

***PROCESSING A FOIA REQUEST:
FROM START TO FINISH***

OIP Sample Templates Created For Use As Reference Guidance

Office of Information Policy (OIP)

U.S. Department of Justice

REFERRALS, COORDINATION, & CONSULTATIONS

- Any referral, consultation, or coordination?
Explanation: _____

RECORDS MAINTAINED IN FILE

Underline N/A if not applicable

- Request letter**
- Certification of ID** (N/A)
- Acknowledgment letter**
- Expedited processing** (analysis of applicable statutory standards) (N/A)
- Case notes** (with analysis for complex requests and any related research)
- Documentation of search** (including search memos, responses to search memos, and search results) (N/A)
- Referrals, coordination, & consultations** (and any responses) (N/A)
- Emails/other correspondence related to the requester** (N/A)
- Response(s) to requester**
- Copy of redacted responsive records** (with exemptions clearly marked) (N/A)
- Copy of unredacted responsive records** (originals) (N/A)
- Copy of all responsive records withheld in full and released in full** (N/A)

APPEALS

Provide all records (above) to OIP and also consider:

- Is the request currently in litigation?
- Untimely appeal?

FOIA: EXPEDITED PROCESSING CHECKLIST

United States Department of Justice
Office of Information Policy

DISCLAIMER: This checklist is not exhaustive and is not intended to be a comprehensive list of all possible FOIA issues.

EXPEDITED PROCESSING

FOIA: The FOIA requires agencies to issue regulations that provide for the expedited processing of FOIA requests for requesters who demonstrate "compelling need," or for other cases deemed appropriate by the agency.

See 5 U.S.C. § 552(a)(6)(E)(i) (2012 & Supp V 2017).

Expedited Processing Overview - Checklist

(Check all that apply):

- Is the requester seeking expedited processing? (If NO, stop).
- Has the requester provided a certified statement explaining the basis for the request for expedited processing? (If NO, deny).
- Was the appropriate standard - under which expedition is sought - considered? (see Standards & Relevant Considerations below)
- NOTE: Requester should be notified of the determination within 10 calendar days of receipt of the request.

***Note:** DOJ components must designate a specific processing track for requests that are granted expedited processing.

Four DOJ Expedited Processing Standards & Relevant Considerations

(Check any and all that apply):

ONLY ONE STANDARD MUST BE MET

- Standard 1 Met?
Consider the following:
 - Does the requester explain how the lack of expedited treatment would pose an imminent threat to the life or physical safety of an individual?
- Standard 2 Met?
Consider the following:
 - Is there a particular urgency to inform the public about an actual or alleged federal government activity? *Consider that the existence of numerous articles published on a given subject can be helpful in establishing breaking news value.*
 - Would a delay compromise a significant recognized interest?
 - Is information dissemination the primary activity of the requester?
- Standard 3 Met?
Consider the following:
 - Is the requester facing grave punishment in a criminal proceeding?

- Is there reason to believe that the information produced will aid in the individual's defense?

Standard 4 Met?

- The requester must show that the subject matter of the request is a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

Processing Note:

The Director of Public Affairs makes the determination regarding whether to grant or deny expedited processing under this standard.

***Note:** Check if a copy of the determination memo is maintained in the file, if applicable.

FOIA: UNUSUAL CIRCUMSTANCES & NOTICE REQUIREMENTS CHECKLIST

United States Department of Justice
Office of Information Policy

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UNUSUAL CIRCUMSTANCES

"Unusual circumstances" means the need to: (1) search in separate offices; (2) examine voluminous records; or (3) consult with another agency, or two or more components within your agency.

NOTICE REQUIREMENTS

- Under 5 U.S.C. § 552(a)(6)(B)(i), the statute provides that the following must be provided in all written notices to the requester invoking unusual circumstances. The agency/component:
 - 1) Must "set[] forth the unusual circumstances for such an extension . . ."; AND
 - 2) Must provide an estimated date of completion.
- For requests where the agency/component is invoking unusual circumstances and the estimated date of completion is greater than the additional ten days, there are additional notice requirements that must be provided to the requester under 5 U.S.C. § 552(a)(6)(B)(ii). NOTE: These notice requirements are in addition to those listed above. In this situation the agency/component must also:
 - 1) Provide the requester with:
 - a. "an opportunity to limit the scope of the request so that it may be processed within that time limit" AND "an opportunity to arrange with the agency an alternative time frame for processing the request"
 - 2) Make available its FOIA Public Liaison; AND Must notify the requester of the right to seek "dispute resolution services" from the Office of Government Information Services (OGIS).

NOTE: If the time requirements for responding to a FOIA request are not met, certain fees may not be assessable. See Fee Restrictions, below.

FOIA: FEE-RELATED PROCESSING CHECKLISTS

United States Department of Justice
Office of Information Policy

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FEES

Types of Fees

DOJ Regulations: See 28 C.F.R. § 16.10.

Search: All time spent searching for and retrieving responsive records or information.

Duplication: The per-page cost (or actual cost if not a paper release) of the materials to be released to the requester.

Review: All that is necessary to review the material to determine if it can be released and to make any necessary withholdings in the material reviewed.

Categories of Requesters (Check appropriate box below)

FOIA: The FOIA provides for three categories of requesters. See 5 U.S.C. § 552(a)(4)(A)(ii) (2012 & Supp. V 2017).

Commercial-Use Requester

Requester seeks the information for a use or a purpose that furthers a commercial, trade, or profit interest. Turns on the use to which the information will be put, not on the identity of the requester.

Assessable Fees: Search, review, and duplication (see Types of Fees).

"Favored" Requesters: Three Types

1. "Educational Institution": Operates a program of scholarly research. "[T]o qualify . . . [t]he requester – whether teacher or student – must seek the information in connection with his or her role at the educational institution." Sack v. DOD, No. 14-5039 (D.C. Cir. 2016).

2. "Noncommercial Scientific Institution": Operates solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

3. "Representative of the News Media": Any person or entity that (1) gathers information of potential interest to a segment of the public, (2) uses its editorial skills to turn the raw materials into a distinct work, and (3) distributes that work to an audience.

- Re: gathering information, the D.C. Circuit has ruled that this fee category is focused "on the nature of the requester, not its request." Cause of Action v. FTC, 799 F.3d 1108 (D.C. Cir. 2015).

- Re: using editorial skills, the requester can create a "distinct work" based solely on FOIA-released documents.
- Re: distribution, size of audience does not matter. This is a fact-based determination based on the requester's past record, current operations, and future plans.

Assessable Fees: Duplication, but receive up to 100 pages (or the cost equivalent, which is currently \$5.00) free of charge (see Types of Fees).

All Others

All requesters that are not considered Commercial-Use or "Favored."

Assessable Fees: Search and duplication, but receive up to 100 pages (or the cost equivalent, which is currently \$5.00) and up to two hours of search time free of charge (see Types of Fees).

General Fee Considerations

- There are two categories of FOIA personnel for fee purposes: "professional" at a rate of \$10 per quarter hour and "administrative," at a rate of \$4.75 per quarter hour. See 28 C.F.R. § 16.10(c)(1)(ii).
- If estimated fees are above \$25, components must provide a breakdown of fees for search, review, or duplication (unless the requester has indicated a willingness to pay as high as those anticipated) and secure a firm commitment to pay; must also provide notice to non-commercial use requesters that they are entitled to 100 pages of duplication and two hours of search at no charge, and to favored requesters that they are entitled to 100 pages of duplication at no charge and that they will not be assessed search fees.

Fee Restrictions

- The FOIA generally prohibits agencies from assessing search fees if the agency fails to meet the 20-day responsive time limit, or the 30-day response time limit if unusual circumstances apply. For favored requesters, the same general prohibition applies to duplication fees.
- "Unusual circumstances" means the need to: (1) search in separate offices; (2) examine voluminous records; or (3) consult with another agency, or two or more agency components.
- Agencies can charge fees even if the statutory time deadlines are not met if: (1) the agency provides timely written notice of unusual circumstances to the requester and responds to the requester within thirty days; OR (2) in the event that unusual circumstances apply and the agency fails to meet the thirty-day response time limit, "more than 5,000 pages are necessary to respond to the request"; AND (3) the agency discussed the scope of the request with the requester.
- If the expected fees are \$25 or less, components cannot charge fees.

- Additional guidance re: prohibitions on assessing fees available at: https://www.justice.gov/oip/oip-guidance/prohibition_on_assessing_certain_fees_when_foia_time_limits_not_met and https://www.justice.gov/oip/oip-guidance/decson_tree_for_assessing_fees_foia_improve_ment_act_2016

FEE WAIVERS

FOIA: Fees shall 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." 5 U.S.C. § 552(a)(4)(A)(iii) (2012 & Supp. V 2017).

Preliminary Considerations: A fee waiver must be specifically requested. Further, there must be assessable fees associated with the request.

Applying the Standard Set Forth in Cause of Action – Three Criteria

First Criterion: The subject of the request must concern identifiable operations or activities of the federal government.

Second Criterion:

Element 1: The disclosure of the requested information must be meaningfully informative about government operations or activities [AND]

Element 2: The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject (dissemination).

Third Criterion: The disclosure must not be primarily in the commercial interest of the requester.

FOIA: REFERRALS, COORDINATION, & CONSULTATIONS CHECKLIST:

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REFERRALS

In the absence of a processing agreement, when an agency/component locates records which originated with another agency/component, the records should ordinarily be referred to the originating agency/component for processing and direct response to the requester.

Threshold Considerations

- Is the entity that will receive the referral subject to the FOIA? Y/N. If NO, do not refer the records and see the Consultations section below.

- Check whether there are standard processing procedures for the records/information at issue.

Standard Procedures for Making a Referral

- Identify records appropriate for referral to other agencies/components as soon as practicable during the course of processing a request.
- Prior to making the referral, review the records for any equity your agency/component may have and include your disclosure recommendations in the referral memorandum.
- Include the following in the referral package:
 - (1) FOIA request number assigned by your agency/component;
 - (2) A copy of the FOIA request;
 - (3) Date the request was received by your agency/component;
 - (4) Referred records, including a copy with recommendations and a clean copy;
 - (5) Preliminary determination (provide a recommendation even if the recommendation is to refer); AND
 - (6) Agency/component point of contact.
- Send the referral package to the originating agency/component as soon as practicable during the course of your processing.
- Include the original FOIA request number in any correspondence with the requester concerning the referred documents.
- The referring agency/component shall advise the requester of the referral, provide the name of the agency/component to which the referral was directed, and include that agency's/component's FOIA contact information. (*Note: If the records are law enforcement/national security records, see Coordination section before informing the requester.)
- The referring agency/component shall document the referral and maintain a copy of the referred records.

Standard Procedures Upon Receipt of a Referral

- Assign your own agency's/component's tracking number to the referral so that you can readily track it.
- Prepare an acknowledgment of receipt of the referral for the requester. The acknowledgment should include:
 - (1) The name of the agency/component that made the referral;
 - (2) Your agency's/component's tracking number;
 - (3) The original FOIA request tracking number assigned by the referring agency/component; AND
 - (4) A telephone or Internet service the requester can use to obtain status information on the referred records.
- Track the referral as you would an incoming request.
- Place the referred documents in the appropriate processing track at your agency/component according to the date the FOIA request was first received by the agency/component making the referral, NOT the date your agency/component received the referral.
- Include the original request number from the referring agency/component AND your agency's/component's referral number in any correspondence with the requester concerning the referred documents.
- Include the referral in your Annual FOIA Report.

EXCEPTION TO STANDARD PROCEDURES FOR MAKING REFERRALS: COORDINATION

An agency/component may locate in its files sensitive records originating with a law enforcement component/agency or an agency that is a member of the Intelligence Community. When responding to requests that include those records, it is sometimes necessary to use modified procedures in order to avoid inadvertently revealing a sensitive fact that could invade someone's personal privacy or damage national security interests. Under such modified procedures, the agency/component that originally received the request will typically respond to the requester itself, after coordinating with the law enforcement entity or Intelligence Community agency that originated the records.

- Upon identification of unacknowledged law enforcement or Intelligence Community records, contact the agency/component originating such records to inquire whether that agency's/component's involvement in the matter can be publicly acknowledged without invading personal privacy or causing law enforcement or national security harms.
 - Provide copies of the request and the requested records as necessary to facilitate this process.
 - The agency/component that originated the records shall promptly respond to the agency/component in receipt of the request.
- Did the agency/component that originated the records advise that there are no privacy, law enforcement, or national security harms at risk by virtue of its involvement? Y/N
 - If YES, then the standard referral procedures can be followed, and the agency/component receiving the referral will respond directly to the requester according to the standard referral process.
 - If NO, the agency/component in receipt of the request should coordinate with the agency/component that originated the records to determine how the records should be handled under the FOIA.
- The agency/component that originated the records should assign a tracking number to the documents that are the subject of the coordination.
 - The originating agency/component should account for the handling of coordinations in its Annual FOIA Report.
- During coordination, the agency/component that received the FOIA request shall respond to status inquiries made by the requester.
- The originating agency/component should promptly provide status updates to the receiving agency/component.
- In order to preserve any privacy, law enforcement, or national security interests, the originating agency/component should promptly provide its views on the records so that they can be readily incorporated into the receiving agency's/component's response letter.
- The receiving agency/component should provide the requester with the release determination for the records that are the subject of the coordination.

CONSULTATIONS

Most commonly arises when an agency/component locates records in response to a request that originated with the agency/component, but which contain information of interest to another agency/component. Consultations are also appropriate when an agency/component locates records in its files that originated with an entity that is not subject to the FOIA. In these situations, the agency/component processing the request should consult with that other agency/component or equity holder to obtain its views prior to disclosure of the records.

Procedures for Making a Consultation

- Use the most time-efficient method to conduct a consultation. For example, a telephone call or email may be all that is required.
- Provide information concerning any litigation deadlines. Give the agency/component adequate time to meet any deadlines as there may be layers of review for the receiving component.
- For consultations requiring more extensive review by the other agency/component, provide:
 - Copies of the documents at issue (both a clean copy and a copy with recommendations);
 - A copy of the request letter;
 - Agency/component point of contact; AND
 - Any other information that may assist the other agency/component in its analysis.
- Conduct consultations simultaneously, rather than sequentially, to ensure greater efficiency.
- Advise receiving agencies/components of the other agencies/components also reviewing the documents.
- When providing updates to requesters on the status of their requests, include information concerning ongoing consultations.
 - With the exception noted above in the section on coordinating responses, the identity of the entity which is being consulted can be provided to the requester.

Procedures Upon Receipt of a Consultation

- Assign the consultation a tracking number to facilitate its handling and inclusion in your Annual FOIA Report.
- Promptly provide your agency's/component's views on the disclosability of the contents of the records to the agency/component seeking the consultation. Use the most time-efficient method to do so.
- Continuously assess the need and frequency of the consultations you receive so you can identify ways to streamline or eliminate the need for certain consultations.

FOIA: SEARCH CHECKLIST

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SEARCH

Standard for an Adequate Search: Agency must conduct a search that is "reasonably calculated to uncover all relevant documents."

- Address any fee issues, if applicable. These may include fee estimates for search time.
- Is the requester entitled to two free hours of search time?
(Y/N)
 - If YES, did the requester receive two free hours?
(Y/N)

Electronic Search

- Document the search terms used.
 - *Note: Requesters may be able to provide relevant search terms for use in conducting the search.
- Does a search need to be conducted in a classified and/or unclassified network? (Y/N)
 - If YES, document which networks were searched.
- Does a search need to be conducted in any database? (Y/N)
 - If YES, document which databases were searched and what search terms were used in each database.

Office(s) Search

- Do you need to search specific program offices? (Y/N)
 - If YES:
 - Send search request (or task). Responses to search request (or task) should provide information concerning records located, if any, and details of search conducted (records custodians canvassed, search terms used, types of records searched, as applicable).
 - Document which program offices were searched and the separate results of each office.
 - Review office search results to ensure that an adequate search has been conducted. Follow-up with program office with questions or to conduct additional searches if necessary.
- Categories of Records – Do you need to search:
 - Computer(s)? (Y/N)
 - Paper? (Y/N)
 - Emails? (Y/N)
 - If YES, contact Information Technology staff to obtain emails.
 - Other? (Y/N)

Procedures After Running Search(es)

- Retrieve and copy all records, if any, located through electronic and/or program office search(es).

- Determine the responsiveness of located records.
- Determine if there are any duplicates or non-responsive records, and set them aside.
- Document your search.

FOIA: EXEMPTIONS AND EXCLUSIONS CHECKLISTS – LAST UPDATED 11/12/19

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Office of Information Policy

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EXEMPTIONS:

FORESEEABLE HARM STANDARD

***Note:** Agencies "shall withhold information" under the FOIA "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law." See 5 U.S.C. § 552(a)(8)(A) (2012 & Supp. V 2018). For exemptions where release of the record would be prohibited by law, you do not need to apply the foreseeable harm standard. You should apply the foreseeable harm standard to your analysis of all FOIA exemptions except where indicated below.

EXEMPTION 1: NATIONAL SECURITY INFORMATION

Protects information: (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) is in fact properly classified pursuant to such Executive order.
5 U.S.C. § 552(b)(1)

Preliminary Considerations

Is the requested information:

- Currently** classified under an Executive order; AND
- Properly** classified under an Executive order?

Review page-by-page within the document

Other Considerations

- If the existence or nonexistence of the information itself is classified, was a Glomar response issued? (Glomar = refusal to confirm or deny the existence of the requested information).
- Consider segregability of all unclassified, non-exempt information.

***Note:** You do not need to apply the foreseeable harm standard to currently and properly classified records.

EXEMPTION 2: INTERNAL PERSONNEL MATTERS

Protects records that are "related solely to the internal personnel rules and practices of an agency."
5 U.S.C. § 552(b)(2).

ALL 3 STEPS MUST BE MET

Step 1: Must Relate to "Personnel" Rules & Practices

- Do the records relate to "personnel rules and practices"?
Examples: Rules and practices dealing with human resources matters, such as: hiring and firing; work rules and discipline; compensation; and benefits.

Step 2: Must Relate "Solely" to Rules & Practices

- Do the records relate solely to rules and practices?

Step 3: Must be "Internal"

- Did the agency keep the records internally for its own use?

***Note:** Exemption 2 may not be applicable to records in which there is a genuine and significant public interest even if the records otherwise meet the above criteria for withholding.

EXEMPTION 3: OTHER STATUTES

Incorporates certain nondisclosure provisions contained in other federal statutes.
5 U.S.C. § 552(b)(3).

Subparts of Exemption 3

Subpart A: Allows the withholding of information if:

- (A)(i) The statute requires that the matters be withheld from the public in such a manner as to leave no discretion, OR
- (A)(ii) The statute establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Subpart B:

- If the statute was enacted after the OPEN FOIA Act of 2009, it must specifically cite to 5 U.S.C. § 552(b)(3).

Other Considerations

- Evaluate the statute's withholding provision.
- Cite to the applicable statute.

[Click here: List of Statutes Found to Qualify under Exemption 3](#)

***Note:** You do not need to apply the foreseeable harm standard to withholdings made under Exemption 3.

SEALING ORDERS

Test: The proper test for determining whether an agency is improperly withholding records under seal is whether the seal prohibits the agency from disclosing the records under FOIA. See Morgan v. DOJ, 923 F.2d 195 (D.C. Cir. 1991).

The agency has the burden of demonstrating that the court issued the seal with the intent to prohibit the agency from disclosing the records under FOIA and that the seal remains in effect. The agency may do this by referring to:

1. The sealing order itself;
2. Extrinsic evidence, such as transcripts and papers filed with the sealing court;
3. Sealing orders of the same court in similar cases that explain the purpose for the imposition of the seals; OR
4. The court's general rules or procedures governing the imposition of seals.

If it is not possible to determine the scope and effect of the seal from the face of the seal or the circumstances surrounding its imposition, the agency may need to seek clarification from the court that issued the seal.

NOTE: If clarification from the Court on the scope of the sealing order is required, the agency should treat the records as sealed, send a letter to the Court seeking clarification, and inform the requester of the actions taken.

EXEMPTION 4: COMMERCIAL INFORMATION

Protects *trade secrets* and *commercial or financial* information obtained from a person which is privileged or confidential.
5 U.S.C. § 552(b)(4).

Preliminary Considerations

Do the records concern trade secrets or commercial or financial information? If so, they may be withholdable under Exemption 4, and are not subject to discretionary release (Trade Secrets Act).

- If records concern **Trade Secrets**, go to [Section A](#); do not go to [Section B](#).
- If records concern **Commercial or Financial Information**, go to [Section B](#).

A. Trade Secrets Analysis

- Does the record concern trade secrets? Y/N "Trade secret" is defined as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." [Public Citizen Health Research Group v. FDA](#), 704 F.2d 1280, 1288 (D.C. Cir. 1983).

***Note:** If YES, you do not need to apply the foreseeable harm standard.

B. Commercial or Financial Information Analysis

MUST SATISFY ALL 3 STEPS

Step 1: "Commercial" or "Financial" Information?

- Does the record consist of commercial or financial information? Y/N

Step 2: "Obtained From a Person"?

- Was the record obtained "from a person"? (*generally any person or entity other than a federal agency*) Y/N

Step 3: "Privileged or Confidential"?

- Is the record privileged or confidential? Y/N (*go to next section for analysis*)

Analysis Under Argus Leader:

- Step 3a:** Does the submitter customarily keep the information private or closely held? (May, in appropriate contexts, be determined from industry practices concerning the information.) Y/N
 - If YES, go to [Step 3b](#).
 - If NO, the information is not confidential.
- Step 3b:** Did the government provide an express or implied assurance of confidentiality when the information was shared with the government? Y/N
 - If YES, the information is confidential under Exemption 4 (this is the situation in [Argus Leader](#)).
 - If NO, go to [Step 3c](#).
- Step 3c:** Were there express or implied indications at the time the information was submitted that the government would publicly disclose the information? Y/N
 - If YES, and no other sufficient countervailing factors exist, the submitter could not reasonably expect confidentiality upon submission and so the information is not confidential under Exemption 4.
 - If NO, the information is "confidential" under Exemption 4 (the government has effectively been silent, so a submitter's practice of keeping the information private will be sufficient to warrant confidential status).

Please also see OIP's official guidance page for further information, available at: <https://www.justice.gov/oip/step-step-guide-determining-if-commercial-or-financial-information-obtained-person-confidential>

EXEMPTION 5: CIVIL DISCOVERY PRIVILEGES

Protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."
5 U.S.C. § 552(b)(5).

Step 1: Check Threshold

- Are the records inter-agency or intra-agency? (*did not pass outside the executive branch*) Y/N If YES, move to [Step 2](#). If NO, Exemption 5 does not apply.

Exceptions: Consultant corollary and common interest doctrine. Refer to Department of Justice Guide to the FOIA, Exemption 5, **available at:** <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

Step 2: Applicable Privilege?

Is there an applicable civil discovery privilege? Check if any of these privileges apply:

- Deliberative process privilege (DPP)** (*Prevents harm to agency decision-making process; Must be Predecisional AND Deliberative*)
 - **Sunset on Deliberative Process Privilege:** Were the records created 25 years or more before the date on which the records were requested? Y/N (*If "Yes" DPP does not apply*).
 - **Predecisional:** Information was generated before the adoption of an agency policy. The information must NOT consist of statements of final policy. Note, however, that the record could be created after a final decision if it memorializes a predecisional discussion. Agencies must establish what deliberative process is involved, and the role played by the records at issue in the course of that process.
 - **Deliberative:** Communications are offered in support of the agency's decision-making process (such as recommendations and opinions).
 - Considerations:
 - Generally, there is a duty to segregate out facts.
 - Exception: Facts are inextricably intertwined (factual material is so inextricably connected to the deliberative material that its disclosure would expose or cause harm to the agency's deliberations).
- Attorney work-product privilege (AWP)** (*Protects material prepared by or at the direction of an attorney AND in reasonable anticipation of litigation*)
 - Courts have also accorded work-product protection to materials prepared by non-attorneys who are supervised by attorneys.
 - Considerations:
 - Was the document prepared in anticipation of foreseeable litigation?
 - Does not apply to documents created in an agency's normal course of business.
 - Generally no duty to segregate out facts.
- Attorney-client privilege (ACP)** (*Protects confidential communications between an attorney and his or her client relating to a legal matter for which the client has sought legal advice*)

Is the communication confidential? (*Note: the underlying subject matter can be known to third parties)

EXEMPTION 6: See Below EXEMPTION 7: THRESHOLD

Protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information" could be expected to cause one of the harms outlined in the subparts.

5 U.S.C. § 552(b)(7).

Three Parts of Threshold Analysis:

1. "records or information"
2. "compiled"
3. "for law enforcement purposes"

Recompilations: Information not initially obtained or generated for law enforcement purposes may still qualify if it is subsequently compiled for a valid law enforcement purpose at any time prior to when the government invokes the exemption.

Broadly defined: Records can be compiled for criminal, civil, or even administrative law enforcement purposes.

EXEMPTION 7(A): PROTECTING INVESTIGATIONS

Protects information compiled for law enforcement purposes if disclosure "*could reasonably be expected to interfere with enforcement proceedings.*" 5 U.S.C. § 552(b)(7)(A).

Threshold – Compiled or recompiled for law enforcement purposes?

BOTH STEPS MUST BE MET

- Step 1: Is the Law Enforcement Proceeding Pending?**

Pending: Exemption 7(A) is not designed to endlessly protect law enforcement information. It may only apply to enforcement proceedings which are:

1. **Pending** (still ongoing/active) OR
2. **Prospective** (concrete or identifiable plan to investigate in the future)

Duration of Exemption 7(A): It may potentially protect information for long periods of time, such as in circumstances where a suspect is still at large, the crime remains unsolved, or there are concrete future proceedings. It may apply to closed investigations, if records substantially relate to another ongoing proceeding (e.g., prosecution of a co-defendant, or further investigation of the same subject).

Law Enforcement "Proceedings": Include criminal, civil, and regulatory or administrative proceedings. Agency must be able to point to a specific pending or contemplated enforcement proceeding, rather than just the speculative possibility of future action.

- Step 2: Release Reasonably Expected to Cause Articulate Harm?**

Representative Examples:

1. Witness reprisals or deterrence from future cooperation;
2. Loss of the ability to control or shape the investigation;
3. Release would allow a target to evade detection or destroy evidence; OR
4. Release would prematurely reveal the government's strategy or evidence.

*Note:

- Agencies have a duty to segregate information that is not reasonably expected to cause articulable harm to a pending law enforcement proceeding.

- Agencies do not need to provide requesters with a page count for a withholding in full if providing that fact may harm the investigation.

EXEMPTION 7(B): FAIR TRIALS AND IMPARTIAL ADJUDICATIONS

Covers information compiled for law enforcement purposes if disclosure "would deprive a person of a right to a fair trial or an impartial adjudication." 5 U.S.C. § 552(b)(7)(B).

Threshold – Compiled or recompiled for law enforcement purposes?

Washington Post Two-Part Test

- 1. A trial or adjudication is pending or truly imminent; AND
- 2. It is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings.

PROTECTING PERSONAL PRIVACY UNDER EXEMPTIONS 6 AND 7(C)

Exemption 6: Protects information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a *clearly unwarranted invasion of personal privacy*."

5 U.S.C. § 552(b)(6).

Exemption 7(C): Protects information, compiled for law enforcement purposes, when disclosure "could reasonably be expected to constitute an *unwarranted invasion of personal privacy*."

5 U.S.C. § 552(b)(7)(C).

Follow the 4 Steps (Steps 1 – 4 Below) in Order

Step 1: Check Threshold

- Exemption 7(C):** Compiled or recompiled for law enforcement purposes? Y/N
 - If YES, go to [Step 2](#). If NO, Exemption 7(C) does not apply, continue with Exemption 6 analysis.
- Exemption 6:** Is the record identifiable to a particular individual? Y/N
 - If YES, go to Step 2. If NO, Exemption 6 does not apply.

Step 2: Privacy Interest Implicated?

- Is there a significant (not de minimis) privacy interest in the requested information? If YES, move to [Step 3](#). If NO, neither Exemption 6 nor Exemption 7(C) applies. **Relevant Considerations:**
 - Common facts in which people have a privacy interest include personally identifiable information such as: names, addresses, phone numbers, dates of birth, medical history, and criminal history.
 - Is the subject of the request deceased? *The deceased have no privacy interest, but surviving relatives may have a*

privacy interest in particularly sensitive, graphic details about the deceased relative.

- Are the records public, and if they were once made public, are they now practically obscure?
- Does the record concern a federal employee? **Note:** Civilian federal employees who are not involved in law enforcement or sensitive occupations generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees or regarding the parts of their successful employment applications that show their qualifications for their positions. See 5 C.F.R. § 293.311.
- Did the subject of the request consent to the release of the records?
- Do the records pertain to a corporation? *Corporations have no privacy interests.*

Step 3: FOIA Public Interest in Disclosure?

- Does disclosure serve the core purpose of the FOIA, to shed light on an agency's performance of its statutory duties? Y/N If YES, move to [Step 4](#). If NO, then Exemption 6 and/or Exemption 7(C) apply. **Relevant Considerations:**
 - Must be a nexus between information requested and the FOIA public interest.
 - Public Servant Accountability (one type of FOIA public interest):
 - Where the public interest asserted is misconduct by federal employees, requesters must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred. Bald allegations do not suffice.
 - Consider the level of responsibility held by a federal employee and the type of wrongdoing committed by that employee.

Step 4: Balance the Interests

- If there is a significant privacy interest in non-disclosure and a FOIA public interest in disclosure, balance those competing interests. ***Note:** This balance is more likely to tip in favor of disclosure under Exemption 6 than under Exemption 7(C).

6/7(C): Targeted Third Party Requests

Preliminary Considerations:

- Targeted Request = Request seeks records concerning identifiable individual(s).
- First consider Glomar Response, then consider Categorical Denial (see below). If those responses are not appropriate, search for the responsive records and redact exempt information.

(1) Glomar Response (refusal to confirm or deny whether records exist; no search; protects the third party's privacy interest as to whether the government maintains records on him/her)

- Request for records about a specifically identifiable individual? *Such as a request for subject of an investigation.*

- Has there been an official acknowledgment ("official and documented disclosure") of the subject of the request, or an admission by the subject of the request? Y/N (If YES, Glomar response is generally not appropriate; go to the Categorical Denial checklist below).

Important considerations:

- **Who** made the acknowledgment? *Component within agency vs. another agency.*
- **How** was the acknowledgment made? *The formality of admission is important.*
- Would acknowledging the existence of such records cause an unwarranted invasion of personal privacy?
- Is there (1) consent, (2) proof of death, OR (3) an overriding public interest? Y/N (If YES, Glomar response is not appropriate).

(2) Categorical Denial (no search; protects the third party's privacy interest in the contents of the records)

- Targeted request?
- Is the entire *category* of responsive records clearly withholdable?
- Is there (1) consent, (2) proof of death, OR (3) an overriding public interest? Y/N (If YES, Categorical Denial is not appropriate).

(3) Search and Redact: Search for records and apply exemptions if a Glomar Response or Categorical Denial is not appropriate.

**EXEMPTION 7(D):
CONFIDENTIAL INFORMANTS**

Protects information compiled for law enforcement purposes if: **(1)** disclosure "could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, **(2)** in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."

5 U.S.C. § 552(b)(7)(D).

Threshold – *Compiled or recompiled for law enforcement purposes?*

What is a Source?

- Individual or Institution? If YES, continue. Note: Almost any individual or entity can potentially serve as a confidential source, with the exception of federal employees acting in an official capacity
 - NOTE: An agency whistleblower could potentially be a source for purposes of Exemption 7(D).

"Source": A broad term that includes more than just informants. The 1986 FOIA Amendments added examples of Exemption 7(D) sources, but courts have found others.

What does it mean for a source to be Confidential?

- Express OR Implied Confidentiality? If YES, apply 7(D).

Agencies must protect confidential sources whenever:

- (1) Law enforcement officials gave an **express** promise of confidentiality (the agency must have some evidence in the records that an express promise was given at the time information was received), OR
- (2) It is **reasonable** to infer that such a promise was **implied** by the circumstances.
 - Consider the nature of the crime or criminal activity and the source's relationship to it.

"Confidential": Signifies that the agency received the information with the understanding that it would use it only for law enforcement purposes. Issue is often whether the source had the understanding that the material would remain confidential, or whether the agency actually maintained the information as confidential.

**EXEMPTION 7(E):
TECHNIQUES, PROCEDURES, & GUIDELINES**

Protects information compiled for law enforcement purposes if disclosure "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

5 U.S.C. § 552(b)(7)(E).

Threshold – *Compiled or recompiled for law enforcement purposes?*

First Clause – Techniques & Procedures

- Law Enforcement Technique or Procedure? AND
- Not well-known to the public?

Courts Split on "Risk of Circumvention" Requirement: It is unclear whether a determination that disclosure would risk circumvention of the law is required for techniques and procedures. This debate may be less salient now that the law requires agencies to apply the foreseeable harm standard to Exemption 7(E).

Second Clause – Law Enforcement Guidelines

- Law enforcement guideline? AND
- Disclosure could reasonably be expected to risk circumvention of the law?

**EXEMPTION 7(F):
PHYSICAL SAFETY**

Agencies may withhold information that "could reasonably be expected to endanger the life or *physical safety of any individual*."

5 U.S.C. § 552(b)(7)(F).

Threshold – *Compiled or recompiled for law enforcement purposes?*

- Disclosure "could reasonably be expected to endanger the life or physical safety of any individual"?

Federal Law Enforcement Personnel: 7(F) may be used to protect federal law enforcement personnel who deal directly with dangerous criminal offenders. Protection may remain in force even after personnel have retired.

Third Parties & Informants: 7(F) may protect the identities of third parties if the circumstances suggest that the third party could face danger as a result of disclosure.

**EXEMPTION 8:
FINANCIAL INSTITUTIONS**

Protects matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."
5 U.S.C. § 552(b)(8).

*Note: This exemption is very specific and rarely used. Courts have given the exemption a very broad scope, holding that it protects a wide range of examination, operating, or condition reports for the purpose of protecting the security of the financial institution. "Financial institution" has been construed broadly by courts to include not just banks but, e.g., securities dealers and brokers, investment advisor companies, and self-regulatory organizations.

Three-Part Test

ALL 3 PARTS MUST BE MET

- (1) Agency in question supervises or regulates financial institutions.
- (2) Materials concern a financial institution. AND
- (3) Materials relate to an examination, operating, or condition report of such a financial institution.

**EXEMPTION 9:
GEOLOGICAL / GEOPHYSICAL DATA**

Protects "geological and geophysical information and data, including maps, concerning wells." 5 U.S.C. § 552(b)(9).

- Information/data concerning wells?

*Note: This exemption is very specific and rarely used. It has been applied to protect data related to various types of "wells," with little regard to the type of well or the substance removed from it. The legislative history of this exemption suggests that Congress was acknowledging that the release of geological and geophysical data can easily compromise valuable underground deposits of many different types.

EXCLUSIONS: (c)(1), (c)(2), & (c)(3)

- The FOIA exclusions are very rarely employed because the criteria for invoking them are very stringent. If it appears that an exclusion may be applicable to records, please contact OIP's exclusion experts for approval (202-514-FOIA).

- If an exclusion is applicable, the records at issue are not subject to the requirements of the FOIA.

(c)(1) EXCLUSION

"Whenever a request is made which involves access to records described in subsection (b)(7)(A) and (A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section."

5 U.S.C. § 552(c)(1).

- Step 1: Do the records satisfy the standards for withholding under Exemption 7(A)?
- Step 2: Do the records concern a possible violation of criminal law?
- Step 3: Does the government have reason to believe the following: (1) the subject of the investigation or proceeding is unaware of its pendency; and (2) disclosure of the existence of records could interfere with law enforcement proceedings?

(c)(2) EXCLUSION

"Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of [the FOIA] unless the informant's status as an informant has been officially confirmed."

5 U.S.C. § 552(c)(2).

- The (c)(2) exclusion protects the existence of informant records about an individual when such records are specifically requested by a third party.

(c)(3) EXCLUSION

"Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in [Exemption 1], the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of [the FOIA]."

5 U.S.C. § 552(c)(3).

*Note: The (c)(3) exclusion only applies to certain FBI records, the existence of which are classified. Such records must pertain to foreign intelligence/counterintelligence or international terrorism.

SAMPLE INTERNAL CASE NOTES

Case Notes

Case No.: FOIA-2020-xxxxxx

Office(s):

Analyst: [NAME]

Reviewer (if assigned): [NAME]

Name of Requester: [NAME/ORGANIZATION]

Date of Request: [MM/DD/YY]

Date of Receipt: [MM/DD/YY]

Date Received by Analyst: [MM/DD/YY]

Subject of Request: records dating from January 2012 to the present relating to the pertaining to abuse prosecution team established in the United States Attorney's Office for the Eastern District of Virginia

Background Notes:

After Abu Graib, reports surfaced of detainee abuse in Guantanamo Bay, Iraq and Afghanistan, which were linked to members of the military; however recent prosecution has shown that there were civilian contractors who participated in the abuse

Processing Notes:

MM/DD/YY

- Received request and reviewed.
- Conducted online search for possible search terms and background

MM/DD/YY

- Sent out Ack letter and conducted search of DOJ IQ database (see search sheet)
- Sent out search notifications for Offices of the Attorney General and Deputy Attorney General

MM/DD/YY

- Began review of search hits
- Called requester
- Sent letter to Requester memorializing conversation for scope.

MM/DD/YY

- Received OAG and ODAG records hits from Clearwell, needs review

MM/DD/YY

- Submitted records for review by reviewer
- Sent out consult to Executive Office of U.S. Attorneys and Criminal Division

MM/DD/YY

- Sent out referral to Department of State

MM/DD/YY

- Sent out final response and records (w/redactions)
- CASE CLOSED –RIP 30 pgs (b)(5) [DPP] and 2 pages Referred to Department of State

SAMPLE INTERNAL CASE NOTES



U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW,
Washington, DC 20530-0001

Telephone: (202) 514-3642

SAMPLE ACKNOWLEDGMENT LETTER (COMPLEX)

[DATE]

[NAME]
[ORGANIZATION]
[STREET]
[CITY, STATE ZIP]
[EMAIL@ADDRESS.COM]

Re: FOIA-2019-XXXXX

Dear [NAME]:

This is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated [...] and received in this Office on [...] in which you requested [SUBJECT OF REQUEST].¹

The records you seek require a search in and/or consultation with another Office, and so your request falls within “unusual circumstances.” See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Because of these unusual circumstances, we need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to discuss either of these options. Any decision with regard to the application of fees will be made only after we determine whether fees will be implicated for this request.

We regret the necessity of this delay, but we assure you that your request will be processed as soon as possible. If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact this Office by telephone at the above number, by e-mail at doj.oip.foia@usdoj.gov, or you may write to the

¹ (If Applicable) You directed your request to the [DOJ component/FOIA/PA Mail Referral Unit (MRU), Justice Management Division], who forwarded it to this Office for handling. The [DOJ Component] tracking number associated with this request is xxxx.

SAMPLE ACKNOWLEDGMENT LETTER (COMPLEX)

Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001. Lastly, you may contact our FOIA Public Liaison, Valeree Villanueva, at the telephone number listed above to discuss any aspect of your request.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448.

Sincerely,

Initial Request Staff
Office of Information Policy
U.S. Department of Justice

SAMPLE OFFICE SEARCH NOTIFICATON EMAIL

From: [EMAIL@USDOJ.GOV]
To: [OFFICE CONTACT]
Cc: [REVIEWER]
Subject: Notification of Records Search to be Conducted in Response to the FOIA, [REQUESTER LAST NAME], OIP No. FOIA-2020-xxxxx

The purpose of this email is to notify you that the records of the below-listed officials will be searched in response to the attached Freedom of Information Act (FOIA) request.

Should you have any questions concerning this matter, please feel free to email or call – [FULL NAME & DIRECT DIAL IR STAFF ASSIGNED TO CASE].

The requester, [REQUESTER], is seeking:

- [SUBJECT]
- Timeframe: [IF APPLICABLE]

The officials whose records will be searched for this request are:

- [CUSTODIAN]
- [CUSTODIAN]
- [CUSTODIAN]
- [CUSTODIAN]
- Please advise our office if any of the above custodians should be removed, or additional custodians should be included in this search.

The FOIA requires agencies to conduct a reasonable search in response to FOIA requests. For your information, this search will encompass the email and computer files (e.g. C or H drive) maintained by the officials listed above.

To the extent officials within your office maintain other types of records, such as paper records or material maintained within a classified system that would be responsive to this request, but would not be located as a result of OIP’s unclassified electronic search, please indicate so in response to this email as soon as possible. OIP staff will make arrangements to conduct those searches as necessary. Similarly, if your office would not maintain any records responsive to this request and/or you can readily identify the officials, be they either current or former employees, who would maintain records responsive to this request, you may indicate so in response to this email.

Please note that the Federal Records Act, as amended in 2014 and [DOJ Policy Statement 0801.04](#) provide that government employees should not use a non-official account including, but not limited to, email, text, or instant message, for official business. However, should this occur, the communication must be fully captured in a DOJ recordkeeping system – either by copying

SAMPLE OFFICE SEARCH NOTIFICATON EMAIL

SAMPLE OFFICE SEARCH NOTIFICATON EMAIL

any such messages to one's official account or forwarding them to one's official account within twenty days. Should any records custodians have official records responsive to this FOIA request, which are maintained only in a non-official account, and not copied into an official account, then those records should be provided to OIP.

ATTACHMENT (Initial Request Ltr)

Please do not reply to this e-mail account, as this account is not monitored. Thank you.

SAMPLE OFFICE SEARCH NOTIFICATON EMAIL

SAMPLE DATABASE SEARCH

IR Staff Database Search

Requester: [NAME]

Subject of Request: [SUBJECT]

OIP No(s): [FOIA-2020-XXXX]

Analyst: [NAME]

The following databases were searched:

[DATABASE]: [DATE RANGE]

Terms Searched	# of Hits	Responsive Hits?
Special Counsel	200	50
Law Enforcement and Police	350	200
Vote*	1000	70

_____ Located records that may be responsive to the request and have printed them out for review.

_____ Located control sheets only; underlying records have been destroyed or cannot be located. Control sheets have been printed for review.

_____ No records were located in the Department Executive Secretariat.

_____ Records, if they exist, are maintained at WNRC.

Were indices searched?

[Yes or No]

If So, What Terms Were Used:

Date search was conducted: *[MM/DD/YY]*



U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW,
Washington, DC 20530-0001

Telephone: (202) 514-3642

SAMPLE SCOPE NARROWING COMMUNICATION

[DATE]

[NAME]
[ORGANIZATION]
[STREET]
[CITY, STATE ZIP]
[EMAIL@ADDRESS.COM]

RE: FOIA-2020-XXXX
xxx:xxx

Dear [NAME],

This correspondence is in reference to your Freedom of Information Act (FOIA) requests dated [...], which were received in this Office on [...], in which you requested records [SUBJECT].

By telephone conversation on [DATE], you clarified that [RESTATE CLARIFICATION]. Furthermore, you agreed to limit responsive records to communications outside the Department. Accordingly, this Office will process your request as clarified. We write to you again once our searches are completed and our disclosure determinations are made.

Should you have any questions concerning the processing of your request, please feel free to call me at 202-514-3642 or by email at [EMAIL@USDOJ.GOV].

Sincerely,

[OIP STAFF NAME]
[TITLE]

SAMPLE SCOPE NARROWING COMMUNICATION



U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW,
Washington, DC 20530-0001

Telephone: (202) 514-3642

SAMPLE NARROW RECORDS LETTER

[DATE]

[NAME]
[ORGANIZATION]
[STREET]
[CITY, STATE ZIP]
[EMAIL@ADDRESS.COM]

Re: FOIA-2020-XXXXX
DRH:XXX:XXX

Dear [NAME]:

This is in reference to your Freedom of Information Act (FOIA) request dated [...], and received in this Office on [...], for records pertaining to [SUBJECT OF REQUEST].

As we advised in our letter dated (date of acknowledgment), the records you seek require a search in another Office. We have now (partially) completed our records search in the Office(s) of (list those Offices applicable) and have identified records, including email, that may be responsive to your request. Because email encompasses a wide range of material that may be responsive to your request but not of interest to you, you may choose to reduce the amount of search and processing time of your request by narrowing the types of email records you seek. During searches of email records, we typically locate the following categories of records:

- 1) Logistical records concerning the scheduling of meetings.
- 2) Emails forwarding draft documents that lack substantive comments within the email.
- 3) Emails forwarding draft documents that include substantive, deliberative comments within the email (for both categories 2 and 3, the attachments to such emails will continue be considered responsive unless you have otherwise indicated that you are not interested in draft documents).
- 4) Emails forwarding news articles and press clips.
- 5) Emails forwarding Department press releases.
- 6) Emails forwarding Department memoranda that are already available on the Department's website.
- 7) (Any other categories that are identified during the processing of the request that it may be reasonable to assume the requester may not want)

SAMPLE ACKNOWLEDGMENT LETTER (COMPLEX)

In an effort to facilitate our processing of your request, and to maximize your search and duplication time before fees are assessed, please indicate which categories of e-mail records you seek by completing and signing the enclosed letter. If we do not receive your response within fourteen days, we will assume that you do not wish to narrow the scope of your request by selecting specific categories outlined in this letter and want us to process all the responsive email records that are located. Please be advised that if additional fees are incurred, or if we identify additional categories of email records in which you may not be interested, we will write to you again. If you have any questions you may contact me by telephone at the above number, by email at [EMAIL@USDOJ.GOV], or you may write to the Office of Information Policy, United States Department of Justice, 441 G Street, NW, Sixth Floor, Washington, DC 20530-0001. Lastly, you may contact our FOIA Public Liaison at the telephone number listed above to discuss any aspect of your request.

Sincerely,

[OIP STAFF NAME]
[TITLE]

Enclosure

With regard to email records, I agree to narrow the scope of my FOIA request for [SUBJECT] to records concerning:

- () Logistical records concerning the scheduling of meetings
- () Emails forwarding draft documents that lack substantive comments within the email (the attached draft documents will continue to be considered responsive, unless it has been otherwise agreed to exclude draft documents)
- () Emails forwarding draft documents that include substantive, deliberative comments within the email (the attached draft documents will continue to be considered responsive, unless it has been otherwise agreed to exclude draft documents)
- () Emails forwarding news articles and press clips
- () Emails forwarding Department press releases
- () Emails forwarding Department memoranda that are already available on the Department's website
- () Any other categories that are identified during the processing of the request that it may be reasonable to assume the requester may not want)

Signature: _____

Date: _____

SAMPLE CONSULT (EMAIL)

CONSULTATION

To: [DOJ COMPONENT/FEDERAL AGENCY]

From: [OIP STAFF NAME]

Cc: [REVIEWER]

Subject: OIP FOIA Consult -- [REQUESTER'S LAST NAME] Request FOIA-2020-xxxxx

Attachments: [Request letter, clean copy of records, and any other pertinent information]

[DOJ COMPONENT OR AGENCY CONTACT NAME],

This concerns the above-referenced FOIA/[PA] request, which was received by OIP. The requester [NAME] is seeking [SUBJECT OF REQUEST].

[When applicable] While processing the above-referenced FOIA/[PA] request, the [NAME OR ACRONYM OF THE REFERRING COMPONENT/AGENCY] referred [NUMBER] document(s), totaling [NUMBER] page(s) to OIP for processing. The requester is seeking [SUBJECT OF REQUEST].

Attached is/are [NUMBER] page(s), which contain information of interest to the [DOJ COMPONENT OR AGENCY BEING CONSULTED]. The documents consist of [...]. Accordingly, we are forwarding this information to you for consultation. Our preliminary determination is [PROVIDE DISCLOSURE RECOMMENDATION]. Please provide this Office with your views regarding the disclosure of the document(s), and the application of any FOIA exemptions. **This Office will provide the final response to the requester.**

[When applicable] For your information, we [are also/have/will be] consulting with the [acronym(s) of other components/agencies consulted] on this/these document(s).

[When applicable] Please be advised that the number(s) in the [upper/lower left/right]-hand corner is/are for administrative purposes only and was/were not on the original document(s).

[When applicable] Please provide your agency's appeal language, should you recommend to withhold any of your agency's equity within the attached.

In an effort to streamline this consultation process, we will not be sending you a formal consultation memorandum. We ask that you provide your response by responding to this e-mail.

A copy of the requester's initial letter is attached for your reference. If you have any questions, you may call me directly at [OIP STAFF PHONE NUMBER], or contact me by e-mail. Thank you for your attention to this matter.

Sincerely,

[OIP STAFF NAME]

[TITLE]

[CONTACT INFORMATION]

SAMPLE CONSULT (EMAIL)

SAMPLE REFERRAL (EMAIL)

REFERRAL

To: [DOJ COMPONENT/FEDERAL AGENCY]

From: [OIP STAFF NAME]

Cc: [REVIEWER]

Subject: OIP FOIA Referral -- [REQUESTER'S LAST NAME] Request FOIA-2020-xxxxxx

Attachments: [Request letter, clean copy of records, and any other pertinent information]

[DOJ COMPONENT OR AGENCY CONTACT NAME],

This concerns the above-referenced FOIA/[PA] request, which was received by OIP. The requester [NAME] is seeking [SUBJECT OF REQUEST].

[When applicable] While processing the above-referenced FOIA/[PA] request, the [NAME OR ACRONYM OF THE COMPONENT/AGENCY] referred [NUMBER] document(s), totaling [NUMBER] page(s) to OIP for processing. The requester is seeking [SUBJECT OF REQUEST].

Paragraph below is typically adjusted to provide additional information

Attached is/are [NUMBER] page(s), which originated with are is/are of primary interest to the [DOJ COMPONENT OR AGENCY NAME]. The documents consist of [...]. Accordingly, we are referring the attached record(s) to your Office/Agency for processing and direct response to the requester. [When applicable] We defer to your Office on the disclosure of this material. The requester has been/will be notified of this referral. **Please furnish this Office with a copy of your final response.**

[When applicable] For your information, we [are also/have/will be] consulting with the [acronym(s) of other components/agencies consulted] on this/these document(s).

[When applicable] Please be advised that the number(s) in the [upper/lower left/right]-hand corner is/are for administrative purposes only and was/were not on the original document(s).

In an effort to streamline this consultation process, we will not be sending you a formal referral memorandum.

A copy of the requester's initial letter is attached for your reference. If you have any questions, you may call me directly at [OIP STAFF PHONE NUMBER], or contact me by e-mail. Thank you for your attention to this matter.

Sincerely,

[OIP STAFF NAME]

[TITLE]

[CONTACT INFORMATION]

SAMPLE CONSULT (EMAIL)



U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW,
Washington, DC 20530-0001

Telephone: (202) 514-3642

SAMPLE FINAL RESPONSE LETTER

[DATE]

[NAME]
[ORGANIZATION]
[STREET]
[CITY, STATE ZIP]
[EMAIL@ADDRESS.COM]

Re: FOIA-2020-XXXXX
DRH:XXX:XXX

Dear [NAME]:

This is responds to your Freedom of Information Act (FOIA) requests dated [...] and received in this Office on [...], in which you requested records [SUBJECT OF REQUEST].

Please be advised that a search has been conducted in the Office of the Attorney General and Deputy Attorney General as well as of the electronic database of the Departmental Executive Secretariat, which is the official records repository for the Office of the Attorney General and Deputy Attorney General. Additionally, we have also reviewed the indices of previous officials in the Offices of the Attorney General and Deputy Attorney General and [NUMBER] pages were located that contain records responsive to your request.

I have determined [NUMBER] pages are appropriate for release without excision and copies are enclosed. Additionally, enclosed are [NUMBER] pages which are appropriate for release with excisions made pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Exemption 5 pertains to certain inter- and intra-agency communications protected by the deliberative process privilege. Finally, I have determined that [NUMBER] pages should be withheld in full pursuant to Exemption 5 which pertains to certain inter- and intra-agency communications protected by the deliberative process privilege. For your information, the withheld materials consist of internal discussions on agency practices and agency preparatory material for a congressional hearing. Please be advised that we have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.

Because [NUMBER] pages, originated with the [DOJ COMPONENT/FEDERAL AGENCY], we have referred that material to the [DOJ COMPONENT/FEDERAL AGENCY] for processing and direct response to you. Should you wish to obtain further information about the processing of the referred material, you may contact the [DOJ COMPONENT/FEDERAL AGENCY] by using the information below or at www.foia.gov.

[INSERT MAILING ADDRESS FOR DOJ COMPONENT/FEDERAL AGENCY]

SAMPLE FINAL RESPONSE LETTER

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2018). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaison, Valeree Villanueva, for any further assistance and to discuss any aspect of your request at: Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001; telephone at 202-514-3642.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with this Office's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically submitted within ninety days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Douglas R. Hibbard
Chief, Initial Request Staff

SAMPLE REDACTED DOCUMENT
(Document below is on DOJ Website)



Office of the Attorney General
Washington, D. C. 20530

October 19, 2010

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Eric Holder".

SUBJECT: Guidance for Conducting Interviews without Providing *Miranda* Warnings in Arrests of Terrorism Suspects

With my approval, the Federal Bureau of Investigation (FBI) has issued guidance for law enforcement agents, FBI field offices, and JTTFs concerning custodial interrogation of an operational terrorist arrested within the United States. In particular, that guidance discusses the interrogation of an operational terrorist that is conducted without provision of an advice of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). This memorandum provides corresponding guidance to federal prosecutors if an agent consults about whether to proceed with unwarned custodial interrogation in the circumstances the FBI guidance addresses.

The FBI guidance primarily concerns the "public safety" exception recognized in *New York v. Quarles*, 467 U.S. 649 (1984), which held that, if law enforcement officials engage in custodial interrogation that is "reasonably prompted by a concern for the public safety," any statements the individual provides in the course of such interrogation shall not be inadmissible on the ground that the questioning was conducted without *Miranda* warnings. The FBI guidance explains that in light of the magnitude and complexity of the threat often posed by terrorist organizations, particularly international terrorist organizations, and the nature of their attacks, the circumstances surrounding an arrest of an operational terrorist may warrant significantly more extensive public safety interrogation than would be permissible in an ordinary criminal case. The FBI guidance instructs that, after any and all applicable public safety questions have been exhausted, agents should advise the arrestee of his *Miranda* rights and seek a waiver of those rights before any further interrogation occurs, absent exceptional circumstances. Specifically, there may be exceptional situations in which continued unwarned interrogation is necessary to collect valuable and timely intelligence, and the government's interest in obtaining this intelligence – lawfully but without *Miranda* warnings – outweighs the disadvantages of proceeding in this fashion. In such a situation, the FBI guidance directs agents to consult, when possible, with FBI Headquarters (including the Office of General Counsel) and Department of Justice attorneys regarding the interrogation strategy to be followed prior to reading the defendant his *Miranda* rights.¹

¹ Neither the FBI guidance nor this memorandum addresses un-*Mirandized* questioning of suspects who are under indictment or represented by counsel. In those circumstances, which may present special legal and/or ethical concerns, prosecutors should whenever possible consult with the Department's Professional Responsibility Advisory

SAMPLE REDACTED DOCUMENT
(Document below is on DOJ Website)

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS
Page 2

FOIA Exemption 5

Finally, note that the FBI guidance makes clear that, in all cases, presentment of an arrestee should not be delayed simply to continue interrogation, unless the arrestee has waived prompt presentment.

Office and/or the National Security Division as appropriate prior to advising an agent to conduct unwarned interrogation.

FOIA Exemption 5

FOIA Exemptions

Exemption 1

Information that is properly classified in the interest of national security pursuant to Executive Order 13526.

Exemption 2

Purely internal personnel practices.

Exemption 3

Information exempted from release by statute, in this instance [*specific statute*].

Exemption 4

Commercial or financial information obtained from a person privileged or confidential.

Exemption 5 - *Deliberative Process Privilege (DPP)*

Certain inter- and intra-agency communications protected by the deliberative process privilege. Note – 25 year sunset provision

Exemption 5 - *Attorney Work-Product Privilege (APP)*

Certain inter- and intra-agency communications protected by the attorney work-product privilege.

Exemption 5 - *Attorney-Client Privilege (ACP)* –

Certain inter- and intra-agency communications protected by the attorney-client privilege.

Exemption 6

Information the release of which would constitute a clearly unwarranted invasion of the personal privacy of (a) third (*party/parties*).

FOIA Exemptions Continued ...

Exemption 7(A)

Records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings.

Exemption 7(B)

Records or information compiled for law enforcement purposes, the release of which would deprive a person of a right to a fair trial or an impartial adjudication.

Exemption 7(C)

Records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of (a) third (*party/parties*).

Exemption 7(D)

Records or information compiled for law enforcement purposes, the release of which would disclose the (*identity/identities*) of (a) confidential (*source/sources*).

Exemption 7(E)

Records or information compiled for law enforcement purposes, the release of which would disclose (*a/certain*) technique(s) or procedure(s) for law enforcement investigations or prosecutions.

Exemption 7(F)

Records or information compiled for law enforcement purposes, the release of which could reasonably be expected to endanger the life or personal safety of an individual.

Exemption 8

Protects matters contained in or related to examination, operating, or condition reports prepared by or for regulators or supervisors of financial institutions.

Exemption 9

Protects geological information and data, including maps, concerning well.