education Project ("Siskiyou Project") and the American Lands Alliance ("ALA"). Our clients hereby request that you provide copies of the following materials:

1. All records relating to, or consisting of, communications — in any format¹ — generated or received by you or your office regarding the article, or the research supporting, "Post-Wildfire Logging Hinders Regeneration and Increases Fire Risk" Donato *et al.*, ("Donato Report") originally published online in Science Express on 5 January 2006, [DOI: 10.1126/science.1122855] (in Science Express Brevia), subsequently published in Science, 20 January 2006: Vol. 311. Issue 5759, p. 352. Specifically included within the scope of this request are any communications you or your office have had with Jim Sedell, Director of Forest Service's Pacific Southwest Research Station in California.
2. All records relating to, or consisting of, communications — in any format — generated or received by you or your office regarding any actions undertaken, contemplated and/or rejected by the United States Bureau of Land Management ("BLM") which pertain in any way to the Donato Report.

¹ This includes, but is not limited to, printed or written correspondence, books, papers, photographs, email or other machine readable electronic record, telephone messages, voice-mails or other sound recordings, notes of personal conferences, telephone conversations or personal meetings. It also includes electronic copies or backups if the originals have been destroyed. This definition of communications applies to all documents sought by this letter.

This request is not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you or your office has destroyed or determines to withhold any documents that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

FEE WAIVER REQUEST

Additionally, I request that you waive all copy, clerical and other fees associated with providing information responsive to this request. The FOIA requires the federal government to furnish documents to public interest groups free of charge, or at a reduced rate, "if disclosure of the information is in the public interest." 5 U.S.C. § 552(a)(4)(A)(iii). Such disclosure is in the public interest if "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." *Id.* While a FOIA requester bears the initial burden of making a prima facie showing of entitlement to a fee waiver, *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284-85 (9th Cir.1987), once that threshold has been satisfied, the burden shifts back to the agency to substantiate denial of a waiver request. The prima facie test is not intended to be a difficult one to satisfy, as the Ninth Circuit has held a requester meets this burden in situations in which "They identified why they wanted the [requested information], what they intended to do with it, to whom they planned on distributing it. . ." *Friends of the Coast Fork v. BLM*, 110 F.3d 53, 55 (9th Cir.1997).

The Oregon Natural Resources Council is a non-profit conservation group with approximately 5000 members organized and operating in the state of Oregon. Founded in 1974, the group's mission is to protect and restore Oregon's wildlands, wildlife and waters as an enduring legacy. ONRC has been instrumental in securing permanent legislative protection for some of Oregon's most precious landscapes, including nearly 1.5 million acres of Wilderness, 95,000 acres of Oregon's Bull Run/Little Sandy forests (protected to provide municipal water supplies) and almost 1,700 miles of Wild and Scenic Rivers. Leading the national grassroots charge for conservation of roadless areas in National Forests, ONRC helped secure administrative protections for over 58 million acres of roadless areas across the country. Its members use and enjoy the Rogue River-Siskiyou National Forest, for hiking, camping, hunting, fishing and general recreational and aesthetic purposes. ONRC and its members have been actively involved in oversight of Forest Service management in this area, particularly following the 2002 Biscuit Fire.

The Siskiyou Regional Education Project is a non-profit, tax-exempt, public interest organization with members in Oregon and northern California. The Siskiyou Project seeks to preserve, protect, and restore the wildlands, wild rivers, wild fish and wildlife of the Siskiyou Mountain Bioregion. Members, staff, and board members of the Siskiyou Project regularly use and enjoy the Rogue River-Siskiyou National Forest, including the areas where the Forest Service has allowed post-fire logging in what is commonly known as the Biscuit Fire burn area, for fishing, camping, kayaking, nature study, scientific study, photography, hiking, and other recreational, educational, and aesthetic purposes. Members, staff, and board members of the Siskiyou Project have been involved in the Rogue River-Siskiyou National Forest's planning process and have regularly submitted comments to, and otherwise corresponded with, the Forest Service regarding timber harvest and associated activities on the Forest.

The American Lands Alliance is a national, nonprofit, conservation organization that works with grassroots organizations and individuals across the country to protect forest, and aquatic ecosystems; preserve biological diversity; restore landscape and watershed integrity. American Lands' mission is to protect and restore America's forest ecosystems by providing national leadership, coordination, and capacity building for the forest conservation movement. We provide national leadership on forest policy issues by combining grassroots experience with a deep understanding of Washington politics.

American Lands accomplishes these goals by strengthening grassroots conservation networks; providing strategic communications, advocacy and other assistance to local conservation groups; and by helping to improve communications among those groups and other segments of society. American Lands is headquartered in Washington DC and has a field office in Spokane Washington, D.C. This unique combination is fundamentally important to achieving effective and cutting-edge forest protection and restoration policy. American Lands was created in 1991 in recognition of the fact that national policies irrevocably impact local forests and conversely, local forest protection organizations acting alone had limited success affecting national policies. ALA's constituents hike, fish, camp, photograph scenery and wildlife, and engage in other vocational, scientific, and recreational activities within the Rogue River-Siskiyou National Forest, including the areas logged and proposed for logging as part of the Biscuit project. ALA's constituents derive recreational, inspirational, religious, scientific, and aesthetic benefit from their activities within this national forest.

ONRC, the Siskiyou Project, American Lands Alliance and their members participated extensively in Forest Service decision-making activities regarding post-fire logging and other post-fire activities within the Biscuit fire area, including extensive involvement in the agency's administrative process for the Biscuit salvage logging project. They submitted detailed comments during the NEPA process and engaged in administrative appeals and litigation of the Agency's final management decision. Additionally, the groups have actively reviewed and participated in the ongoing public dialogue regarding public lands' management in relationship to fire. They have a demonstrated ability to utilize the scientific expertise available within their respective staffs and membership to both analyze relevant data and then disseminate it to a larger public via their multi-faceted communications tools.² The groups have a corresponding ability to thereby inform and mobilize a public dialogue relating to issues of importance to their members and relevant to their organizational goals.³ Moreover, the groups have a demonstrated capacity to utilize information in support of administrative oversight, intervention and judicial review of unlawful gov-

² These include but are not limited to: the lobbying of federal, state and local governmental decision-makers; the publication and targeted distribution of analytical reports on topics relevant to their respective programmatic goals; the initiation of targeted campaigns to timely address specific issues of public importance (*e.g.*, the Siskiyou Project's Biscuit Salvage logging campaign at: <http://www.siskiyou.org/campaign/intro.cfm>) and ALA's Wild Siskiyou and fire campaigns at: <http://www.americanlands.org/issues.php?subsubNo=1113510275> and <http://www.americanlands.org/issues.php?subsubNo=1085140832>, respectively; frequent outreach to the news and popular media; the use of their quarterly newsletters (ONRC's Wild Oregon and the Siskiyou Project's Voice of the Wild Siskiyou), websites (<http://www.onrc.org>, <http://www.siskiyou.org>, <http://www.americanlands.org>) as well as various public workshops, forums and Action Alerts to quickly inform and mobilize public education relating to issues of the moment.

³ For example, directly relevant to this request, in September of 2005, ALA published "After the Fires: Do No Harm in America's Forests. A Report on the Impacts of Logging on Forest Recovery." (available for downloading at: <http://www.americanlands.org/issues.php?subsubNo=1085141603>). The report used as one of its primary focal points, the same Biscuit fire that is the subject of the Donato Report.

ernmental actions on public lands. They are actively engaged in the public dialogue currently underway relating to fire salvage logging on public lands as well as a number of currently pending legislative proposals that have the potential to significantly alter how public agencies respond to fires in public forests. Their advocacy work — and the concomitant public dissemination of information relevant to these issues — assists the market more accurately price commodities by internalizing what would otherwise be ignored as "external costs" of logging, by recognizing the external benefits of healthy forests, and by helping ensure that the true replacement costs of public resources are properly accounted for. Commodities that are more accurately priced are subjected to more rational market demand and the community welfare in thereby increased.

The requesting parties seek the this information in order to generally illuminate the public debate regarding fire salvage logging on public lands as well as specifically inform the dialogue relating to the response the Donato Report engendered in the general public and within relevant branches of the government. Of particular interest to the requesters is the degree and scope of support or opposition, guidance and coordination persons and/or entities external to the Oregon State University's College of Forestry ("COF") might have offered to the COF, its staff, faculty or students in regard to the publication of the Donato Report. Similarly, the requesters are interested in better illuminating the context in which the BLM acted when suspending federal funding for Donato's research. All responsive documents produced by the COF will be reviewed and their information publicly disseminated as appropriate to these ends.

The parties making this public records request have no financial interest in the requested information.

CONCLUSION

Since none of the statutory exceptions from the FOIA's mandatory disclosure provisions apply, access to the requested records should be granted within twenty (20) working days from the date of your receipt of this request. If this request is denied in whole or in part, I ask that you justify the denial with reference to specific exemptions in the Act and that you release any segregable or otherwise exempt material. I further request that you describe the deleted material in detail. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination and in formulating arguments in the event an appeal is taken. Your written justification might also help to avoid unnecessary litigation.

I thank you in advance for your prompt reply. Please do not hesitate to contact me should you have any questions or comments regarding this request. You may direct all communications and responses relating to this request directly to me.

Sincerely,



David A. Bahr, Attorney at Law

cc. Clients

FORMAL OPINION NO. 2005-144

[REVISED 2007]

**Communicating with Represented Persons:
Obtaining Public Records from a Represented Public Body**

Facts:

Lawyer *A* represents a client who opposes certain County action. County is represented in the matter by Lawyer *B*.

Question:

May Lawyer *A* contact a County employee to obtain copies of public records without first obtaining Lawyer *B*'s consent?

Conclusion:

Yes.

Discussion:

Oregon RPC 4.2 provides:

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law or by court order to do so;
or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

For purposes of analysis, we will assume that the records sought concern the subject for which the public body has counsel. The question whether a particular entity employee is a "person . . . represented" is discussed in OSB Formal Ethics Op Nos 2005-80 and 2005-152. In general, an employee whose conduct is at issue or who could bind the entity is a "person represented." An officer or manager of County would be considered a represented party. OSB Formal Ethics Op Nos 2005-80, 2005-152. Although we recognize that, in many cases, the records clerk to whom a request is presented is not a manager or other "person

represented,” we will for this discussion also assume that the person who must be contacted about the records is such a person. The question thus becomes whether communication with that person for purposes of obtaining a public record is authorized by law. *Cf.* ABA Formal Ethics Op 97-408.¹

Since Oregon became a state, the general rule has been that records of public bodies should be readily available for inspection by members of the public. *Jordan v. MVD*, 308 Or 433, 436–437, 781 P2d 1203 (1989). That historical policy is presently stated in the Public Records Law: Unless a record is exempt from disclosure, the Public Records Law provides any person the right to inspect or get copies of records for any reason or no reason. ORS 192.410–192.505. An exercise of rights under the Public Records Law requires at least some level of communication with the custodian² of a public record, e.g., “May I have a copy of document X?” In this statutory and policy context, Lawyer A’s limited communication with a county employee to accomplish the delivery of a specified public document is a communication authorized by law. If the document requested is, or may be, exempt from disclosure, the public body may seek the advice of counsel whether to assert that the record is exempt from disclosure. ORS 192.450, 192.460. A public body’s claim of exemption from disclosure, at least when made in response to a request for disclosure of a specific document, presupposes some means of prior identification of the document by the requesting party and communication of that identification to someone who serves, at least functionally, as a custodian of records for the public body. Except as discussed below, nothing in the statutory scheme suggests that the prior identification of the record requested must or should be made to the public body’s counsel. If, however, Lawyer A’s client is “a party to a civil judicial proceeding” to which the County is a party, or if the client has filed a tort claims notice with the County under ORS 30.275, and if the document relates to that proceeding or notice, ORS 192.420(2)(a) requires Lawyer A to submit the request in writing to the attorney for the public body at the same time as he or she submits it to the custodian

¹ If the county employee were a quasi-judicial decision-maker, it would also be necessary to consider Oregon RPC 3.5 regarding *ex parte* communications with judicial decision-makers. *Cf.* OSB Formal Ethics Op Nos 2005-83, 2005-134.

² Under the Public Records Law, the *custodian* is the public body. ORS 192.410(1)(b). As a practical matter, employees of the public body perform the custodial functions for the public body.

of records.³ Thus, Lawyer A may communicate directly with County employee to obtain a public record, but, in situations contemplated by ORS 192.420(2)(a), must make the request, in writing, simultaneously to the public body and its counsel.

The “authorized by law” exception has been narrowly construed. *In re Williams*, 314 Or 530, 538–539, 840 P2d 1280 (1992) (construing that phrase as used in *former* DR 7-104(A)(1)(b), which is essentially identical to Oregon RPC 4.2). Communications that involve substantive content rather than identification of the documents would violate Oregon RPC 4.2 if the communications are directed to a “person represented.”⁴ Thus, for example, Lawyer A would violate Oregon RPC 4.2 by asking a person who is deemed to be represented to explain the legal significance of the document. Similarly, questions to such persons that are intended to elicit statements or admissions against the interest of the public body would be improper.

Approved by Board of Governors, February 2007.

³ ORS 192.240(2)(a) provides:

If a person who is a party to a civil judicial proceeding to which a public body is a party, or who has filed a notice under ORS 30.275(5)(a), asks to inspect or to receive a copy of a public record that the person knows relates to the proceeding or notice, the person must submit the request in writing to the custodian and, at the same time, to the attorney for the public body.

⁴ In some smaller jurisdictions, the person to whom public records requests are addressed may also be an official who will decide the dispute in question. In that event, a lawyer needs to be mindful of the prohibition in Oregon RPC 3.5(b) against *ex parte* communications.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§6.5, 9.5 (Oregon CLE 2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§99–101 (2003); and ABA Model Rule 4.2.