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Description of document: Environmental Protection Agency (EPA) Internal Memos and Guidance Documents Regarding FOIA Processing 2021-2023

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National FOIA Office  
US Environmental Protection Agency  
1200 Pennsylvania Avenue NW (2310A)  
Washington, DC 20460

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

Washington, D.C. 20460

June 1, 2023

OFFICE OF  
GENERAL COUNSEL

RE: Request Number EPA-HQ-2023-003280

This is in response to your Freedom of Information Act (FOIA) request, to the U.S. Environmental Protection Agency (EPA), Office of General Counsel (OGC), National FOIA Office (NFO) on March 27, 2023, in which you requested the following “A copy of all EPA guidance for EPA FOIA Staff on "Estimated Completion Dates". Please include memos, directives, guidances, instructions, legal direction, policies, etc. You may limit this to EPA agency-wide records. You may limit this to EPA records not published on the department's public website. You may limit this to records since January 1, 2018.”

We are providing you with the following documents provided to EPA FOIA Staff:

- Unusual Circumstances (February 2020)
- Managing the FOIA Request Clock (April 2020)
- Email from Timothy R. Epp, with instructions to the EPA FOIA Community, Regarding Due Date Extensions due to Health Emergency (April 2020)
- FOIA Negotiating with Requesters (May 2020)
- FOIA Due Date Extensions Checklist (July 2020)
- FOIA Procedures (November 2020)
- FY21 Due Date Extensions Self Audit with Unusual Circumstances Training (July 2021)
- Still Interested and Negotiating with FOIA Requesters (November 2021)
- FOIA Toolkit (March 2022)
- FOIA Negotiating with Requesters (May 2022)

These documents have been uploaded in FOIAonline under your request number, EPA-2023-003280. To retrieve the documents, click “Case File” and once the drop down appears, click “Records”. We have determined that the total fees incurred in processing this request does not meet the cost threshold; therefore, it is not billable.

This letter concludes our response to your request. You may appeal this response by email at [hq.foia@epa.gov](mailto:hq.foia@epa.gov), or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 or through FOIAonline if you are an account holder. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., Room 7309C, Washington, DC 20460.

Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 p.m. EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal."

Additionally, you may seek dispute resolution services from EPA's FOIA Public Liaison at [hq.foia@epa.gov](mailto:hq.foia@epa.gov) or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email, [ogis@nara.gov](mailto:ogis@nara.gov); telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.

If you have any questions concerning this determination, please contact me at (202) 564-2830.

Cordially,



Digitally signed by  
TIMOTHY EPP  
Date: 2023.06.01  
13:29:15 -0400

Timothy R. Epp  
Associate General Counsel  
National FOIA Office

# Unusual Circumstances NFO FOIA Training



**National FOIA Office**  
**EPA Office of General Counsel**

INTERNAL DELIBERATIVE

# Roadmap

- ▶ What are Unusual Circumstances (UC)?
- ▶ Why Assert Unusual Circumstances?
- ▶ When does the agency use Unusual Circumstances?
- ▶ From the Regulations: Text and Requirements
- ▶ UC during or after Intake Review
- ▶ Notifying the Requester
- ▶ Extending the Due Date
- ▶ Knowledge Check



# What are Unusual Circumstances?

The FOIA provides that agencies may extend FOIA processing time limits when “unusual circumstances” are met in the processing of a request. See 5 U.S.C. § 552(a)(6)(B)(i) (2014).

Those “unusual circumstances” are set forth in the statute and are described as

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein *id.* § 552(a)(6)(B)(iii).

# From the EPA FOIA Regulations: Text

- ▶ Unusual Circumstances, 40 CFR 2.104 (e)

- ▶ § 2.104 Responses to requests and appeals

- ▶ (e) Unusual circumstances. When the Agency cannot meet statutory time limits for processing a request because of “unusual circumstances,” as defined in the FOIA, and the time limits are extended on that basis, the Agency will notify the requester in writing, as soon as practicable, of the unusual circumstances and of the date by which processing of the request should be completed. If the 20 working-day period is extended, EPA will give the requester an opportunity to limit the scope of the request, modify the request, or agree to an alternative time-period for processing, as described by the FOIA. EPA will also provide contact information for its FOIA Public Liaison to assist in the resolution of any disputes between the requester and the Agency, and the Agency will notify the requester of their right to seek dispute resolution services from the Office of Government Information Services within the National Archives and Records Administration.

# In other words...

## ▶ Regulatory Requirements under § 2.104

1. Notify the requester in writing, as soon as practicable,
  - a) of the unusual circumstances; and,
  - b) of the date by which processing of the request should be completed.
2. Give the requester:
  - a) an opportunity to limit the scope of the request,
  - b) modify the request,
  - c) or agree to an alternative time-period for processing.
3. Provide contact information for the FOIA Public Liaison; and,
4. Notify the requester of their right to seek dispute resolution services from the Office of Government Information Services (OGIS).

# Why assert Unusual Circumstances?

Asserting that unusual circumstances exist gives the Agency more time to process the request. This is important in relation to:

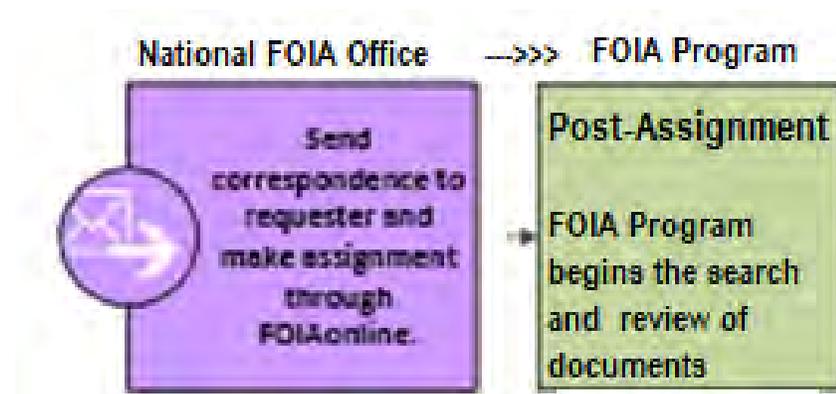
- ▶ Preserving the ability to charge fees. 5 U.S.C. § 552 (a)(4)(A)(viii)
- ▶ The FOIA backlog
- ▶ Good customer service
- ▶ Avoid potential FOIA lawsuits
  - ▶ Requesters may seek judicial relief in district court if you fail to meet the statutory time frame for response. 5 U.S.C. §552(a)(6)(C)(i).
  - ▶ FOIA litigation is labor intensive and expensive
  - ▶ Attorney fees and costs come out of EPA office budgets

# When does the agency invoke unusual circumstances (UC)?

1. During Intake: The agency reviews requests for unusual circumstances during the intake process



2. After Intake: FOIA Programs receiving a perfected and assigned request may also invoke unusual circumstances under certain circumstances.



# UC during Intake Review

- ▶ Incoming FOIA requests are first reviewed by a designated Intake Reviewer at the National FOIA Office.

## Unusual Circumstances

- ▶ **Do any unusual circumstances apply?**
  - Record from a field office of other entity separate from the EPA FOIA Program processing the request
  - Voluminous amount of records
  - Consultation with another agency or two or more EPA FOIA Programs that have substantial subject matter interest
  - No

# UC after Intake Review

- ▶ What if a request has been perfected and assigned to a FOIA Program? Can I apply unusual circumstances?
  - ▶ Yes! Just follow the requirements under the Freedom of Information Act EPA Regulations.
  - ▶ Be sure you do so before the FOIA is late!

Knowledge Check! What are the requirements??

1. Notify the requester in writing, as soon as practicable,
  - a) of the unusual circumstances; and,
  - b) of the date by which processing of the request should be completed.
2. Give the requester:
  - a) an opportunity to limit the scope of the request,
  - b) modify the request,
  - c) or agree to an alternative time-period for processing.
3. Provide contact information for the FOIA Public Liaison; and,
4. Notify the requester of their right to seek dispute resolution services from the Office of Government Information Services (OGIS).

# Notifying the Requester

The agency must inform the requester of the unusual circumstances. This can be done in the assignment letter (during intake) or using a separate correspondence (after intake). A sample excerpt is below.

Pursuant to 40 C.F.R. § 2.104(d), an extension of time is necessary to respond to your request. Given the scope of the request, EPA anticipates that the response will require a significant amount of EPA's resources and time

**[SELECT AT LEAST ONE:**

to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request **and/or**

to search for, collect, and appropriately examine a voluminous amount of separate and distinct records **and/or**

for consultation with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.]

EPA anticipates that the response will take at least an additional 10 working days to respond. If EPA will require more than the additional 10 working days to respond, our FOIA Program will contact you to provide information on the estimated date of completion. If you would like to modify or narrow your request so that it may be processed sooner, please contact the FOIA Program.

# Extending the Due Date

To extend the due date, an agency user must enter the information in FOIAonline under Actions > Extend Due Date.

Case File Details ▾

Actions ▲

Make Assignment

Estimate Costs

**Extend Due Date**

Upload Responsive Records

Interim Release

Begin Close Out Process

Create New ▾

Other ▾

### Requester Information

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### Due Date Extensions

Estimated Completion	Requester Approved	Requester Approval Date
No due date extensions have been created.		

Copy to Clipboard Export to CSV

### Extend the Due Date

\* Is Extension due to Unusual Circumstances? Yes ▾

\* Estimated Date of Completion ⓘ

Estimated Date of Completion is required.

\* Extension Justification

0/256

Extend Due Date Cancel

# Knowledge Check!

Example 1: You have a request that seeks e-mail records about a recent Air rulemaking between OAR, the Administrator, and the White House.

Do unusual circumstances apply??

1. the need to search for records from field facilities or other locations,
2. the need to search, collect and examine voluminous records, or
3. the need for consultation with another agency or among two or more components of an agency. See *id.* § 552(a)(6)(B)(iii).

Example 2: Your Office was assigned a request from the National FOIA Office. NFO has already asserted unusual circumstances and extended the deadline by 10 days. On day 5 you realize it will take longer because you need to get records back from Discovery Services and you know there will be records between EPA and NOAA for consult. What do you do?

# Need Even More Time?

You can extend the response time BEYOND 30 working days upon notice to the requester in writing:

- ▶ Unusual circumstances that apply to the request;
- ▶ Agency response requires more than 10 additional working days to complete;
- ▶ Provide an opportunity to limit the scope so that it may be processed within 30 working days or an opportunity to arrange an alternative time frame for processing the request or modified request;
- ▶ Provide contact information for the FOIA Public Liaison to assist in the resolution of any disputes between the requester and agency; and
- ▶ Provide notice of the requester's right to seek dispute resolution services from OGIC and OGIS' contact information



National FOIA Office  
EPA Office of General Counsel



Thank you! Questions?

# MANAGING THE FOIA REQUEST CLOCK

WHEN AND HOW TO TOLL THE 20-DAY CLOCK

FOIA Community Meeting  
April 16, 2020

NATIONAL FOIA OFFICE  
OFFICE OF GENERAL COUNSEL

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# ROADMAP

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Tolling the  
Clock:  
Clarification

Syncing the  
Request Clock  
and Due Date

What does the  
FOIA Statute  
Say?

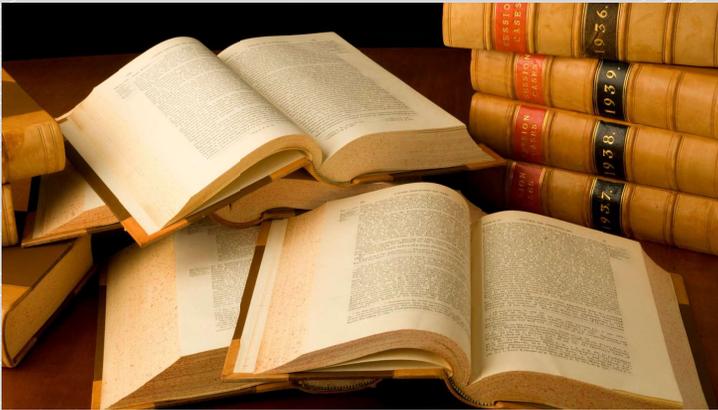
Tolling the  
Clock: Fees



# STATUTORY LANGUAGE

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“The 20-day period shall not be tolled by the agency except—



[T]hat the agency may make one request to the requester for information and toll the 20 day period while it is awaiting such information that it has reasonably requested from the requester...

OR

[I]f necessary to clarify with the requester issues regarding fee assessment.

In either case, the agency’s receipt of the requester’s response to the agency’s request for information or clarification ends the tolling period.

5 U.S.C. §§552(A)(6)(A) (2018).

# CLARIFICATION

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- ✓ **Purpose**: To seek additional information to resolve an ambiguity or issue that impacts request processing
- ✓ One-time stoppage
- ✓ To properly toll clock for clarification, send *written* correspondence to requester containing:
  1. Description of the additional information needed to continue processing the request;
  2. Statement advising the request clock is tolled until the requester provides the requested information;
  3. (Optional, but advised) Reasonable cutoff date to respond; and
  4. Information on their rights to seek assistance from the FOIA Public Liaison and Office of Government Information Services (OGIS).

# CLARIFICATION

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- ✓ Practice Pointer: ‘Clarified’ vs. ‘Reasonably described’
  - ✓ Terms of art vs. Common Meaning
  - ✓ If requester does not timely respond to request for clarification, and the request, or part(s) of the request, are otherwise reasonably described, consider whether the request or part(s) of the request may still be processed—apply a reasonable interpretation of what the requester originally provided, restart the clock, and proceed.
- ✓ *Hypothetical FOIA request: “I would like all emails from the Office of Interstellar Objects sent to or from the Chief Commandant in 2019 about this solar system’s planets.”*

# FEES

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- ✓ Purpose: Ensure the requester is providing proper assurance of payment of fees for request from cradle to grave.
- ✓ Unlimited clock stoppages for fee-related issues
- ✓ When a Fee-Related Issue May Arise:
  - ✓ Approaching fee limit provided by requester; or
  - ✓ Determination the processing fees will rise to a billable amount and there is an outstanding fee waiver task.

# FEES

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- ✓ To properly toll clock for fee-related reason, send written correspondence to requester containing:
  1. Estimate of fees;
  2. Statement that requester must provide assurance of payment to continue processing request;
  3. (Optional – Situational) Statement that requester may be charged for fees even if no records are disclosed;
  4. Statement advising the request clock is tolled until the requester provides assurance of payment;
  5. (Optional, but advised) Reasonable cutoff date for requester to respond; and
  6. Information on their rights to seek assistance from the FOIA Public Liaison and OGIS.

# FEES

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- ✓ **Practice Tip**: Other fee-related issues may arise:
  - ✓ Advanced Payment of Fees;
  - ✓ Aggregation of Similar Requests for Fee-related Reasons;
  - ✓ Delinquent Requesters on the Do Not Serve List

# WHEN REQUIRED TO RESTART CLOCK

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- ✓ **Let's look at the statute again:** “[T]he agency’s receipt of the requester’s response to the agency’s request for information or clarification ends the tolling period.
- ✓ **Clarification:** Requester provides the information, or reasonably akin to the clarifying information requested.
- ✓ **Fees:** Requester provides assurance of payment of the total estimated costs to process request. \*\*

\*\* If other fee-related situations apply, the clock must start when the requester cures the applicable fee problem.

# RECAP

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## CLARIFICATION

- One-time clock stoppage
- Seek information reasonably necessary to process request
- Send written correspondence to requester as notice of need for clarification and the clock stoppage



## FEES

- Unlimited clock stoppages
- Need assurance of payment of fees to process request
- Send written correspondence to requester as notice of fee-related issue(s) and the clock stoppage

# SYNCING THE REQUEST CLOCK AND DUE DATE

- ✓ FOIAonline does not automatically update your due date for a request to match the clock days once you restart the clock.
- ✓ Using the 'Extend Due Date' action in FOIAonline, you can update the Due Date by adding the number of calendar days equal to the duration field:
  1. After you have restarted the clock in the 'Clock Details' section, click the + to see the details of the clock action. Listed will be the duration of the stoppage:

Type	Timestamp	Performed By	Detail
Manual - Stop / Start	04/16/2020 01:19 PM	Nicole Rementer	
Stoppage Start Date	04/14/2020		
Stoppage End Date	04/16/2020		
Duration	2 days		
Reason	Fee Related		
Notes	Fee estimate		
Clock Days	0		
Initial Start	04/16/2020 01:17 PM	Nicole Rementer	

2. Navigate to the 'Extend the Due Date' Action. Add the duration of the stoppage to the Due Date listed at the top of the request page. If the day falls on a weekend or holiday, select the next working day. Select 'Extend Due Date.'

**Extend the Due Date**

\* Is Extension due to Unusual Circumstances? No

\* Estimated Date of Completion 05/18/2020

\* Requester Extension Approval No

\* Extension Justification

22/256

Fees or Clarification:

Extend Due Date Cancel



QUESTIONS  
?

**From:** [Epp, Timothy](#)  
**To:** [EPA FOIA Community](#); [OGC Info Atty Call](#); [OGC GLO ILPG](#); [OGC RCs and DRCs](#)  
**Cc:** [Wright, MichaelB](#); [Purifoy, Tiffany](#); [Indermark, Michele](#); [McCray, Pamela](#); [Kennedy, Chandra](#); [Lao, Judy](#); [Puchalski, Connie](#); [Lesch, Sandra](#); [McQuilkin, Wendy](#); [Campbell, Rich](#); [Latham, John](#); [McLendon, Wanda](#); [Manchen, Kenneth](#); [Zipf, Lynn \(she/her/hers\)](#); [Pressley, Miriam](#); [Evanko, Peter](#); [Aldinger, Dayle](#); [Clausen, Rebecca](#); [Connery, Shannon](#); [Stoy, Alyse](#); [Landrum, Ryan \(he/him/his\)](#); [Murdock, James](#); [Smart, Mark](#); [Brockett, Aretha](#); [Tate, Rita](#); [Roberts, Antonio](#); [Yarbrough, Christopher](#); [Stevens, Edie](#); [Battle, Jernell](#); [Zywicki, Glynis](#); [Sulej, Erik](#); [Ramsey, Ashley](#); [Messier, Dawn \(she/her/hers\)](#); [Newman, Maya](#); [Luksis, John](#); [Brown, Sineta](#); [Calderon, Wanda](#); [Leon, Sandra](#); [Davis, Lillie](#); [Callahan, Adrienne \(she/her/hers\)](#); [Kaminer, Joan](#); [Ferrif, Sarah](#); [MacDonald, Jennifer](#); [Johnson, Larry-C](#); [Reynolds, David](#); [Daniels-Lewis, Alicia \(she/her/hers\)](#); [Dykeman, Denise \(she/her/hers\)](#); [Evans, Crystal](#); [White, Elizabeth](#); [Herron, Tarsha](#); [Wade, Diane](#); [Marrable, Lanita](#); [Castanon, Lisa](#); [Vizard, Elizabeth](#); [OGC NFO](#); [Means-Thomas, Janet](#); [Davis, Gail](#); [Johnson, Larry-C](#)  
**Subject:** Template Letters for Current Health Emergency  
**Date:** Tuesday, April 7, 2020 2:29:00 PM  
**Attachments:** [Template Notify Requester of Impacted Request Due to Health Emergency Clean.docx](#)  
[Template short form Confirming Agreement with Requester of Extended Due Date to Health Emergency Clean Copy.docx](#)

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Hi All,

Attached are template letters for you to use in communicating with requesters regarding difficulty during the current public health emergency that you may be having in searching for and collecting hardcopy records in response to FOIA requests. The shorter template is for use in confirming an agreement you reached with a requester to extend the FOIA response due date to enable the hardcopy record search to be conducted at a later time.

The longer template is for use when you are unable to reach the requester to negotiate an extension of time. This version is used to provide the requester an estimated date for your office's response and should be used only when you have tried unsuccessfully to reach the requester for a telephone discussion or when the requester has not provided a telephone number.

The template advises that the estimated extension should be calculated as a reasonable processing time beyond the currently applicable President's announcement to continue social distancing through April 30, 2020. If that date is extended in the future or another date is applicable in a particular locality, such date should be used for calculating the estimated response due date.

If you have any questions on how to use these templates, please contact me, Nicole Rementer, Denise Walker, Ian Altendorfer or any member of the NFO staff.

Tim

**Timothy R. Epp**

Associate General Counsel | [National FOIA Office](#)

U.S. Environmental Protection Agency | Office of General Counsel

1200 Pennsylvania Avenue, N.W. (MC 2310A)

Washington, D.C. 20460 | WJCN 7309B

Phone (202) 564-2830 | [epp.timothy@epa.gov](mailto:epp.timothy@epa.gov)

#2p4





**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

June 10, 2023

[Requester Name]  
[Requester Address 1]  
[City, State, Zip]

**Re: Freedom of Information Act Request - EPA-[XX]-[#####] Extension of Time**

Dear [Requester]:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA), National FOIA Office on [X Date]. In a letter dated [X Date], we informed you that your request is assigned to [FOIA Program] for processing. We are processing your request focusing first on electronic records and are working to provide interim releases of any such responsive documents. Our search and collection of hardcopy records for review and response will be delayed because of current circumstances.

As you may know, on March 13, 2020, the President declared a nationwide emergency for COVID-19 pandemic pursuant to Sec. 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207. On March 15, 2020, the Administrator extended a voluntary unscheduled telework/unscheduled leave policy to all agency employees at least through April 3, 2020. On March 17, 2020, the Office of Management and Budget (OMB) directed federal agencies to “adjust operation and services to minimize face-to-face interactions.” Specifically, the OMB guidance stated that “[n]on-mission-critical functions that cannot be performed remotely or that require in-person interactions may be postponed or significantly curtailed.” (Available at <https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-16.pdf>).

As of the date of this letter, EPA FOIA processing employees in [FOIA Program] are working full-time at alternative work locations separate from their assigned duty station offices. We continue to expeditiously search, review, and prepare the portions of requests that are accessible in electronic format and are working to provide you with those record first through interim releases. [FOIA Program] identified the need to search for potentially responsive paper or hardcopy records to fully respond to your request. Because EPA staff who are assigned to respond to your request are temporarily teleworking from alternative work locations, these files are located at an establishment separate from the office processing your request. [FOIA Program/Location] office has no access to search for, collect, or review these records until such time when an EPA employee or contractor is able to return on-site. Accordingly, an extension of time to respond to your request, with respect to these hardcopy records, is necessary.

Given the uncertainty of the developing COVID-19 situation, it is difficult to predict when EPA will be able to obtain access to the records that require a physical search. However, at this time, the estimated date of completion for your request is [April 30, 2020 + reasonable estimate of additional processing time]. If circumstances change, we will provide you with an update. Thank you for your patience. We have updated the due date for the final response to this request in FOIA

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online.

FOIA professionals including myself and the FOIA Public Liaison are available to discuss your request with you. Our contact information is below. We are available to work with you to identify ways to most effectively produce the records you seek, given the circumstances of this nationwide emergency. If you would like to modify or narrow your request so that it may be closed out sooner, please contact [*Insert contact person and information*]. [*FOIA Program*] will continue to search, collect, review, and process responsive records in electronic formats and will provide interim releases.

For further assistance or to discuss any aspect of your request, you may also contact EPA's FOIA Public Liaison at [hq.foia@epa.gov](mailto:hq.foia@epa.gov) or call (202) 566-1667. You may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001; email: [ogis@nara.gov](mailto:ogis@nara.gov); telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact [press@epa.gov](mailto:press@epa.gov).

Sincerely,

[*Name*]

[*FOIA Program*]

U.S. Environmental Protection Agency



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

June 10, 2023

[Requester Name]  
[Requester Address 1]  
[City, State, Zip]

**Re: Freedom of Information Act Request - EPA-[XX]-[#####] Extension of Time**

Dear [Requester]:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA), National FOIA Office on [X Date]. In a letter dated [ X Date], we informed you that your request had been assigned to [FOIA Program] for processing. Per our telephone conversation on [X DATE] you agreed to an extension of time to process this request to [Insert new due date]. We are processing your request and will provide interim releases of responsive documents as soon as possible. Thank you for your patience. We have updated the due date for this request in FOIA online.

As we discussed, this due date extension is necessary for [FOIA Program] to search for potentially responsive paper or hardcopy records that are currently not accessible to [FOIA Program] staff who are working at alternative locations separate from their assigned duty station offices because of the nationwide COVID-19 pandemic emergency. [FOIA Program] continues to expeditiously search, review, and prepare records responsive to your request that are accessible in electronic format and is working to provide you with those records first through interim releases. FOIA professionals including myself and the FOIA Public Liaison are available to discuss your request with you. We are available to work with you to identify ways to most effectively produce the records you seek, given the circumstances of this nationwide emergency. If you would like to modify or narrow your request so that it may be closed out sooner, please contact [Insert contact person and information].

For further assistance or to discuss any aspect of your request, you may also contact EPA's FOIA Public Liaison at [hq.foia@epa.gov](mailto:hq.foia@epa.gov) or call (202) 566-1667. You may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001; email: [ogis@nara.gov](mailto:ogis@nara.gov); telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact [press@epa.gov](mailto:press@epa.gov).

Sincerely,

ATTORNEY-CLIENT PRIVILEGED // DRAFT //  
NOT TO BE USED AS AN OFFICAL DOCUMENT

*[Name]*

*[FOIA Program]*

U.S. Environmental Protection Agency



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

June 10, 2023

[Requester Name]  
[Requester Address 1]  
[City, State, Zip]

**Re: Freedom of Information Act Request - EPA-[XX]-[#####] Extension of Time**

Dear [Requester]:

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA), National FOIA Office on [X Date]. In a letter dated [ X Date], we informed you that your request had been assigned to [FOIA Program] for processing. Per our telephone conversation on [X DATE] you agreed to an extension of time to process this request to [Insert new due date]. We are processing your request and will provide interim releases of responsive documents as soon as possible. Thank you for your patience. We have updated the due date for this request in FOIA online.

As we discussed, this due date extension is necessary for [FOIA Program] to search for potentially responsive paper or hardcopy records that are currently not accessible to [FOIA Program] staff who are working at alternative locations separate from their assigned duty station offices because of the nationwide COVID-19 pandemic emergency. [FOIA Program] continues to expeditiously search, review, and prepare records responsive to your request that are accessible in electronic format and is working to provide you with those records first through interim releases. FOIA professionals including myself and the FOIA Public Liaison are available to discuss your request with you. We are available to work with you to identify ways to most effectively produce the records you seek, given the circumstances of this nationwide emergency. If you would like to modify or narrow your request so that it may be closed out sooner, please contact [Insert contact person and information].

For further assistance or to discuss any aspect of your request, you may also contact EPA's FOIA Public Liaison at [hq.foia@epa.gov](mailto:hq.foia@epa.gov) or call (202) 566-1667. You may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001; email: [ogis@nara.gov](mailto:ogis@nara.gov); telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact [press@epa.gov](mailto:press@epa.gov).

Sincerely,

ATTORNEY-CLIENT PRIVILEGED // DRAFT //  
NOT TO BE USED AS AN OFFICAL DOCUMENT

*[Name]*

*[FOIA Program]*

U.S. Environmental Protection Agency

# Freedom of Information Act Community Mtg

## Negotiating with Requesters – May 21, 2020

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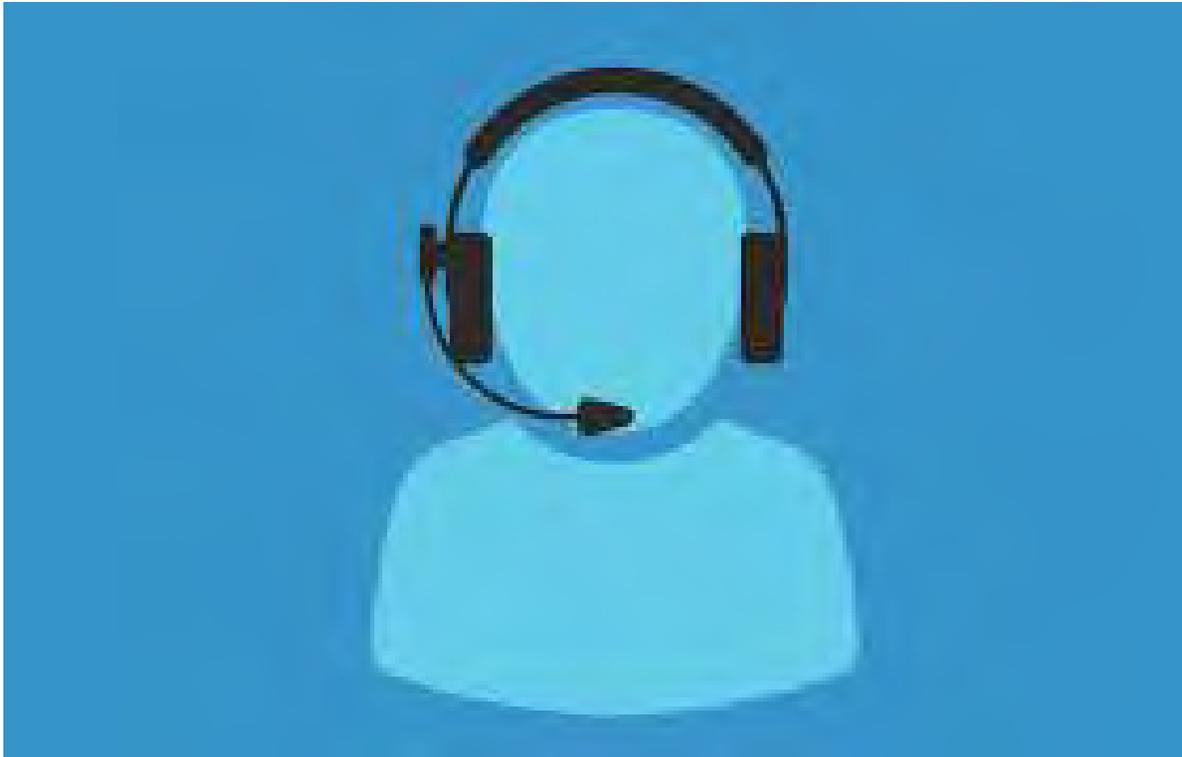
National FOIA Office  
EPA Office of General Counsel

Denise A. Walker  
National FOIA Office  
Office of General Counsel

# Why is this training important?

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- ❖ To help you comply with the law
- ❖ Good Customer Service
- ❖ To support the Agency's 2018-2022 [Strategic Plan](#)
- ❖ To meet EPA's FOIA commitments in [Administrator Wheeler's 2018 FOIA memorandum](#):
  - ❖ Transparency
  - ❖ Timeliness
  - ❖ Quality
  - ❖ Professionalism
- ❖ To create a clear record & avoid excessive FOIA litigation and attorneys' fees
- ❖ To help decrease your FOIA program's backlog



When is it a Good  
Idea to Contact a  
Requester?

---

# Communication is key

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**Below are common communications that may occur:**

Clarify Scope of  
the request

Increase Fee  
Limit / Assurance  
of Payment

Extend Due Date

Discuss Search  
Terms

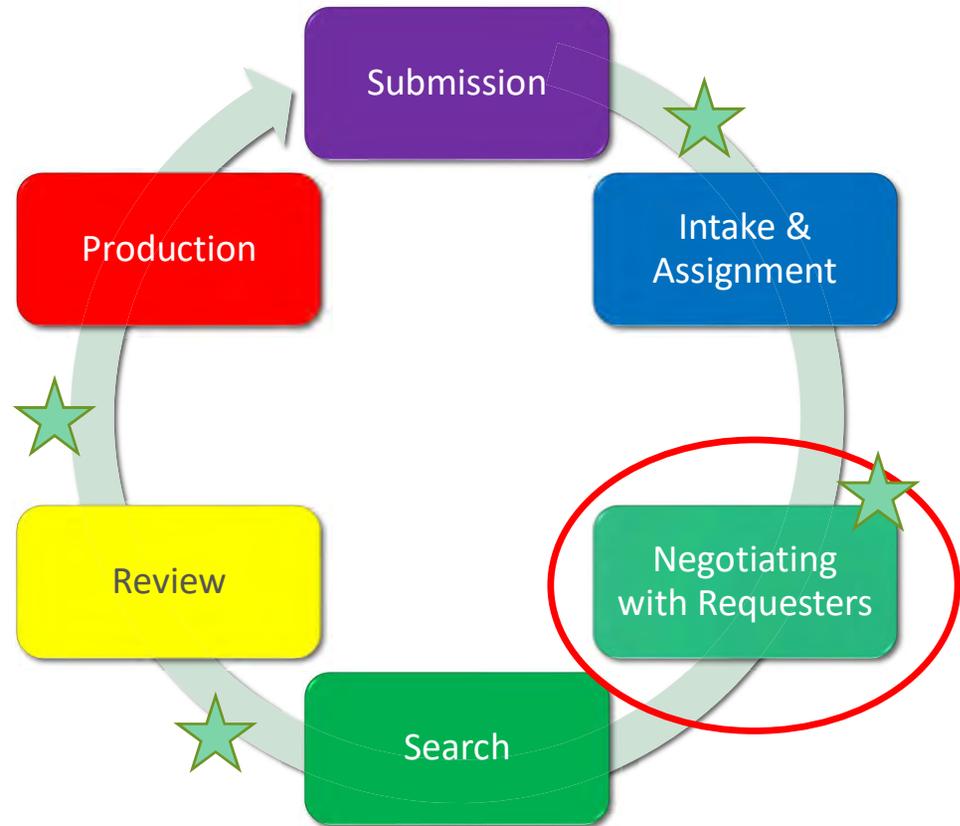
Discuss  
Preliminary  
Search Results

Status Updates

Interim release  
of records

Final release and  
close out letter

# Lifecycle of a FOIA Request at EPA



OGC NATIONAL FOIA OFFICE



National FOIA Office  
EPA Office of General Counsel



## Why Don't We Call Requesters?

---

It is scary! What if I say the wrong thing?? I don't want to get into trouble!

I don't know what to say. It's easier to just interpret the request myself!

What if they start asking questions??

# The 'Why' behind the request

---

FOIA requesters generally do not have to justify or explain their reasons for making requests.

## **Exceptions:**

- When expedited processing is requested
- When a fee waiver is requested

However, understanding what a requester is looking for can really help!

# Negotiating and Documenting a Clarification: Before the Call

---

- Make sure you're prepared!
- Have a call with your subject matter experts.
- Agree who will lead the call and who will take notes.
- Talk through the information you already have and that you need to find out to conduct a search:
  - Custodians?
  - Search Terms?
  - Record Types and Locations?
  - Time Frame?



# What is Active Listening?



# Negotiating and Documenting a Clarification: During the Call

---

Relax. You're prepared.



## **1. Be attentive:**

Make sure everyone is on the call. Introduce yourself and your team with confidence and kindness.

Wait for everyone to join. It's OK to engage in a little innocuous small talk while you wait.

Once everyone arrives: Begin by thanking the requester to take time to talk to you about the request.

# Negotiating and Documenting a Clarification: During the call

---



## 2. Ask Open Ended Questions and Listen:

*“I have your request in front of me, but I’d like to start by letting you explain in your own words what you’re looking for.”*

Don’t interrupt until the requester is finished. Encourage the speaker to continue with small verbal comments like yes, and uh huh.



## 3. Ask Probing Questions:

*“Is there a specific document you have in mind?”*

*“If we were able to provide the perfect document or set of records to you, what would it look like?” “Do you need records by a particular date?”*

-Ask any follow-up questions that will help you or the SMEs locate the right records

# Negotiating and Documenting a Clarification: During the call

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## 4. Request Clarification:



“Could you clarify what you meant by “related to QAWESOME?””

## 5. Paraphrase:



*“So let me see if I understand: You’re looking for email records that reflect EPA conversations with outside stakeholders while the agency was developing the Q-AWESOME Policy. Is that correct?”*

# Negotiating and Documenting a Clarification: During the call

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## 6. Be Attuned to and Reflect Feelings:

*“It sounds like you’re concerned that we might clarify or put limits on your request in a way that won’t meet your needs. After this call, I’ll send you a letter that will document our conversation today. You will have the opportunity to review it and let us know if we misunderstood something. And, of course, you can always submit more FOIA requests.”*

*“It sounds like you might be feeling frustrated about the timeline that I proposed, would it help to set up a bi-weekly check in call to update you on our progress?”*



## 7. Summarize:

“You’re looking for the email records and attachments that were sent to and from non EPA email addresses by the key employees in this office between March 1 and March 31 and we’ll use the search term: “Q-AWESOME”.

# Negotiating and Documenting a Clarification: During the call

---



## 8. Be attentive as you end the call:

Again thank the requester for speaking with you. Let them know they can reach you by phone or email if they have additional questions. Let them know the next steps as applicable:

*“Thank you for speaking with us today. I think we have what we need to move forward with the search and collection for your request. We will restart the clock as of today’s date. We’ll send you a letter this afternoon/ Monday/in the next few days that will capture what we talked about today. The letter will also include your (revised fee estimate/ information for a follow-up call/ the estimated date of completion... Etc.)*

*Is there anything else you need from us at this point?*

*Again, thank you for your time. We will be in touch soon.*

# Negotiating and Documenting a Clarification: After the Call

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Debrief with anyone else who was on the call with you.

As soon as possible, draft the follow-up letter/ email to the requester.

If the clock was stopped for clarification or fees restart it in FOIAonline.

Let's look at a few example follow-up letters.

# The importance of a good administrative record

- ❖ A **good administrative record** tells the story of the request – from cradle to grave.
- ❖ Use **Comments and Correspondence features** in FOIAonline to maintain your administrative record.
- ❖ **Include:**
  - ❖ All communications (phone calls, email, and letters) with requester;
  - ❖ Summary of internal discussions about request, especially decisions regarding interpretation of request, search strategy, withholdings, productions;
  - ❖ Procedural actions and reasoning (e.g., clock stoppage, office reassignment);
  - ❖ Search instructions;
  - ❖ Applied and unapplied versions of redacted and withheld records; and
  - ❖ Any information you think would be helpful to GLO on appeal/litigation.

# What if things go sideways??

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## **1. The requester calls you out of the blue and you aren't prepared to talk to them.**

→ Tell them you are not available to talk right now but will be happy to schedule a time with them.

## **2. The requester is hostile, angry, or abusive.**

→ Breathe. Be polite and helpful to a point. Please do not tolerate abusive behavior. Do your best to acknowledge their feelings or fears and attempt to resolve the situation. "It sounds like you are upset and frustrated about the possibility of contamination in your community. Can you tell me which records would best assist your community group...?"

If the requester persists with being abusive or hostile, politely let them know you cannot continue the conversation if the behavior continues and you will arrange to speak with them at another time.

"Mr. Angry, if you continue to swear at me, I will be unable to help you. Are you willing to continue the conversation calmly or shall I reschedule/refer you to the FOIA Public Liaison?"

## **3. The requester asks for something you aren't sure about.**

→ It's ok to say that you need to confer with your supervisor/ the NFO /SME and get back to them.

## **4. The requester asks questions about the work of the agency.**

→ In general, refer these questions to the Office of Public Affairs. [press@epa.gov](mailto:press@epa.gov)

# Clarification Call Checklist



1. **Be attentive**



2. **Ask open ended questions and listen**



3. **Ask probing questions**



4. **Ask for clarification**



5. **Summarize**



6. **Be attuned to and respond to feelings**



7. **Summarize**



8. **Be attentive as you wrap up the call with next steps.**

# Checklist

## Self – Audit for FOIA Extended Due Dates

<b>Why was due date extended?</b>	<b>What documentation should be in FOIAonline?</b>
<b>Fee Assurance</b>	<ul style="list-style-type: none"><li>• Communications to requester</li><li>• Requester replies (there may be several communication before you reach resolution)</li></ul>
<b>Clarification of Request</b>	<ul style="list-style-type: none"><li>• Communications to requester</li><li>• Requester replies clarifying the request</li><li>• Communication to requester confirming agreed clarification</li></ul>
<b>Unusual Circumstances</b>	<ul style="list-style-type: none"><li>• Communication to requester stating criteria for unusual circumstances</li><li>• Must occur before request becomes backlogged</li></ul>
<b>Due Date Negotiated with Requester</b>	<ul style="list-style-type: none"><li>• Communications to requester</li><li>• Requester replies</li><li>• There may be several communications before you reach resolution</li><li>• You may negotiate an extended due date more than once while the request is open</li></ul>
<b>Program Communicates Estimated Completion Date to Requester</b>	<ul style="list-style-type: none"><li>• Communications to requester stating an estimated due date</li><li>• <b>Cannot extend due date until you have documented agreement</b></li></ul>



# Freedom of Information Act Procedures

Issued by the EPA Acting Chief Freedom of Information Act Officer

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# Freedom of Information Act Procedures

## 1. Purpose

These Freedom of Information Act Procedures (Procedures) outline the process for implementing the Freedom of Information Act (FOIA or statute), 5 U.S.C. § 552, at the U.S. Environmental Protection Agency's (EPA's or Agency's) Headquarters and Regional Offices, field offices, and EPA laboratories. These Procedures are intended to ensure that the Agency responds to FOIA requests in accordance with statutory requirements, the EPA FOIA Regulations, 40 C.F.R. Part 2, Subpart A (FOIA Regulations), the Policy, and applicable open government and transparency policies.

## 2. Scope and Applicability

These Procedures implement the EPA FOIA Policy (Policy). These Procedures focus on promoting accountability, encouraging timeliness, and ensuring the quality of EPA FOIA responses by outlining the statutory and regulatory requirements, as well as the policy, procedural, and processing steps that all EPA organizations should follow.

## 3. Audience

The audience for these procedures includes: all EPA organizations, officials, and employees; those who oversee contractors and grantees; and others operating on behalf of the EPA in accordance with their contract or grant.

## 4. Overview

### A. EPA FOIA Administration

These Procedures define the term "FOIA Program" as each EPA Headquarters and Regional Office as a whole. For the Regional Offices, the term "FOIA Program" is not limited to each Office of Regional Counsel's office, division, or organization established to perform certain centralized FOIA functions, but rather refers to the entire regional office. Relatedly, these Procedures use the term "Lead FOIA Program" to identify the FOIA Program assigned to process the FOIA request by the National FOIA Office (NFO). Further, these Procedures use the term "Contributing FOIA Program" to identify a FOIA Program that is not assigned to process the request by the NFO but possesses records that are responsive to the FOIA request. Thus, in using the terms FOIA Program, Lead FOIA Program, and Contributing FOIA Program, these Procedures do not describe interactions between work units within the same EPA organization—except where indicated.

Each FOIA Program will designate a FOIA Coordinator or FOIA Officer to serve as the primary contact for the NFO and other FOIA Programs. Each FOIA Program shall employ a backup coverage system to ensure the timely processing of requests when the FOIA Coordinator or FOIA Officer is unavailable.

Each FOIA Program will submit updated local FOIA procedures to the NFO within 180 days of the Chief FOIA Officer issuing this document. *See* EPA FOIA Policy, 6.J. The Chief

FOIA Officer will approve each local FOIA procedure, except for the local FOIA procedures submitted by the Office of Inspector General (OIG). Each FOIA Program's local procedures are to be consistent with the FOIA, the EPA FOIA Regulations, the FOIA Policy, and these Procedures, and may add more detail, including detail on matters not covered or not fully covered by the Agency's FOIA Policy and Procedures.

### **B. The Freedom of Information Act**

Congress enacted the FOIA in 1966. The statute gives any person the right to obtain access to federal agency records unless one or more of the nine exemptions or three law enforcement exclusions<sup>1</sup> contained in the statute protect such records, or portions of such records, from public disclosure. *See* 5 U.S.C. § 552(b). The FOIA applies only to administrative agencies within the federal Executive Branch.

### **C. FOIAonline**

FOIAonline is an internet tool where requesters may submit FOIA requests. FOIAonline is also EPA's management and tracking system for FOIA responses. *See* EPA Records Schedule 0263, FOIAonline System (Jan. 31, 2016).

These Procedures do not provide detailed instructions for using FOIAonline. The Agency sponsors FOIAonline training for managers, supervisors, and staff, and has developed user guides that are available through FOIAonline and in the FOIA Toolkit located on the NFO's SharePoint site.

### **D. Document Review Tools**

Relativity is EPA's standard document review platform for all records collected by an eDiscovery Division centralized search. EPA staff can access Relativity through a web browser from their office or from a remote location.

To review any records that are not collected by an eDiscovery Division centralized search, it is recommended that EPA staff use EPA-approved document review and redaction software, such as Adobe Acrobat Pro DC. Contact your local Information Security Officer or local Information Technology staff to obtain access to Adobe Acrobat Pro DC.

These Procedures do not provide instructions for using Adobe Acrobat Pro DC or Relativity for document review. EPA staff can access Relativity training and user guides through the eDiscovery Division's Relativity Resource Center on the eDiscovery Division's SharePoint site. EPA staff can access directions on using Adobe Acrobat Pro DC to review and redact documents in the FOIA Toolkit.

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## **5. Authority**

Freedom of Information Act, 5 U.S.C. § 552.

EPA FOIA Regulations, Title 40, C.F.R. Part 2, Subpart A.

EPA Freedom of Information Act Policy.

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<sup>1</sup> There are three enforcement exclusions under the FOIA. Per the Roles and Responsibilities section below (Section 9), the General Law Office concurs on the use of these exclusions.

## 6. Procedures

Generally, the steps performed by the NFO are detailed in Steps 1–6, and the steps performed by the FOIA Programs (i.e., EPA Region or Headquarters Program Office) are detailed in Steps 7–18. Each FOIA Program must develop or update their local FOIA procedures to ensure that their internal FOIA processes are consistent with the procedures outlined below. A FOIA Program may expressly identify, by role, individuals that perform Steps 7–18 in their local FOIA procedures.

### A. Intake Procedures

#### Step 1. Submission and Receipt of Requests.

The public will submit FOIA requests to the NFO via FOIAonline, U.S. Mail, or overnight delivery service, or an electronic government submission website established pursuant to 5 U.S.C. § 552(m), such as foia.gov, consistent with the Agency’s FOIA regulations. If the NFO receives a request via U.S. Mail or overnight delivery service, the NFO will enter the request, including all attachments, into FOIAonline. If the requester provides an email address, FOIAonline will automatically send an acknowledgement email to the requester. If the requester does not provide an email address, NFO will issue an acknowledgement through U.S. Mail.

If a FOIA Program (i.e., EPA Region or Headquarters Program Office) receives a request directly from a requester, the FOIA Program should not process the request because it was not submitted in accordance with the FOIA Regulations. The FOIA Program should inform the requester that the request will not be accepted as a properly submitted FOIA request and inform the requester of the proper methods for submitting a FOIA request. *See generally* 40 C.F.R. § 2.101(a).

#### Step 2. Intake and Initial Review of Incoming Requests.

When the NFO receives a request, the NFO may consider generally whether:

- The request was not made in writing;
- The request does not comply with the FOIA Regulations;
- The request does not seek Agency records (*see also* Step 7, *Lead FOIA Program Review of the FOIA Request*); and
- The request does not reasonably describe the records sought (*see also* Step 7, *Lead FOIA Program Review of the FOIA Request*). 40 C.F.R. §§ 2.101(a) and 2.102(c).

The NFO may issue a final determination and close the request, as appropriate, upon initial review of the above factors. *See* Step 16, *Interim and Final Responses*. Additionally, the NFO may coordinate with the appropriate FOIA Programs when evaluating a request based on the matters above. *See* Step 3, *NFO and Lead FOIA Program Intake Coordination*. The NFO will notify the requester in writing of a decision made on these matters.

If the NFO does not issue a final determination on any of the above matters pursuant to 40 C.F.R. § 2.104(i), the Lead FOIA Program should consider these matters, as appropriate, in issuing its final determination. *See* Step 7, *Lead FOIA Program Review of the FOIA Request*.

The NFO may also review the request for the following circumstances that may be considered throughout the response process:

- Determine whether unusual circumstances apply to the request (*see also* Step 9, *Estimate Processing Time and Determine Response Deadline*); and
- Whether the requester has paid all fees for any prior FOIA requests as required by the regulations.

### Step 3. NFO and Lead FOIA Program Intake Coordination.

This step discusses the coordination between the NFO and the Lead FOIA Program for FOIA request intake processing. If any of the issues identified in Step 2, *Intake and Initial Review of Incoming Requests*, require additional input from the Lead FOIA Program prior to the NFO taking action, the NFO may seek input from the FOIA Officer or Coordinator in the Lead FOIA Program, including but not limited to the following circumstances:

- The NFO believes the request does not seek Agency records;
- The NFO believes the request may not be reasonably described;
- The NFO believes that the processing of the request may benefit from clarification;
- The NFO requires more information to ensure proper assignment of the Lead FOIA Program; or
- The NFO believes the request may be fulfilled through publicly available or previously released records.

The NFO may take appropriate action, considering the response from the Lead FOIA Program. The NFO will coordinate with the Lead FOIA Program before stopping the clock; the clock may only be stopped once for clarification. *See* 40 C.F.R. § 2.104(d). If the FOIA requester responds to the EPA's request for clarification, the NFO will coordinate with the Lead FOIA Program on the response.

### Step 4. Process Fee-Waiver and Expedited Processing Requests.

The NFO will determine whether to grant or deny fee waiver and expedited processing requests. The NFO will evaluate each fee waiver and expedited processing request using the factors outlined in 40 C.F.R. §§ 2.107(l)(2)-(3), and 2.104(f), respectively. The NFO will document all decisions to grant or deny fee waiver and expedited processing requests in FOIAonline. If the NFO grants expedited processing, the Lead FOIA Program must give the processing of the FOIA request priority and process it as soon as practicable. *See* 40 C.F.R. § 2.104(f)(4).

### Step 5. Determine the Processing Track and Fee Category.

The NFO will initially indicate in FOIAonline the processing track and fee category based on available information, and the Lead FOIA Program may adjust based on information available during review and processing. The NFO will identify the processing track by distinguishing between a simple and complex request based on an evaluation of the amount of work, time needed to process the request, or both, including limits based on the number of pages involved. *See* Section 10, Definitions, *Complex Requests* and *Simple Requests*.

The NFO will initially assign the fee category for the requester. The fee categories under the FOIA are:

- Commercial Use Requester:
  - According to the OMB Fee Guidelines, “commercial use” requesters are those who ask for records for “a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made.” 52 C.F.R. §§ 10012, 10017–18 (Mar. 27, 1987).
- Educational Institution or Non-Commercial Scientific Institution:
  - Educational institutions include schools such as universities and vocational institutions whose purpose is scholarly research. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II).
  - Noncommercial scientific institutions are institutions whose purpose is scientific research. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II).
- Representative of the News Media:
  - The FOIA defines a “representative of the news media” as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” The FOIA also explains that this category includes news agencies as well as freelance journalists if they “can demonstrate a solid basis for expecting publication through [a news media] entity, whether or not the journalist is actually employed by the entity.” *See* 5 U.S.C. § 552(a)(4)(A)(ii)(III).
- Other Requester:
  - The “other” category is simply a catchall category for any requester that does not fall into the above categories.

#### Step 6. Assign the Request to the Lead FOIA Program.

The NFO will assign the Lead FOIA Program by evaluating which FOIA Program (i.e., EPA Region or Headquarters Program Office) is likely to have the most records responsive to the request. Following the initial review described in Steps 2 and 3, the NFO will assign the request to the Lead FOIA Program in FOIAonline. A FOIA Coordinator or FOIA Officer may request that NFO reassign the request to another FOIA Program by contacting the NFO staff member that assigned the request initially. The NFO will resolve any assignment disputes between the FOIA Programs and, if appropriate, will reassign the request to the new Lead FOIA Program. Additionally, a Lead FOIA Program may also request reassignment of a FOIA request once documents are collected and the search results demonstrate that it may be more appropriate that the NFO assign another FOIA Program as the Lead FOIA Program.

The NFO will notify the requester that the NFO assigned the request to the Lead FOIA Program and include information for the staff contact in the Lead FOIA Program.

## B. Processing the Request

### Step 7. Lead FOIA Program Review of the FOIA Request.

After the NFO assigns a request to the Lead FOIA Program, the Lead FOIA Program is responsible for issuing the Agency's final decision on the FOIA request. The Lead FOIA Program may look to the description provided below for assistance if it is necessary to evaluate the matters in Steps 2 and 3.

First, a request is reasonably described if it enables an Agency employee familiar with the subject matter to locate the records with a reasonable amount of effort. *See generally* 40 C.F.R. § 2.102(c). The Lead FOIA Program will identify and coordinate with subject matter experts, as necessary, to determine whether the request reasonably describes the records sought.

If the Lead FOIA Program determines that the request is not reasonably described, the Lead FOIA Program will:

- Inform the requester that the request does not reasonably describe the records sought and either identify what additional information the requester needs to provide or explain why the request is otherwise insufficient;
- Provide the requester with an opportunity to discuss and modify the request;
- Provide a specific deadline that is at least 20 calendar days after the request for clarification, for the requester to provide clarification or additional information; and
- Inform the requester in writing that if no additional information is provided, EPA may issue a final determination closing the request.

Second, the Lead FOIA Program will ensure that the request seeks Agency records. If not, the Lead FOIA Program will notify the requester and close the request.

#### What is an Agency Record?

An Agency Record is:

- Created or obtained by the Agency; and
- Under Agency control when the request is received.

The FOIA does **not** require the Agency to:

- Create a new record or re-create records that were properly disposed;
- Produce records over which it retains no control;
- Produce purely personal records; or
- Produce future records.

Third, the Lead FOIA Program may need to take actions to, among other things, better understand what records are being sought or improve the Agency’s ability to respond to the

### How many times may I stop the clock to clarify the request?

The clock may only be stopped once to clarify the scope of the request—either by the FOIA Program or by the NFO as noted in Step 3. Once the clock has been stopped, it should not be restarted until the information or clarification is provided by the requester. Nevertheless, a FOIA Program may contact a requester as many times as needed to clarify the scope of the request without stopping the clock.

FOIA Programs should document all communications, including a description of the modified scope of the request, for the official record in FOIAonline. Further, the Lead FOIA Programs should ensure that FOIAonline reflects any updated deadlines.

request. For example, the Lead FOIA Program may evaluate whether clarification by the requester would benefit the processing of the request and if so, contact the requester. Subject matter experts in the Lead FOIA Program and any other FOIA Programs with applicable knowledge may aid in identifying what additional clarification is needed to process the FOIA request. The NFO is available to assist the Lead FOIA Program with seeking clarification from the requester.

The Lead FOIA Program may also review and adjust, as necessary, the processing track (i.e., simple or complex, but not expedited). *See* Section 10, Definitions, *Simple Request* and *Complex Request*.

## Step 8. Assign Tasks in FOIAonline.

### 8.A. Assign EPA Search and Review Tasks.

The Lead FOIA Program will identify the individuals within the Lead FOIA Program who will assist in conducting the search and review tasks. The Lead FOIA Program will coordinate with other FOIA Programs who may have responsive records—i.e., Contributing FOIA Programs. The Contributing FOIA Programs will identify the staff in their programs who may have responsive records and provide that information to the Lead FOIA Program.

The Lead FOIA Program will coordinate with the designated criminal enforcement contact for their Region or Program Office, as appropriate based on the scope of the FOIA request, to identify any criminal enforcement staff who may have responsive records and to coordinate the collection and review of records involving these custodians. If any criminal enforcement staff are identified by a Contributing FOIA Program, the FOIA Officer or Coordinator in the Contributing FOIA Program will coordinate with their designated criminal enforcement contact regarding the collection and review of records involving these custodians. The Contributing FOIA Program will keep the Lead FOIA Program informed regarding the plan and progress of the review for criminal enforcement staff.

For a large, complex FOIA request, it is a recommended practice for the Lead FOIA Program to convene meetings with assigned staff in the Lead FOIA Program and any Contributing FOIA Programs to clarify responsibilities, methods to be used for collection, and other issues described in Steps 9–15. Those meetings may also include NFO staff, subject matter experts, Records Liaison Officers, information technology specialists, and legal counsel. If

necessary, the Lead FOIA Program may request NFO assistance in developing a search and review strategy in coordination with the Contributing FOIA Programs.

The Lead FOIA Program will ensure the proper tasks are assigned in FOIAonline, including to staff located in the Lead FOIA Program and to the FOIA Coordinator or FOIA Officer in each Contributing FOIA Program. The Lead FOIA Program will ensure that assignees complete and close all tasks. If necessary, the FOIA Manager, FOIA Coordinator, or FOIA Officer in the Lead FOIA Program may obtain NFO assistance in coordinating the completion and closing of tasks by the Contributing FOIA Programs.

Generally, the Lead FOIA Program will submit all eDiscovery Division centralized search requests—including for the custodians identified for Contributing FOIA Programs—and will review all potentially responsive records collected by the eDiscovery Division centralized search. See Step 12, *Collect Records* and Step 13, *Review Records* for a detailed discussion of collections and reviews. The Lead FOIA Program and any Contributing FOIA Programs should track the time it takes to complete the search, collection, and review tasks and enter that time and associated costs into FOIAonline. See Step 10, *Estimate Fees* for assistance on how to calculate fees.

#### 8.B. Refer the Request or a Portion of the Request to Other Federal Agencies

A record that originated with another federal agency may be referred to that agency for direct response to the requester. The Lead FOIA Program must obtain the NFO's concurrence before referring a request, or portion of a request, to another federal agency. 40 C.F.R. § 2.103(c)(2).

If the referral is to a federal agency that uses FOIAonline, then the Lead FOIA Program should send the referral in FOIAonline. If the referral is to a federal agency that does not use FOIAonline, then the Lead FOIA Program should first send the referral either by email or mail and second document the communication making the referral in FOIAonline.

If the Lead FOIA Program refers the entire request to another federal agency, the Lead FOIA Program will notify the requester that the request has been referred and close the request. See Step 16, *Interim and Final Responses*. If the Lead FOIA Program refers only a portion of the request, the Lead FOIA Program will notify the requester that a portion of the request has been referred to another federal agency and continue processing the remaining portion of the request that is not referred. See the NFO SharePoint site for a list of NFO contacts for obtaining concurrence on referrals.

#### Step 9. Estimate Processing Time and Determine Response Deadline.

Lead FOIA Programs must issue a final determination on a properly submitted FOIA request (see Step 2, *Intake and Initial Review of Incoming Requests* and Step 7, *Lead FOIA Program Review of the FOIA Request*) within 20 working days of the date that the request is received unless unusual circumstances apply (excluding days the clock is stopped for clarification or fee related reasons). 5 U.S.C. § 552(a)(6)(A), (B). The Lead FOIA Program will determine the estimated processing time by discussing the scope of the request and estimated number of responsive documents with subject matter experts and other persons within the Lead FOIA Program and any Contributing FOIA Programs.

When the Lead FOIA Program or the NFO estimates that the response cannot be completed within 20 working days, the EPA may extend the due date if “unusual circumstances” apply, as defined by the FOIA, 5 U.S.C. § 552(a)(6)(B).

### When do “Unusual Circumstances” apply?

An “unusual circumstance” exists when there is:

- (1) A need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- (2) A need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
- (3) A need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the Agency having substantial subject-matter interest therein. 5 U.S.C. § 552(a)(6)(B)(iii).

If unusual circumstances exist and there is a need to extend the due date for 10 working days or less, the Lead FOIA Program or the NFO must, within the 20-working day time limit, notify the requester in writing setting forth the unusual circumstances and provide a new estimated due date. 5 U.S.C. § 552(a)(6)(B).

When one or more of the listed unusual circumstances result in a need to extend the due date for more than 10 working days, the Lead FOIA Program must:

- Notify the requester in writing that EPA cannot process the request within the time limit specified;
- Provide the requester an opportunity to limit the scope of the request in writing so that it may be processed within that time limit or negotiate a new time frame with the requester for processing the request or a modified request; and
- Provide the contact information for the EPA FOIA Public Liaisons and notify the requester in writing that it has the right to seek dispute resolution services from the Office of Government Information Services.

5 U.S.C. § (a)(6)(B)(ii).

The Lead FOIA Program will enter the new due date and the justification for the extension into FOIAonline. The justification should include whether an opportunity to clarify the request was provided to the requester. The Lead FOIA Program will communicate the new due date to the requester and document all communication in FOIAonline.

## Step 10. Estimate Fees.

### 10.A. Fee Types and Requester Fee Categories.

The FOIA allows agencies to charge certain fees to a requester to process their FOIA request. The FOIA allows agencies to charge search, review, and duplication fees.

Requesters are placed into one of three fee categories. Which types of fees an agency may charge is based on the requester’s fee category. See *Step 5 Determine the Processing Track*

and Fee Category for a description of each type of requester fee category. While the NFO initially assigns a fee category, the Lead FOIA Program may also review and adjust the fee category, as necessary.

Types of Fees that May be Charged by Fee Category			
Type of Requester	Search	Review	Duplication
Commercial	Yes*	Yes	Yes
Educational, Non-Commercial Scientific, or News Media	No	No	Yes (100 pages free)*
All Others	Yes (First 2 hours free)*	No	Yes (100 pages free)
* Fees shaded in grey above cannot be charged if the Agency fails to comply with the response time period and the requirements of the FOIA Regulations, 40 C.F.R. § 2.107(d)(6).			

The Lead FOIA Program will estimate the request processing fees per the requirements outlined in 40 C.F.R. § 2.107. Contributing FOIA Programs will provide the Lead FOIA Program with the estimated fees from their respective FOIA Program. The Lead FOIA Program will communicate the estimated fees to the requester unless the estimated cost falls below the payment assurance provided by the requester, or the NFO granted a fee waiver.

Type of Staff	Charges
Clerical	\$4.00/quarter hour
Professional	\$7.00/quarter hour
Managerial	\$10.25/quarter hour

If EPA does not comply with the FOIA’s time limits for responding to a request, EPA will not charge search fees, or, in the instance of educational institution, noncommercial scientific institution, or news media requesters, duplication fees, unless EPA gave the requester timely written notice that unusual circumstances as defined by the FOIA apply and more than 5,000 pages are necessary to respond to the request. *See* 40 C.F.R. § 2.107(d)(6)(ii), 5 U.S.C. 552(a)(4)(a)(viii)(II). In this situation, EPA must also have discussed with the requester by written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. § 552(a)(6)(B)(ii), which includes notification to the requester of the availability of the FOIA Public Liaison and the right to seek dispute resolution services from the Office of Government Information Services.

#### 10.B. Advance Payment, Assurance of Payment, and Stopping the Clock.

The Lead FOIA Program must provide written notice to requesters of anticipated fees more than \$25 if the requester did not agree to pay a higher amount in the initial FOIA request or subsequently. *See* 40 C.F.R. §§ 2.102(d), 2.107(e). EPA then requires a written assurance of payment from the FOIA requester, unless an advance payment was received. *See* 40 C.F.R. §

2.107(e). The requester may also designate a fee limit with their FOIA request. An assurance of payment is required if the estimated costs of processing the request exceed the fee limit.

The Lead FOIA Program may ask for advance payment of fees from the requester in two circumstances: (1) when the fees will exceed \$250 or (2) when the requester has previously failed to pay fees in a timely fashion. If you are working with a requester who has a history of prompt payment, you may simply ask for an assurance of payment. If you are working with a requester with no history of payment, you may either ask for a written assurance of payment or an advance payment. For requesters who have failed to pay in a timely manner in the past, you should ask for an advance payment.

The Lead FOIA Program may stop the clock as many times as needed for fee-related reasons, including when the requester is required to provide a written assurance of payment and has failed to do so. The Lead FOIA Program should notify the requester when the Lead FOIA Program stops the clock for fee-related reasons.

#### Step 11. Determine Search Parameters and Additional Clarification.

In response to a properly submitted FOIA request, FOIA Programs will conduct a search that is reasonably calculated to locate all relevant documents, including relevant hard-copy and electronic documents. The Lead FOIA Program, in coordination with all Contributing FOIA Programs, will determine where records responsive to the FOIA request may be located.

To determine which records are within the scope of a request, the Agency will ordinarily include only those records in its possession as of the date the request was received by one of the methods described in 40 C.F.R. § 2.101(a). The Lead FOIA Program will inform the requester if any other date is used. 40 C.F.R. § 2.103(a).

The Lead FOIA Program, in coordination with Contributing FOIA Programs, should consider whether there may be responsive hardcopy records and where those records may be located, including staff workspaces, Agency file rooms, and Agency records being maintained at one or more records centers.

If a FOIA request seeks records that may include electronic records, the Lead FOIA Program should coordinate with all Contributing FOIA Programs to identify all locations likely to contain potentially responsive records. Potential electronic repositories include, for example: Outlook email and calendars; chats (Skype or Teams); Lotus Notes mailboxes, calendars, and databases; Enterprise Content Management System (ECMS or EZ-records); the Correspondence Management System (CMS); local or shared computer drives; SharePoint sites; OneDrive; mobile devices (e.g., text messages and photographs); and external drives and discs. EPA organizations should submit search requests to collect electronic documents from the identified record source locations covered by the eDiscovery Division's centralized search, unless a more targeted collection is more likely to locate all responsive documents, such as where all responsive records are located in a specific folder within an email account.

The Lead FOIA Program will coordinate with all Contributing FOIA Programs to develop search parameters for the electronic searches based on an understanding of the scope of the request. Depending on the scope of the request, search parameters may include any of the following:

- Date Range;
- Custodians;
- Types of Records; or
- Keywords or Subject Matter.

The Lead FOIA Program may seek assistance from the eDiscovery Division or NFO staff in developing search parameters.

As previously stated in Step 8, it is a recommended practice to convene meetings with appropriate staff to clarify responsibilities and develop a collection plan for a large, complex FOIA request. See the FOIA Toolkit for additional assistance on conducting a reasonable search.

#### Step 12. Collect Records.

Utilizing the search parameters developed in Step 11, the Lead FOIA Program will ensure that a reasonable search for responsive records is conducted. Generally, the Lead FOIA Program will submit any necessary eDiscovery Division centralized search requests. The Lead FOIA Program may allow a Contributing FOIA Program to submit a centralized search request if:

- The request has two or more distinct parts requesting records that are solely associated with a Contributing FOIA Program, and the requester does not agree to resubmit the parts as separate requests;
- The request includes custodians from the OIG, the Office of Criminal Enforcement, Forensics and Training (OCEFT), or Regional Criminal Enforcement Counsel (RCEC) (see Step 8.A., *Assign EPA Search and Review Tasks*); or
- The Contributing FOIA Program agrees to submit the eDiscovery Division centralized search request.

The eDiscovery Division will process the centralized search request and will load the collected records into Relativity for review. For information on what sources the eDiscovery Division will not collect from, please visit the eDiscovery Division's SharePoint site.

Second, the Lead FOIA Program will assign tasks in FOIAonline to the appropriate individuals within the Lead FOIA program and to the FOIA Officer or Coordinator in any Contributing FOIA Programs, as necessary, for the collection of records from local sources, including hard copies and any electronic record source locations not included in the centralized search conducted by the eDiscovery Division. If necessary, the Lead FOIA Program may obtain NFO assistance with developing a collection strategy in coordination with the Contributing FOIA Programs.

## Step 13. Review Records.

### 13A. Develop and Implement a Review Strategy.

The review of records collected by the eDiscovery Division centralized search will be conducted in Relativity to enhance the efficiency and consistency of the review. The Lead FOIA Program will review the potentially responsive records collected by the eDiscovery Division centralized search to determine whether the records are responsive or any exemptions from disclosure apply, unless:

- A Contributing FOIA Program agrees to assist with the review; or
- A Contributing FOIA Program submitted the eDiscovery Division centralized search pursuant to Step 12.

Contributing FOIA Programs are expected to work with the Lead FOIA Program in developing the review strategy and encouraged to assist with the review, considering:

- The number of records associated with each FOIA Program (i.e., EPA Region or Headquarters Program Office);
- The extent records associated with a Contributing FOIA Program overlap those associated with the Lead FOIA Programs;
- Whether a Contributing FOIA Program has specific resource issues that would limit its ability to timely complete the review; and
- The extent to which distributing review of records among the Lead FOIA Program and Contributing FOIA Programs would lead to greater consistency or efficiencies, such as accelerating equity reviews.

The appropriate criminal enforcement point of contact(s) will conduct an initial review of all records collected from criminal enforcement staff to segregate out any law enforcement sensitive records. If records relating to criminal enforcement staff or matters are located during the review, the Lead FOIA Program will coordinate with the designated criminal enforcement contact in their region or office, and with the FOIA Officer or Coordinator and designated criminal enforcement contact in the appropriate Contributing FOIA Program to develop and implement a review plan for these records.

For the review of any records collected from a local source, *see Step 12, Collect Records*, the Lead FOIA Program and any Contributing Programs will implement a consistent review strategy.

If necessary, the FOIA Programs may reach out to the NFO for advice about developing a review strategy and to assist in elevating concerns regarding Lead FOIA Program and Contributing FOIA Program responsibilities.

Contributing Programs are also expected to conduct a review of any records in which they have an equity interest. *See Step 13.C, Equity Review and Consultation.*

### 13B. Determine Which Records (or Portions) May Be Released.

All records released or withheld in response to a FOIA request should be reviewed by at least two knowledgeable individuals, including one manager or supervisor, to ensure openness, transparency, consistency, and the appropriate application of FOIA exemptions. One of the

reviews may be performed by the individual who processes the request. Only Authorized Officials may issue final determinations under 40 C.F.R. § 2.103(b).

The FOIA requires that “any reasonably segregable portion of a record” must be released “after deletion of the portions which are exempt” under the Act’s nine exemptions. *See* 5 U.S.C. § 552(b). In such circumstances, the Lead FOIA Program and Contributing FOIA Programs must take reasonable steps necessary to segregate and release nonexempt information. EPA organizations may make discretionary disclosures of exempt information, as a matter of administrative discretion, where they are not otherwise prohibited by law from doing so.

A responsive record may be withheld per one of the nine exemptions of the FOIA. *See* 5 U.S.C. § 552(b). EPA Organizations may not redact non-responsive information within a responsive FOIA record. Where a FOIA requester has narrowed their request to exclude non-responsive information within a responsive record, such narrowing should be memorialized in writing to ensure clarity.

If a discretionary FOIA exemption—exemptions 2, 5, 7(a)–(b), 7(d)–(f), 8 and 9—is implicated, the Lead FOIA Program and Contributing FOIA Programs should only withhold records, or portions of records, when they reasonably foresee that disclosure would harm an interest protected by one of the exemptions or when disclosure is prohibited by law. *See* 5 U.S.C. § 552(a)(8)(A)(i). Note, however, “that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.” 5 U.S.C. § 552(b)(1)(A)(5).

The Lead FOIA Program and Contributing FOIA Programs will: 1) ensure that information cannot be read through redactions on photocopied records; 2) remove “hidden” metadata as appropriate (e.g., Microsoft Excel document properties) from copies of records prepared for release; and 3) annotate records with any applicable FOIA exemptions at the location of the redacted information.

The Lead FOIA Program and Contributing FOIA Programs may consult with the NFO, their Office of Regional Counsel (ORC), or the General Law Office (GLO) about withholding of records under a FOIA exemption. The Lead FOIA Program and Contributing FOIA Programs may consult with an NFO, ORC, or GLO attorney on questions about withholding records under FOIA Exemption 4. The Lead FOIA Program and Contributing FOIA Programs should consult with an ORC or GLO attorney concerning the requirements of 40 C.F.R. Part 2, Subpart B.

### 13C. Equity Review and Consultation

The Lead FOIA Program or, where appropriate, the Contributing FOIA Programs will make records available for review to another EPA organization when the documents include information of substantial interest to that office. Substantial interest includes documents that were created in that office, emails involving personnel from that office, and opinions or advice given by an attorney in a legal office. This review is an “equity review.”

The Lead FOIA Program (i.e., EPA Region or Headquarters Program Office) should task equity reviews to other EPA organizations in FOIAonline. The Lead FOIA Program should schedule sufficient time for the other EPA organizations to complete the equity review. If necessary, the FOIA Coordinator or Officer in the Lead FOIA Program will contact the NFO for assistance in coordinating the completion of equity review tasks.

The Lead FOIA Program or, where appropriate, the Contributing FOIA Programs will make records available for review to another federal agency or the White House when the documents include information of substantial interest to that agency or the White House. Substantial interest includes documents that were created by that agency, emails involving personnel from that agency, and opinions or advice given by an attorney in a legal office. This review is called a “consultation.”

The Lead FOIA Program will coordinate with the NFO when there are consultations with other federal agencies. In performing consultations, the Lead FOIA Office will:

- Concurrently notify the NFO in writing for any consultation sent to an individual below the Deputy Assistant Secretary-level and will obtain the NFO’s concurrence prior to any consultation sent to an individual at the Deputy Assistant Secretary-level or higher, except for the OIG; and
- Contact the NFO for instructions on how to complete consultations with the White House.

The FOIA Coordinator or Officer in the Lead FOIA Program may contact the NFO for assistance in coordinating the completion of consultations with other federal agencies.

#### Step 14. Authorized Official Approval and Awareness Notification.

The Lead FOIA Program will obtain approval from an Authorized Official before releasing or withholding any records. 40 C.F.R § 2.103(b). *See Step 16, Interim and Final Responses.*

If a request is designated for awareness notification, the Lead FOIA Program will follow the instructions outlined in the Awareness Notification memo before releasing records in FOIAonline. *See Memorandum, Ryan Jackson, Chief of Staff, EPA, Awareness Notification Process for Select Freedom of Information Act Releases (Nov. 16, 2018).*

#### Step 15. Upload Records to FOIAonline.

The Lead FOIA Program and Contributing FOIA Programs will upload all responsive records into FOIAonline, including:

- Responsive records that will be released to the public;
- Records that are responsive but are being withheld in full per one or more FOIA exemptions; and
- The original, unredacted version of any record that is being released with redactions.

Responsive records that are being withheld in full and original, unredacted versions of any records that are being released with redactions should be coded appropriately in FOIAonline so that access is limited to EPA staff (see the FOIA Toolkit for instructions on how to code records in FOIAonline).

FOIA Programs will release responsive records to the public through FOIAonline except where:

- The records are subject to special handling requirements or policies, including CBI;
- Release to the public will create a potential harm protected by a FOIA exemption (e.g., requests for agency records from requesters about themselves which would harm the requester's privacy interests if released to the public); or
- A waiver of the requirement to release the records in FOIAonline is granted by the NFO (e.g., unable to load a specific record due to file-type restrictions, such as a video, computer model, or large image file).

If records provided in response to a request are not released to the public in FOIAonline because of the waiver exception outlined above, a placeholder document should be uploaded with contact information describing how to obtain a copy of the response.

It is important to upload all responsive records to FOIAonline, including those that are not releasable. Uploading records that will be withheld preserves the entire record so that it may be reviewed in full on appeal or during litigation. If a FOIA Program chooses to maintain non-releasable responsive records in another manner pursuant to EPA's FOIA records retention schedule, Schedule 1049, the FOIA Program should provide a notation in FOIAonline that identifies where such records are maintained. See the FOIA Toolkit for instructions for uploading documents into FOIAonline.

#### Step 16. Interim and Final Responses

Lead FOIA Programs should consider issuing interim responses when a request involves a voluminous amount of records and for a request that will take an extended time to process. See the FOIA Toolkit for template language for interim response letters.

When issuing a final response, the following dispositions are available in FOIAonline and one must be selected:

- All Records Referred to Another Agency. The EPA searched for records, and the records all belonged to another agency. The records were referred to the other agency for direct response to the requester and the request was closed out.
- Duplicate Request. In some instances, a requester submits more than one request with the same scope. EPA will process one of the requests and close the other request as a duplicate request upon notice to the requester.
- Records Not Reasonably Described. The EPA reached out to the requester indicating that the request did not reasonably describe the records sought, and the requester failed to provide the additional information necessary to clarify the scope of the request.
- Not an Agency Record. The EPA reached out to the requester indicating that the request is not seeking Agency records, and the requester failed to identify the Agency records sought.
- Full Grant. All responsive records are being released in full to the requester.
- Full Denial Based on Exemptions. All records will be withheld from release pursuant to one or more FOIA exemptions.

- Fee-Related Reasons. The request is being denied for a fee-related reason, such as:
  - EPA reached out to the requester to obtain payment assurance based on the Agency's estimated fees to process the request, and the requester has failed to provide a payment assurance; or
  - The requester has not paid all fees for a prior FOIA request as required by the regulations.
- Glomar Response. In some instances, the EPA may expressly refuse to confirm or deny the existence of records responsive to a FOIA request; this is called a Glomar response. The Lead FOIA Program, except for the OIG, must obtain approval from OGC or ORC prior to issuing a Glomar response.
- No Records. If, after a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, the requester will be informed in writing.
- Partial Grant/Partial Denial. Portions of the record will be withheld from the requester if covered by either one or multiple FOIA exemptions. The portions of the record that are not redacted are released to the requester.
- Request Withdrawn. The requester voluntarily withdraws the FOIA request
- Improper FOIA Request for Other Reasons. The request is being denied because it was not properly submitted per the Agency's FOIA regulations.
- Other.

In addition, if a final response is also a final determination pursuant to 40 C.F.R. §§ 2.103(b), the final determination letter will include:

- The name and title or position of the person responsible for the determination;
- A brief statement of the reason or reasons for the denial, including an identification of records being withheld (either individually or, if a large number of similar records are being denied, described by category) and any FOIA exemption applied by the office in denying the request;
- An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through annotated deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption;
- A statement that an adverse determination may be appealed under 40 C.F.R. § 2.104(j) and description of the requirements for submitting an administrative appeal; and
- A statement that the requester has the right to seek dispute resolution services from an EPA FOIA Public Liaison or the Office of Government Information Service. 40 C.F.R. § 2.104(i).

#### Step 17. Finalize Processing Fees.

The Lead FOIA Program will inform the requester in the final determination letter if fees for processing the request are less than EPA's minimum billable threshold (i.e., equal to or less than \$14.00). If the processing fees exceed EPA's minimum billable threshold (i.e., greater than \$14.00), the Lead FOIA Program will generate an invoice in FOIAonline.

The EPA is required to document actual fees charged to the public (billable) and the administrative costs (unbillable) incurred by the Agency in processing FOIA requests. Lead FOIA Programs should document billable and unbillable costs in the Administrative Cost section in FOIAonline. If not completed as part of an earlier step, the Lead FOIA Program and all Contributing FOIA Programs working on a request will enter their administrative time and costs in FOIAonline. *See Step 10, Estimate Fees.*

#### **Step 18. Finalize Actions and Respond to Request.**

The Lead FOIA Program will ensure that all releasable records are uploaded into FOIAonline even if the records were provided to the requester via U.S. mail, except where an exception outlined in Step 15, *Upload Records to FOIAonline* applies. In addition, the Lead FOIA Program will ensure all supporting documentation is entered in FOIAonline (e.g., communications and notes regarding search criteria and coordination between the Lead FOIA Program and Contributing FOIA Programs).

The Lead FOIA Program will provide the final determination letter, responsive records coded for release, and the billing invoice, when applicable, to the requester through FOIAonline. If the requester provides an email address, the Lead FOIA Program will notify the requester via FOIAonline that the responsive records are available in FOIAonline. Otherwise, the Lead FOIA Program will provide the response package via U.S. mail.

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### **7. Appeals and Litigation**

Within 90 days of the Agency's final FOIA determination, the FOIA requester may file an administrative appeal of that determination. The FOIA requester may also seek judicial relief by filing a complaint in United States District Court after the Agency issues an administrative appeal decision or if the Agency does not respond to a FOIA request or administrative appeal within the statutory time frame. The General Law Office handles appeals and litigation related to FOIA requests.

In cases where the FOIA requester is determined to be a prevailing party, and the EPA is required to pay legal fees, please refer to the Office of the Chief Financial Officer's FOIA Fee Policy, RMDS 2540-04-P2.

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### **8. Related Documents**

Statutes, Regulations, and Policy

- EPA FOIA Regulations, 40 C.F.R. Part 2, Subpart A.
- U.S. Department of Justice Mark-up of the FOIA to highlight all amendments, <https://www.justice.gov/oip/freedom-information-act-5-usc-552> (last accessed October 2, 2019).
- Freedom of Information Act Policy.
- Chief Information Officer Policy 2171, EPA Information Access Policy.
- Chief Information Officer Policy 2155.4, Interim Records Management Policy.

## Procedures and Guidance

- About the Office of Government Information Services (OGIS), <http://www.archives.gov/ogis/about-ogis.html> (last accessed October 2, 2019)
- CIO Policy 2171-p-01, EPA Information Access Procedures.
- CIO XXXX-P-XX, Discovery Services Search and Review Procedure.

## 9. Roles and Responsibilities

**Authorized Officials** – The Administrator, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, Deputy Regional Administrators, General Counsel, Deputy General Counsels, Regional Counsels, Deputy Regional Counsels, and Inspector General, or those individuals' delegates, are authorized to make final determinations required by 5 U.S.C. § 552(a)(6)(A). *See* 40 C.F.R § 2.103(b).

**Chief FOIA Officer** – At the EPA, the General Counsel is the Chief FOIA Officer. *See* Delegations Manual, Delegation 1-131, *Chief Freedom of Information Act Officer* (Sept. 11, 2018). The Chief FOIA Officer is responsible for ensuring the efficiency and effectiveness of the Agency's FOIA administration, including compliance, accountability, and reporting to the Administrator, the Department of Justice and the Office of Management and Budget on the status of the Agency's FOIA Program.

**Contributing FOIA Program** – Another Regional or Headquarters Program office that may possess records, which are responsive to a request assigned to the Lead FOIA Program. A Contributing FOIA Program is responsible for the following core functions:

- Complete and close all assigned search, collection, and review tasks in a timely manner, including local electronic and hardcopy searches;
- Coordinate with the Lead FOIA Program to identify subject matter experts, custodians, record source locations, including electronically stored information, search terms, date range and other search criteria for centralized searches performed by the eDiscovery Division;
- Assist the Lead FOIA Program with document reviews, as appropriate; and
- Enter administrative costs into FOIAonline, as necessary.

The Contributing FOIA Program's FOIA Officer or Coordinator may assign tasks to the appropriate division or branch within the Contributing FOIA Program for completion. The Contributing FOIA Program will identify the staff who will assist in conducting the search and review tasks.

**eDiscovery Division** – The eDiscovery Division provides an electronic centralized search service to support the Agency's Program and Regional Offices in responding to litigation, FOIA requests, congressional inquiries and other formal requests for Agency information.

**FOIA Coordinator or FOIA Officer** – Each FOIA Program (i.e., EPA Region or Headquarters Program Office) shall have a FOIA Coordinator or FOIA Officer who serves as the primary contact for the NFO and other FOIA Programs. The primary function of the FOIA Coordinator or FOIA Officer is to ensure:

- The proper assignment of a request within their FOIA Program;

- That proper staff are assigned to process the FOIA request;
- The timely processing of a FOIA request in accordance with the FOIA, the FOIA Regulations, the Agency's FOIA Policy, and these Procedures; and
- That reports are properly and timely submitted to the NFO.

Additional duties to be performed by the FOIA Coordinator or FOIA Officer may be detailed in the FOIA Program's local procedures.

**FOIA Manager** – A FOIA Manager is a GS-14 level or higher manager who is specifically assigned to oversee prompt processing of FOIA requests by a FOIA Program. A FOIA Manager is also responsible for the duties listed in the Managers and Supervisors role.

**FOIA Professionals** – All FOIA Managers, FOIA Officers, FOIA Coordinators or other EPA employees, contractors, or grantees who interact with FOIA requesters or perform FOIA processing activities as part of their regularly assigned duties or in accordance with their contract or grant.

**FOIA Programs** – See “Headquarters or Regional FOIA Programs.”

**FOIA Public Liaisons** – EPA “supervisory officials to whom a requester under [the FOIA] can raise concerns about the service the requester has received from the FOIA Requester Service Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.” 5 U.S.C. § 552(l). At the EPA, the FOIA Public Liaisons are the Associate General Counsel for the National FOIA Office and any supervisor designated as a FOIA Public Liaison by the Chief FOIA Officer or the Associate General Counsel for the National FOIA Office.

**FOIA Requester Service Center** – The FOIA Requester Service Center (FOIA Hotline) provides members of the public with information on the status of their request, on how and where to submit a FOIA request, and the types of information available on EPA's websites. The FOIA Public Liaisons and the National FOIA Office's staff members make up the FOIA Requester Service Center.

**General Law Office** – The General Law Office (GLO) within the EPA's Office of General Counsel is responsible for the following FOIA functions:

- Provide FOIA legal counseling, including on the applicability of FOIA exemptions;
- Concur on the use of 5 U.S.C. § 552(c)
- Adjudicate FOIA appeal determinations;
- Provide legal counsel to support the Agency's defense in FOIA litigation proceedings;
- Provide and support FOIA training; and
- Review CBI substantiations, and issue determinations for TSCA and FIFRA CBI claims, and CBI claims originating in Headquarters.

**Headquarters and Regional FOIA Programs (FOIA Programs)** – The Office of the Administrator, each EPA assistant administrator-level Headquarters office, and each EPA Region. Each FOIA Program shall have a FOIA Coordinator or FOIA Officer who serves as the primary contact for the NFO and other FOIA Programs. Any further assignment of FOIA

processing responsibilities and tasks within a FOIA Program should be addressed in the FOIA Program's local procedures.

**Lead FOIA Program** – The FOIA Program assigned the FOIA request by the NFO. The Lead FOIA Program is responsible for the following core functions:

- Serve as the primary contact for FOIA requesters;
- Assign review tasks, and search tasks for hardcopies and records that are not collected through the eDiscovery Division centralized search, to staff within the Lead FOIA Program and to the FOIA Officer or Coordinator in any Contributing FOIA Program;
- Submit all necessary centralized searches to the eDiscovery Division and ensure that all necessary search and review tasks are completed;
- Coordinate referrals, consultations, equity reviews, and awareness notifications; and
- Release records that are responsive and properly reviewed in FOIAonline, as appropriate, prepare and issue interim response and final determination letters, send invoices, and close out FOIA requests.

The Lead FOIA Program's FOIA Officer or Coordinator may assign the request to the appropriate division or branch within the Lead FOIA Program for processing. The Lead FOIA Program will identify the staff who will assist in conducting the search and review tasks. The Lead FOIA Program will contact each Contributing Programs' FOIA Officer or Coordinator to coordinate Contributing FOIA Program search and review tasks.

**Managers and Supervisors** – EPA managers and supervisors are accountable for ensuring that staff responding to FOIA requests have the knowledge, skills, abilities, resources, and time to perform their duties, which includes responding in a thorough and timely manner to requests, and ensuring both the protection of confidential and privileged information and the Agency's compliance with all applicable laws, regulations, policies and Executive Orders. Additionally, EPA managers and supervisors are responsible for the following functions:

- Conducting a second-level review of the documents to ensure compliance with the FOIA, including application of exemptions, prior to releasing records;
- Ensuring the issuance of timely and well-reasoned interim responses and final determinations responding to the request; and
- Actively assisting with related appeals and litigation.

**National FOIA Office** – The National FOIA Office (NFO) is designated by the Chief FOIA Officer. *See* 40 C.F.R. § 2.100(c). The Associate General Counsel for the NFO is delegated the authority to perform and oversee the functions assigned to the NFO. The NFO coordinates and administers the Agency's FOIA implementation, including but not limited to: assigning requests to a Lead FOIA Program; issuing expedited processing and fee waiver determinations; developing EPA's FOIA Policy and Procedures; reviewing FOIA Programs' local procedures; counseling on processing and responding to FOIA requests, including on the applicability of FOIA exemptions; preparing quarterly and annual reports to the Department of Justice; coordinating with the Office of Government Information Services and DOJ's Office of Information Policy; and providing FOIA training, support and assistance to Agency employees, FOIA Professionals, and Managers and Supervisors.

**Office of General Counsel** – The Office of General Counsel (OGC) is responsible for exercising the authorities assigned to the Chief FOIA Officer, the NFO, and the General Law

Office. Under the direction of the General Counsel, the OGC provides direction, oversight, and support for FOIA processing throughout the Agency.

**Office of Inspector General** – On FOIA matters pertaining to the Office of Inspector General (OIG), including the collection and review of records in the custody and control of the OIG, OIG and the Counsel to OIG perform the following functions: issue determinations on FOIA appeals, and confidentiality determinations, except when a conflict of interest arises as described in the EPA FOIA Regulations; provide counsel on FOIA exemptions; and assist the DOJ attorneys in FOIA litigation. The OIG will comply with these Procedures and the FOIA Policy to the extent it does not conflict with the Inspector General Act, as amended.

**Office of Regional Counsel Attorneys** – Regional attorneys provide legal counsel to regional staff who have been assigned to assist and review records with respect to a FOIA response and perform at least the following functions:

- Review documents for consistent and correct application of exemptions, as appropriate;
- Assist in communications with the requester, as necessary and appropriate on a case-by-case basis, to clarify a request, determine appropriate search terms, and negotiate deadlines for response, among other things;
- Assist in preparation of FOIA response letters that assert one or more FOIA exemptions;
- Review CBI substantiations and coordinate with the Regional Counsel to issue CBI determinations;
- Coordinate with attorneys in OGC to ensure nationwide consistency of legal interpretations, as necessary; and
- Actively assist with FOIA appeals and litigation.

**Subject Matter Experts** – Subject matter experts are staff who have knowledge regarding the scope of a FOIA request and responsive documents. Subject matter experts will assist in identifying, locating, and reviewing records potentially responsive to a FOIA request.

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## 10. Definitions

**Administrative Appeal** – An independent review of and adverse determination made in response to a FOIA request. The GLO generally handles administrative appeals, except that the NFO handles administrative appeals of adverse determinations made by the GLO and the Office of Inspector General handles appeals of adverse determinations made by the Office of Inspector General. *See* 40 C.F.R. § 2.104(j).

**Agency Records** – An agency record subject to FOIA includes records, in any format including electronic, that are either created or obtained by an agency, and under agency control at the time of the FOIA request regardless of whether they are considered Federal Records under the Federal Records Act.

**Commercial Use** – A type of request from or on behalf of a person who seeks information for a use or purpose that furthers the requester’s commercial, trade, or profit interests, which may include furthering those interests through litigation. *See* 52 Fed. Reg. 10012 (March 27, 1987).

**Complex Request** – A complex request typically requires an increased amount of work, additional time needed to process the request, or both, including limitations based on the number of pages involved. *See also* Definitions, *Simple Request*.

**Consultation** – When an agency locates records that either “originated with the agency, but which contain within them information of interest to another agency or another component [within their agency],” or “originated with an entity that is not itself subject to the FOIA” and “consults with that other agency, or equity holder, to obtain its views prior to disclosure of the records.” *See* Department of Justice Office of Information Policy Guidance, *Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them*.

**Educational Institution** – A preschool, public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education or an institution of vocational education, “whose purpose is scholarly. . . research.” *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II).

**Expedited Processing** – The processing of a FOIA request or appeal out of the order in which it was received and prioritized over other pending FOIA requests “whenever EPA determines that such requests or appeals involve a compelling need, as follows: (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or (ii) An urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public.” 40 C.F.R. § 2.104(f).

**Fee Categories** – Categories under FOIA that determine assessments of fees to requesters. Requesters fall into one of four fee categories: (1) commercial requesters; (2) educational or noncommercial scientific institutions; (3) representatives of the news media; and (4) all other requesters (i.e., requesters who do not fall into any of the other four categories).

**Fee Waiver** – A request made to an agency to waive any applicable fees for its processing of a FOIA request. Fee waivers are limited to situations in which a requester can show that the disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester. Requests for a fee waiver are evaluated on a case-by-case basis consistent with the statutory requirements.

**FOIA Exemptions** – Pursuant to 5 U.S.C. § 552(b), the nine enumerated exemptions to the statutory requirement that agencies make records available in response to a FOIA request. *See* 5 U.S. C. § 552(b)(1)–(9).

**Full Denial** – An agency decision not to release any responsive records in response to a FOIA request because the records are exempt in their entirety under one or more of the FOIA exemptions.

**Full Grant** – An agency decision to disclose all responsive records in full in response to a FOIA request.

**Glomar Response** – An agency’s express refusal to confirm or deny the existence or non-existence of records responsive to a FOIA request because confirmation of the existence of a record would reveal protected information.

**Media Requester** – “[A]ny person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ‘news’ means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by, or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.” 5 U.S.C. § 552(a)(4)(A)(i)(II).

**Non-Commercial Scientific Institution** – An institution that is not operated on a commercial basis but “whose purpose is. . . scientific research,” the results of which are not intended to promote any particular product or industry. *See* 5 U.S. C. § 552(a)(4)(A)(ii)(II).

**No Records Response** – A FOIA request for which no responsive records were located.

**Partial Grant/Partial Denial** – Portions of the record will be withheld from the requester if covered by either one or multiple FOIA exemptions. The portions of the record that are not redacted are released to the requester.

**Redact** – The act of removing or obscuring exempt information from copies of responsive documents either manually or utilizing redaction software.

**Referral** – When an agency locates records that “originated with another agency” and “refers records for direct handling to [that other agency].” *See* Department of Justice Office of Information Policy Guidance, *Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them*.

**Requester** – Any individual (including non-U.S. citizens), corporation or association, public interest group, or state, local, tribal, or foreign government making a FOIA request. Requests from federal agencies, the Government Accountability Office, or Congress (e.g., the Speaker of the House, the President of the Senate, or the chair of a committee or subcommittee when acting on behalf of their committee or subcommittee) are not covered under FOIA.

**Simple Request** – A FOIA request that an agency anticipates may be processed without an increased amount of work, additional time, or both, including consideration of the number of pages involved. *See also* Definitions, *Complex Request*.

**Unusual Circumstances** – When there is a: “(1) need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or (3) need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.” 5 U.S.C. § 552(a)(6)(B)(iii).

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**11. Material Superseded**

Chief Information Officer 2157-P-01.1, Procedures for Responding to Freedom of Information Act (FOIA) Requests.

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**12. Additional Information**

This document is not intended to create any rights or privileges for the public, or obligations on the part of EPA.

**DAVID FOTOUHI** Digitally signed by DAVID  
FOTOUHI  
Date: 2020.11.06 14:40:21 -05'00'

David Fotouhi

Acting General Counsel and Chief Freedom of Information Act Officer

U.S. Environmental Protection Agency

# Conducting a FOIA Self Audit for Due Date Extensions

Timothy R. Epp

Denise Walker

Joan Mumbleaux

National FOIA Office  
July 15, 2021

## Why self audit - what are the benefits?

- ▶ Ensure that extended due dates are *defensible in appeals or litigation*
  - ▶ Saves time and money by reducing instances of administrative appeals and litigation
- ▶ *Support data reporting of the backlog* by using full statutory flexibility
  - ▶ Provides an opportunity to decrease your program's backlog numbers
  - ▶ Allows EPA to use the statute provisions to the full extent available during our annual reporting to DOJ and OMB

## *We are employing the self audit processes established last year*

- ▶ The most efficient process - each program review,
  - ▶ all *open requests*
  - ▶ with *extended due dates* and,
  - ▶ confirm that each request's FOIAonline record includes supporting documentation
  - ▶ Provide Joan Moubleaux with certification

## *How to self-audit, step-by-step*

- ▶ *Review each request with a due date more than 20 working days after the perfected date.*
- ▶ *Ensure that initial correspondence was sent within the initial 20 working days, and any subsequent extension needs to be given before the prior extension expires.*
- ▶ *Confirm that each case file includes correspondence to requester confirming due date extension(s).*

## Reasons for Extending Request Due Dates

- ▶ *Fee assurance*
- ▶ *Request clarification* - providing the requester an opportunity to negotiate scope or to extend the due date
- ▶ *Due Date Negotiated* with requester
- ▶ *Unusual Circumstances* properly invoked, with estimate of completion date provided to the requester

*Let's take a closer look at each scenario*

*Here's what to look for in each  
FOIA request with extended due dates*



## ***Fees and Fee Assurance Documentation***

- ▶ A fee negotiation can occur as many times as needed
- ▶ **What does confirmation look like in FOIAonline?**
  - ▶ Communications to the requester
  - ▶ Requester's replies
  - ▶ There may be several communications before you reach a resolution

## *Clarification Documentation*

- ▶ Clarification can occur only once
- ▶ **What does confirmation look like in FOIAonline?**
  - ▶ Communication to requester
  - ▶ Requester's reply clarifying the request by changing the scope or agreeing to an extended due date
  - ▶ Communication to requester confirming agreed clarification

## *Date Negotiated with Requester Documentation*

- ▶ Negotiations can occur as many times as needed
- ▶ **What does confirmation of a negotiated due date look like in FOIAonline?**
  - ▶ Communications to requester
  - ▶ Requester replies
  - ▶ There may be several communications before you reach agreement
  - ▶ You may negotiate to extend the due date at any time and more than once while the FOIA is open

## *Unusual Circumstances Documentation*

- ▶ **What does assertion of unusual circumstances look like in FOIAonline?**
  - ▶ Communication to requester stating unusual circumstances and providing estimated completion date. *40 C.F.R. § 2.104(e)*
  - ▶ Reasons for invoking Unusual Circumstances
    - ▶ Voluminous records
    - ▶ Collecting records from multiple locations within the Agency
    - ▶ Records contain other agencies' interests requiring their consultation

# Unusual Circumstances, 40 CFR 2.104 (e)

## ► Regulatory Requirements under § 2.104

1. Notify the requester in writing, as soon as practicable,
  - a) of the unusual circumstances; and,
  - b) of the date by which processing of the request should be completed.
2. Give the requester:
  - a) an opportunity to limit the scope of the request,
  - b) modify the request,
  - c) or agree to an alternative time-period for processing.
3. Provide contact information for the FOIA Public Liaison; and,
4. Notify the requester of their right to seek dispute resolution services from the Office of Government Information Services (OGIS).

# Why assert Unusual Circumstances?

Asserting that unusual circumstances exist gives the Agency more time to process the request. This is important in relation to:

- ▶ Preserving the ability to charge fees. 5 U.S.C. § 552 (a)(4)(A)(viii)
- ▶ The FOIA backlog
- ▶ Good customer service
- ▶ Avoid potential FOIA lawsuits
  - ▶ Requesters may seek judicial relief in district court if you fail to meet the statutory time frame for response. 5 U.S.C. §552(a)(6)(C)(i).
  - ▶ FOIA litigation is labor intensive and expensive
  - ▶ Attorney fees and costs come out of EPA office budgets

# When does the agency invoke unusual circumstances (UC)?

1. During Intake: The agency reviews requests for unusual circumstances during the intake process



2. After Intake: FOIA Programs receiving a perfected and assigned request may also invoke unusual circumstances under certain circumstances.



## Need Even More Time?

You have the automatic 10 day extension BUT you can extend the response time BEYOND 30 working days upon notice to the requester in writing:

- ▶ Unusual circumstances that apply to the request;
- ▶ Agency response requires more than 10 additional working days to complete;
- ▶ Provide an opportunity to limit the scope so that it may be processed within 30 working days or an opportunity to arrange an alternative time frame for processing the request or modified request;
- ▶ Provide the estimated date by which processing of the request should be completed
- ▶ Provide contact information for the FOIA Public Liaison to assist in the resolution of any disputes between the requester and agency; and
- ▶ Provide notice of the requester's right to seek dispute resolution services from OGIC and OGIS' contact information

# How Do I Do This?

- ▶ Go to the NFO SharePoint Site
- ▶ Open [Due Date Extensions Including Unusual Circumstances](#)
- ▶ OR Find the template letters in the toolkit.



# Extending the Due Date

To extend the due date, an agency user must enter the information in FOIAonline under Actions > Extend Due Date.

The screenshot shows the 'Extend the Due Date' form in the FOIAonline system. On the left is a navigation menu with options: Case File Details, Actions, Make Assignment, Estimate Costs, **Extend Due Date**, Upload Responsive Records, Interim Release, Begin Close Out Process, Create New, and Other. The main content area is divided into three sections: 'Requester Information', 'Due Date Extensions', and 'Extend the Due Date'. The 'Requester Information' section is currently empty. The 'Due Date Extensions' section contains a table with columns for 'Estimated Completion', 'Requester Approved', and 'Requester Approval Date'. A message states 'No due date extensions have been created.' Below the table are 'Copy to Clipboard' and 'Export to CSV' buttons. The 'Extend the Due Date' section contains three required fields: 'Is Extension due to Unusual Circumstances?' (a dropdown menu with 'Yes' selected), 'Estimated Date of Completion' (an empty text box with a red border and a help icon), and 'Extension Justification' (a large text area with a character count of 0/256). At the bottom of this section are 'Extend Due Date' and 'Cancel' buttons.

Estimated Completion	Requester Approved	Requester Approval Date
No due date extensions have been created.		

**Extend the Due Date**

- \* Is Extension due to Unusual Circumstances? Yes
- \* Estimated Date of Completion  
Estimated Date of Completion is required.
- \* Extension Justification  
0/256

Requester Info Available to the Public

Yes

Request Track

Simple

Fee Category

Commercial

Fee Waiver Requested No

Fee Waiver Status

Expedited Processing Requested No

Expedited Processing Status

Request Type

FOIA

Request Perfected

Yes

\* Perfected Date

11/19/2019

Acknowledgement Sent Date

Unusual Circumstances

Extension Justification

Given the current holiday season, it took a great deal of time to research the records requested due to many staff being on vacation.

Litigation

No

While it is good to provide details about resource issues, etc. one of the statutory reasons must also be cited.

# Questions and Guidance

*PLEASE Use our template letters!*

*Please send comments and questions to [moumbleaux.joan@epa.gov](mailto:moumbleaux.joan@epa.gov)*



National FOIA Office  
EPA Office of General Counsel

# “Still-Interested” Inquiries & Negotiating with FOIA Requesters

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Kevin W. Hill & Denise Walker  
FOIA Expert Assistance Team,  
National FOIA Office,  
Office of General Counsel

# Why is this training important?

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- ❖ To help decrease your FOIA program's backlog
- ❖ To help you comply with the law and Department of Justice Guidance
- ❖ Good Customer Service
- ❖ To support the Agency's 2018-2022 [Strategic Plan](#)
  - ❖ *Zero agency backlog by September 30, 2022*
- ❖ To meet EPA's FOIA commitments in [Administrator Regan's FOIA Memorandum](#)
- ❖ To create a clear administrative record & avoid excessive FOIA litigation and attorneys' fees

# Agenda

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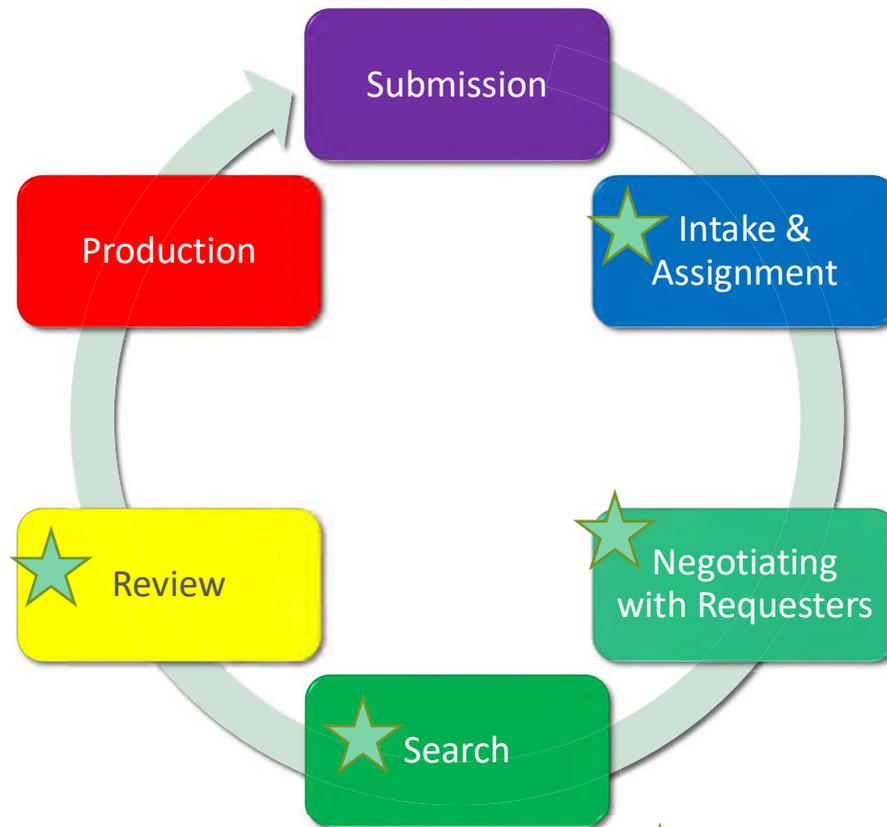
## **Part 1: Still-Interested Inquiries**

- New Guidance from the DOJ's Office of Information Policy
- Implementation Checklist – 8 Steps
- Template Language

## **Part 2: Negotiating with FOIA Requesters**

- Clarification Call Checklist

# Lifecycle of a FOIA Request at EPA



★ = When to contact requester



National FOIA Office  
EPA Office of General Counsel

# Communication is key

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**Below are common communications that may occur:**

Clarify Scope of the request

Increase Fee Limit /  
Assurance of  
Payment

Extend Due Date

Discuss Search  
Terms

Discuss Preliminary  
Search Results

Status Updates

Interim release of  
records

Final release and  
close out letter

# “Still-Interested” Inquiry

# DOJ Guidance: “Still-Interested” Inquiries

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**Guidance from the  
DOJ’s Office of Information Policy  
in 2010**



**Implementation Checklist for  
“Still-Interested” Inquiries**



**Updated Guidance  
on July 23, 2021**

## Purpose of the “Still- Interested” Inquiry

As stated in DOJ’s 2010 guidance, “When done judiciously, this is entirely appropriate because agency resources should not be expended on processing a request when the requester is no longer interested in the records.”

Rather than expending limited time and resources on a request that is no longer of interest, agency FOIA professionals can move on to processing the next requests in their processing queues, ensuring that those requests are not delayed unnecessarily.

\*NEW \* Agencies ***should first*** send an acknowledgement of the request and provide a point of contact for questions, ***prior to*** sending a still-interested inquiry!

From the DOJ Guidance: “As a matter of sound FOIA administration, prior to sending a “still-interested” inquiry agencies should, at a minimum, have already provided the requester with an acknowledgment of his or her request and given the requester a point of contact and contact information for any questions. ***The “still-interested” inquiry should never be the first communication a requester receives from the agency.***”

\*New\* send acknowledgement first

# Implementation Checklist

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The Department of Justice developed an “Implementation Checklist” for agencies to reference with 8 easy-to-follow steps.

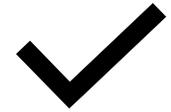
The checklist was updated with the July 2021 Guidance

## 1. Reasonable Grounds

Ensure there are reasonable grounds to make a “still-interested” inquiry in the first instance.

# Knowledge Check

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- A FOIA request has been open for two years.
- Is the passage of time enough to send a still interested letter?

From the DOJ Guidance: “While the passage of time is often an indicator, it is not dispositive. For example, an agency may have been in regular communication with a requester and as a result of those exchanges it would have a clear indication that the requester remains interested in the records despite the age of a request. A “still-interested” inquiry would not be appropriate in such a case. ”



# Is passage of time enough?

From the DOJ Guidance: “As OIP emphasized in its [2010 guidance](#), it is critical that agencies remain cognizant of how such communications can be perceived by requesters and to work in a “spirit of cooperation” when making “still-interested” inquiries. For example, it can be helpful to explain why the agency is making the inquiry.”



## Explaining the “Why”

# Knowledge Check

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- The agency sent a significant interim release and thinks that the interim release will cover most of the records sought.
- Would this be reasonable grounds to send a still-interested inquiry?

From the DOJ Guidance: “When making a significant interim release to a requester the agency may believe that the release will satisfy the requester’s information needs and so inquiring about proceeding further would be appropriate. ”

Is an interim release enough?

# Knowledge Check

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- The agency proactively disclosed responsive records and directed the requester about how to locate these materials.
- Would this be reasonable grounds to send a still-interested inquiry?

From the DOJ Guidance: “The agency may have proactively disclosed records on a topic that is also the subject of a request. It would be appropriate for an agency to point to the newly posted material and inquire whether the availability of that material has met the requester’s information needs.

Is a proactive release enough?

From the DOJ Guidance: “The key point for agencies is that prior to sending a “still-interested” inquiry, they must have reasonable grounds to do so. If the agency does not have reason to believe that the requester’s interest in the request has waned, it should not send a “still-interested” inquiry.”

Reasonable grounds?

## 2. One-time inquiry

Absent good cause, an agency should not inquire more than once whether a requester is “still-interested”

### 3. Use Requester's Preferred Method

Use requester's preferred method of communication and in the absence of a preference, communicate by telephone or email as the default.

## 4. Memorialize

Memorialize any decision by a requester to withdraw a request that is conveyed by telephone by sending the requester a brief email or letter noting the withdrawal.

## 5. Wait 30 Working Days

Provide requesters no less than thirty (30) *working* days to respond to the “still-interested” inquiry and ensure that there is a simple way to do so.

## 6. Notify about Consequences

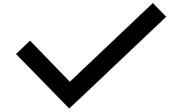
Advise the requester that if they elect not to respond to the inquiry, the request will be administratively closed at the conclusion of the designated time period (which must be at least 30 working days).

## 7. Multiple Methods

Prior to administratively closing a request based upon the lack of a response by the requester, make good faith efforts to reach out to the requester using *multiple methods* of communication.

# Knowledge Check

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- The agency tried to reach the requester by phone unsuccessfully, and then sent an email, explaining the consequences for a non-response.
- This counts as two communication methods, but would this be enough to administratively close the request?

From the DOJ Guidance: “Whenever feasible, the agency should make its “still-interested” inquiry using more than one method of communication. When attempts to reach a requester by phone are unsuccessful, the agency should send a written communication, either email or letter, and include in that outgoing communication a notification to the requester of what will happen to the request if the requester does not respond to the “still-interested” inquiry.”

## Multiple methods?

# How Many Attempts?

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- The DOJ guidance is not clear about *how many* attempts, but the guidance does recommend “multiple methods.”
- The guidance gives the example of one unsuccessful phone call followed by one email or letter.
- Best practice would be to include two written communications, including a follow-up email or letter.
- Memorialize in your Close Out Letter the *dates* and *methods used* to contact the requester



## 8. Requester Responds after Closure

In the event a requester responds to the “still- interested” inquiry within a reasonable time after the deadline has passed, reopen the request and place it back into the processing queue where it would have been.

# Knowledge Check

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- The agency called the requester, followed-up with an email, waited 30 working days and heard no response.
- Two months later, the requester contacts the agency and advises that he was out of the country, but that he is still interested in the processing of the request.
- What should the agency do?

From the DOJ Guidance: “There may be occasions, however, where a requester takes longer than the allotted days to indicate that he or she is still-interested. This can occur for example, when the employee of an organization has changed jobs, or when a requester has been on extended travel. In such circumstances the requester might miss even the thirty working day window now being afforded to indicate his or her continued interest. In that event, when a requester responds to the agency *within a reasonable time after the deadline*, in order to be sure that the requester has not been disadvantaged by the administrative closure, the agency should simply re-open the request. Importantly, agencies should also place the request back into the processing queue in the place where it would have been had the “still-interested” inquiry not been sent.”

## Re-open and place back in queue?

**Interim Response & Time Has Passed:** We apologize as our agency FOIA Program is working through a large backlog of requests. I have been assigned to process your FOIA request. Given that so much time has passed since the submission of your request and the agency's interim release of records on August 29, 2018, are you at this time still interested in these records from 2018? If not, I would be happy to withdraw the request for you. Please let me know if you are still interested in this request. Please contact NAME at EMAIL ADDRESS with your confirmation or call PHONE NUMBER if you would like to set up a time to further discuss your request.

**Interim Response:** Please contact our office if these interim response records satisfy your request or you no longer wish to pursue your request. You may contact NAME at EMAIL ADDRESS or at PHONE NUMBER. If you wish to request information connected to this request in the future, please reference the FOIA request number.

# Template language

**Topic No Longer Timely:** Because the issue has since been resolved, and the records you are seeking are about the issue, are you still interested in proceeding with your request?

**Proactive Disclosures:** We apologize for the long delay as we are working through a backlog of requests. On DATE, the agency proactively released agency records on this same topic at the following link. After reviewing the records at this link, do you remain interested in the records for your FOIA request?

Template language

## **Notice of 30 Working Days + Closure Paragraph:**

Please reply within 30 working days from the date of this letter. If we do not hear back from you, the agency may issue a final determination to close out your request. Please note that you are not prohibited from submitting additional Freedom of Information Act requests in the future. For more information, please visit our website at: <https://www.epa.gov/foia>.

# Template language

## **Public Liaison & OGIS Paragraph:**

If you need any further assistance or would like to discuss any aspect of your request, you may seek assistance from EPA's FOIA Public Liaison at [hq.foia@epa.gov](mailto:hq.foia@epa.gov) or call (202) 566-1667. You may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001; email: [ogis@nara.gov](mailto:ogis@nara.gov); telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

# Template language

My Name x

My Actual Agency

Request Details v

Request Details

Initial Review

Expedition Review

Search Pending

Review

Concurrence Pending

Final Review

Non-Partner Consultation

Fee Estimate

Other

## Tracking the 30 Days

- Open a task in FOIAonline
- Assign it to yourself
- Set the task due date at 30 *working* days (not calendar days)
- One task type to use: Request Details

# Negotiating with Requesters



# When is it a Good Idea to Contact a Requester?

---

## **When you have questions and need answers to save processing time:**

- “Willing to narrow the scope of the request?”
- Clarify something about the Request Description for us?”
- “ You left out a time period of interest? Are you interested in records from 2019? 2020? Only this year?”
- What do you mean by “all emails” for all of our agency? Could you provide more information about employees who may have been involved”
- “Are you still interested in the records?”

# Negotiating and Documenting a Clarification: Before the Call

---

- Make sure you're prepared!
- Have a call with your subject matter experts.
- Agree who will lead the call and who will take notes.
- Talk through the information you already have and that you need to find out to conduct a search:
  - Custodians?
  - Search Terms?
  - Record Types and Locations?
  - Time Frame?
  - Possible CBI?

## Coordinate with the Requester:

- Send a letter requesting clarification explaining what information you need and include publicly available information if applicable.
- Agree on the date and time for the call and who the participants will be.



# What is Active Listening?



# Clarification Call Checklist



National FOIA Office  
EPA Office of General Counsel



**1. Be attentive**



**2. Ask open ended questions and listen**



**3. Ask probing questions**



**4. Ask for clarification**



**5. Paraphrase**



**6. Be attuned to and respond to feelings**



**7. Summarize**

# Negotiating and Documenting a Clarification: During the Call

---

Relax. You're prepared.



## **1. Be attentive:**

Make sure everyone is on the call. Introduce yourself and your team with confidence and kindness.

Wait for everyone to join. It's OK to engage in small talk while you wait.

Once everyone arrives: Begin by thanking the requester to take time to talk to you about the request.

# Negotiating and Documenting a Clarification: During the call

---



## 2. Ask Open Ended Questions and Listen:

*“I have your request in front of me, but I’d like to start by letting you explain in your own words what you’re looking for.”*

Don’t interrupt until the requester is finished. Encourage the speaker to continue with small verbal comments like yes, and uh huh.



## 3. Ask Probing Questions:

*“Is there a specific document you have in mind?”*

*“If we were able to provide the perfect document or set of records to you, what would it look like?” “Do you need records by a particular date?”*

-Ask any follow-up questions that will help you or the SMEs locate the right records

# Negotiating and Documenting a Clarification: During the call

---

## 4. Request Clarification:



“Could you clarify what you meant by “related to Q-AWESOME?”

→ Certain offices: Ask if the requester is willing to exclude CBI from the request. Explain why and how this will save time.

## 5. Paraphrase:



*“So let me see if I understand: You’re looking for email records that reflect EPA conversations with outside stakeholders while the agency was developing the Q-AWESOME Policy. Is that correct?”*

→ During the pandemic, if requesters are seeking paper or microfiche records (registration materials or pesticide studies) let them know we are unable to access those currently.

# Negotiating and Documenting a Clarification: During the call

---



## 6. Be Attuned to and Reflect Feelings:

*“It sounds like you’re concerned that we might clarify or put limits on your request in a way that won’t meet your needs. After this call, I’ll send you a letter that will document our conversation today. You will have the opportunity to review it and let us know if we misunderstood something. And, of course, you can always submit more FOIA requests.”*

*“It sounds like you might be feeling frustrated about the timeline that I proposed, would it help to set up a bi-weekly check in call to update you on our progress?”*



## 7. Summarize:

“You’re looking for the email records and attachments that were sent to and from non-EPA email addresses by the key employees in this office between March 1 and March 31 and we’ll use the search term: “Q-AWESOME”.

# Negotiating and Documenting a Clarification: During the call

---



## 8. Be attentive as you end the call:

Again thank the requester for speaking with you. Let them know they can reach you by phone or email if they have additional questions. Let them know if the information they want is online. Let them know the next steps as applicable:

*“Thank you for speaking with us today. I think we have what we need to move forward with the search and collection for your request. We will restart the clock as of today’s date. We’ll send you a letter this afternoon/ Monday/in the next few days that will capture what we talked about today. The letter will also include your (revised fee estimate/ information for a follow-up call/ links to publicly available information/ the estimated date of completion... Etc.)*

*Is there anything else you need from us at this point?*

*Again, thank you for your time. We will be in touch soon.*

# Negotiating and Documenting a Clarification: After the Call

---

Debrief with anyone else who was on the call with you.

As soon as possible, draft the follow-up letter/ email to the requester.

If the clock was stopped for clarification or fees restart it in FOIAonline.

→ During the pandemic, if requesters are seeking paper records, include the NFO language in the follow-up letter.

Upload the clarification letter in FOIAonline.

Let's look at a few example follow-up letters.

# What if things go sideways??

---

## **1. The requester calls you out of the blue and you aren't prepared to talk to them.**

→ Tell them you are not available to talk right now but will be happy to schedule a time with them.

## **2. The requester is hostile, angry, or abusive.**

→ Breathe. Be polite and helpful to a point. Please do not tolerate abusive behavior. Do your best to acknowledge their feelings or fears and attempt to resolve the situation. "It sounds like you are upset and frustrated about the possibility of contamination in your community. Can you tell me which records would best assist your community group...?"

If the requester persists with being abusive or hostile, politely let them know you cannot continue the conversation if the behavior continues and you will arrange to speak with them at another time.

"Mr. Angry, if you continue to swear at me, I will be unable to help you. Are you willing to continue the conversation calmly or shall I reschedule/refer you to the FOIA Public Liaison?"

## **3. The requester asks for something you aren't sure about.**

→ It's ok to say that you need to confer with your supervisor/ the NFO /SME and get back to them.

## **4. The requester asks questions about the work of the agency.**

→ In general, refer these questions to the Office of Public Affairs. [press@epa.gov](mailto:press@epa.gov)

# The importance of a good administrative record

- ❖ A **good administrative record** tells the story of the request – from cradle to grave.
- ❖ Use **Comments and Correspondence features** in FOIAonline to maintain your administrative record.
- ❖ **Include:**
  - ❖ All communications (phone calls, email, and letters) with requester;
  - ❖ Summary of internal discussions about request, especially decisions regarding interpretation of request, search strategy, withholdings, productions;
  - ❖ Procedural actions and reasoning (e.g., clock stoppage, office reassignment);
  - ❖ Search instructions;
  - ❖ Applied and unapplied versions of redacted and withheld records; and
  - ❖ Any information you think would be helpful to GLO on appeal/litigation.

# Thank you!

---

**Questions and Feedback:**

**Kevin W. Hill, National FOIA Office, Office of General Counsel**

[hill.kevinw@epa.gov](mailto:hill.kevinw@epa.gov)

**EPA FOIA Intranet: [https://usepa.sharepoint.com/sites/EPA\\_OGC\\_NFO](https://usepa.sharepoint.com/sites/EPA_OGC_NFO)**

**DOJ guidance: <https://www.justice.gov/oip/limitations-use-still-interested-inquiries>**



# FOIA Toolkit

The Life Cycle of a FOIA Request

The Key Steps to Processing FOIA Requests





**National FOIA Office**

Office of General Counsel

*Last Updated March 2022*



## Introduction

The Freedom of Information Act (FOIA or statute), 5 U.S.C. § 552, provides that any person has a right to obtain access to agency records, except to the extent that such records (or portions of them) are protected from public disclosure by an applicable FOIA exemption. EPA receives thousands of FOIA requests a year, many of which are complex requests that seek records from multiple EPA offices. When responding to FOIA requests, EPA complies with the FOIA, EPA's FOIA Regulations, 40 C.F.R. § 2.100 *et seq.*, EPA's FOIA Policy, EPA's FOIA Procedures, and FOIA Program's local FOIA procedures, <http://intranet.epa.gov/foia/FOIA-Procedures.html>.

This Toolkit and the Toolkit Appendix detail the lifecycle of a FOIA request and contain tips to help you successfully process both complex and simple FOIA requests. The Toolkit is intended for the internal use of agency employees and contains best practice guidelines and suggestions only. While the Toolkit is intended to help Agency employees comply with EPA policies, this document is not an official EPA policy. Further, the Toolkit does not change, modify, or supersede applicable legal obligations, including obligations imposed by regulation or statute.

Your use of this Toolkit is voluntary. This Toolkit is not legally enforceable and does not confer legal rights or impose legal requirements upon any member of the public, States, or any other federal agency. The word "should" in this Toolkit does not connote a requirement but rather indicates a strong recommendation in terms of a best practice.

Furthermore, the suggestions in this Toolkit may not apply in a situation based upon the circumstances, and EPA retains the discretion to adopt approaches on a case-by-case basis that differ from this Toolkit. Finally, this is a "living document," and EPA may revise the Toolkit periodically.

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## Part 1. Centralized Intake

### Part 1.A. Receiving FOIA Requests

FOIA requesters can submit their written FOIA requests to EPA electronically via FOIAonline. FOIA requesters can also submit written requests via U.S. Mail or overnight delivery to the National FOIA Office, in which case the National FOIA Office will input the request into FOIAonline. FOIAonline is EPA's management and tracking system for FOIA responses; EPA processes all requests through FOIAonline. *See* EPA FOIA Policy § 6.B.

If a FOIA Program (i.e., EPA Region or Headquarters Program Office) receives a request directly from a requester, the FOIA Program should not process the request because the requester did not submit the request in accordance with EPA's FOIA Regulations. *See* 40 C.F.R. § 2.101(a). The FOIA Program should inform the requester that the Agency will not accept the request as a properly submitted FOIA request and inform the requester of the proper methods for submitting a FOIA request under EPA's FOIA Regulations. *See generally id.*

---

#### Template A—Response to Request Submitted Directly to FOIA Program

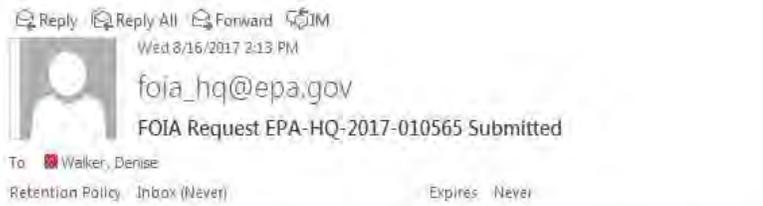
---

Once a requester submits a request through FOIAonline, the requester immediately receives notification via the FOIAonline website. In this notification, FOIAonline confirms submission of the request and provides the requester with a tracking number, the date submitted, and a brief description of the request as provided by the requester in the submission. FOIAonline then automatically generates an acknowledgement email to the requester.

The screenshot shows the FOIAonline website interface. At the top, there is a navigation bar with links for 'Glossary', 'FAQs', 'Resources', and 'About'. Below this is a secondary navigation bar with 'Home', 'Search', and 'Reports' tabs, and a search box labeled 'Search FOIA requests...'. The main content area is titled 'Request Confirmation' and contains a 'Request Information' box. The information displayed is as follows:

Tracking Number :	EPA-HQ-2017-010565
Requester Name :	Ms. Denise A. Walker
Date Submitted :	08/16/2017
Request Status :	Submitted
Description :	This is a TEST of EPA's FOIA online system. I am trying to find out what kind of acknowledgement is sent to requesters. This is not an actual FOIA.

At the bottom of the 'Request Information' box, there are two green buttons: 'MAKE ANOTHER FOIA REQUEST' and 'HOME'. Below the main content area, there is a footer with links for 'Privacy and Security Notice', 'Accessibility Statement', and 'Contact Us'.



This message is to confirm your request submission to the FOIAonline application:  
[View Request](#). Request information is as follows:

- Tracking Number: EPA-HQ-2017-010565
- Requester Name: Denise A. Walker
- Date Submitted: 08/16/2017
- Request Status: Submitted
- Description: This is a TEST of EPA's FOIA online system. I am trying to find out what kind of acknowledgement is sent to requesters. This is not an actual FOIA.

The submission confirmation and the acknowledgment email are the first communication the requester receives from the Agency. The acknowledgment email, a system-generate email, will appear as the first correspondence entry under the correspondence tab in FOIAonline.

#### Part 1.B. NFO and Lead FOIA Program Intake Coordination

This Part discusses the coordination between the NFO and the Lead FOIA Program for FOIA request intake processing. As noted in EPA's FOIA Procedures, if additional input from the Lead FOIA Program is necessary prior to the NFO acting during intake processing, the NFO may seek input from the FOIA Officer or Coordinator in the Lead FOIA Program, including but not limited to the following circumstances:

- The NFO believes the request does not seek Agency records;
- The NFO believes the request may not be reasonably described;
- The NFO believes that the processing of the request may benefit from clarification;
- The NFO requires more information to ensure proper assignment of the Lead FOIA Program; or
- The NFO believes the request may be fulfilled through publicly available or previously released records.

The NFO may take appropriate action, considering the response from the Lead FOIA Program. The NFO will coordinate with the Lead FOIA Program before stopping the clock; the clock may only be stopped once for clarification. *See* 40 C.F.R. § 2.104(d)(1). If the FOIA requester responds to the EPA's request for clarification, the NFO will coordinate with the Lead FOIA Program on that response.

The NFO will initially indicate in FOIAonline the processing track based on available information, and the Lead FOIA Program may adjust based on information available during review and processing. *See* FOIA Procedures § 10, Definitions, *Simple Request* ("A FOIA request that an agency anticipates may be processed without an increased amount of work, additional time, or both, including consideration of the number of pages involved."); FOIA Procedures § 10, Definitions, *Complex Request* ("A complex request typically requires an increased amount of work, additional time needed to process the request, or both, including limitations based on the number of pages involved.").

The NFO may also contact the FOIA Program with questions regarding a fee waiver request. The factors NFO considers when making a fee waiver determination, identified in 40 C.F.R. § 2.107(l)(2)–(3), are:

- Factor 1—*The subject of the request.* Whether the subject of the requested records concerns “the operations or activities of the government.”
- Factor 2—*The informative value of the information to be disclosed.* Whether the disclosure is “likely to contribute” to an understanding of government operations or activities. The disclosable portions of the requested records are meaningfully informative about government operations or activities and are “likely to contribute” to an increased public understanding of those operations or activities.
- Factor 3—*The contribution to an understanding of the subject by the public is likely to result from disclosure.* Whether disclosure of the requested information will contribute to “public understanding.” The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.
- Factor 4—*The significance of the contribution to public understanding.* Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.
- Factor 5—*The existence and magnitude of a commercial interest.* Whether the requester has a commercial interest that would be furthered by the requested disclosure.
- Factor 6—*The primary interest in disclosure.* Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

#### Part 1.C. Assign the Request to the Lead FOIA Program.

The NFO will assign the Lead FOIA Program by evaluating which FOIA Program (i.e., EPA Region or Headquarters Program Office) is likely to have the most records responsive to the request. Following the initial review described above, the NFO will assign the request to the Lead FOIA Program in FOIAonline.

A FOIA Coordinator or FOIA Officer may request that NFO reassign the request to another FOIA Program by contacting the NFO staff member that assigned the request initially. The NFO will resolve any assignment disputes between the FOIA Programs and, if appropriate, will reassign the request to the new Lead FOIA Program. Additionally, a Lead FOIA Program may also request reassignment of a FOIA request once documents are collected and the search results demonstrate that it may be more appropriate that the NFO assign another FOIA Program as the Lead FOIA Program.

The NFO will notify the requester that the NFO assigned the request to the Lead FOIA Program and include information for the staff contact in the Lead FOIA Program.

## Part 2. FOIA Program Initial Review

The NFO will assign the request to your FOIA Program as perfected, and it is your FOIA Program’s responsibility to ensure that the request is proper. A proper FOIA request is one that conforms to the requirements of the FOIA and the FOIA Regulations. Detailed below are the two core requirements, that the FOIA request reasonably describes the records sought and that the FOIA request seeks agency records. *See* [Part 2.A, Reasonably Described Requests](#); [Part 2.B, Agency Records](#). During your initial review, you should also consider whether the request could benefit from additional clarification. *See* [Part 2.G, Clarifying FOIA Requests](#). Remember, the clock can only be tolled (“stopped”) once to clarify the request.

### Part 2.A. Reasonably Described Requests

A proper request must reasonably describe the records sought (i.e., be “reasonably described”) meaning it enables an Agency employee familiar with the subject area to locate the records with a reasonable amount of effort. *See generally* 40 C.F.R. § 2.102(c). If a request is not reasonably described, then it is not a proper FOIA request and can be closed only after the requester is given an opportunity to modify the request. *See* [Part 2.A.iii, Applicable Legal Requirements](#).

The key inquiry is whether the request sufficiently describes the records sought such that you have enough information to begin a search. Congress intended the FOIA to provide the public with access to Agency records. The FOIA does not require the Agency to answer questions or create records to respond to a request. Keep in mind that requests can be exceptionally large—and benefit from clarification with the requester—yet still be proper.

#### Part 2.A.i. Applicable Legal Requirements

Section 2.102(c) of EPA’s FOIA Regulations state, the “request should reasonably describe the records you are seeking in such a way that will permit EPA employees to identify and locate them.” 40 C.F.R. § 2.102(c). Section 2.102(c) further provides that, “[w]henver possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter.” *Id.*

Requests do not need to have *all* these elements to be proper requests; however, requests that contain none or only one of these pieces of information likely require modification.

#### Part 2.A.ii. Evaluating Whether a Request is Reasonably Described

In evaluating whether a request is reasonably described, consider whether you can identify the records sought by the requester. It is also important to note that under the FOIA EPA does not have to answer questions, interrogatories, or perform research to answer FOIA requests. Examples of this type of improper request include:

- “What did the EPA consider or rely on to . . .”;
- “How does EPA justify . . .”; and
- “Produce any documents that prove or disprove (statement or argument).”

---

**Practice Tip:** When reading the request, if you think, “I don’t even know how we would begin to search for this,” you may have an improper request. Do not guess what the requester might be looking for—contact the requester to modify the request! See Section 2B for more information on reaching out to the requester for modification.

---

#### Part 2.A.iii. Asserting That a Request is Not Reasonably Described

First, prepare a letter to the requester, utilizing the “Opportunity to Discuss and Modify” optional language in the Detailed Initial Response template.

---

#### Template C—Detailed Initial Response

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Second, send the letter through FOIAonline or regular mail to the requester, as appropriate. If you send the letter through regular mail, ensure that a copy is included in FOIAonline under the “correspondence” tab, so all communications can be kept as part of the FOIAonline case file.

Third, stop the clock in FOIAonline.

1. In the FOIAonline case file, under Case File Details, click the “Clock Details” button on the Left Navigation.
2. Select “Clarification” in the Reason drop down menu.
3. Explain the reason for stopping the clock in the Notes field. Also, to avoid confusion later, be sure to type in the Notes field the date by which you expect a response from the requester.
4. Click the “Save” button on the page.
5. Wait for the requester to respond or the due date to pass. When the requester responds and modifies the request, click the “Start the Clock” button on the left side of the page in FOIAonline.
6. Once you are on the “Start the Clock” screen, press the “Start the Clock” button on the bottom of the page.

Fourth, if the requester does not respond by the due date—which should be at least 20 calendar days from the date the request for modification is sent—or fails to provide a modification that sufficiently describes the records sought, then begin the close-out process using the Closure for Failure to Modify FOIA request template. Be sure to document all communications in FOIAonline, including those to which the requester fails to respond. *See also* [Part 6.E, Final Release and Response to Requester](#).

---

## Template D—Closure for Failure to Modify FOIA Request

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---

**Practice Tip:** We still have an obligation to respond to the parts of the request that are proper. One imperfect part of a FOIA request does not permit the Agency to fail to respond to the entire request!

---

If the requester does respond and sufficiently modifies the request, then proceed to process the request. If the requester responded to your communication or you were able to modify over the phone, then confirm that modification in writing. Once confirmed, update FOIAonline using the following steps:

1. Go to the “Submission Details” tab in FOIAonline and click the box saying, “Has Description Been Modified?”
2. Type the modified description in the box.
3. Click “Save Changes” button at the bottom of the page.

Process the request according to the modified description.

---

## Template F—Confirmation of Request Modification

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**Practice Tip:** If you determine that the FOIA request constitutes an improper request because the request is not reasonably described, per EPA’s regulations, you must contact the requester to give the requester the opportunity to discuss and modify the request. For more information on request parameters, see EPA regulations at 40 C.F.R. § 2.102(c) (“Procedures for making requests”).

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### Part 2.B. Agency Records

The Agency is only required to respond to requests for agency records. The FOIA does not require EPA to create new records by compiling or reformatting data, nor does it require the Agency to re-create records that were properly disposed of in accordance with the Agency’s records policy. Please note, if the request seeks records in EPA’s possession that originated with another federal agency then see [Part 5.D.vi, External Consultations and Referrals](#).

#### What is an Agency Record?

An Agency Record is:

- Created or obtained by the Agency; and
- Under Agency control when the request is received.

The FOIA does **not** require the Agency to:

- Create a new record or re-create records that were properly disposed;
- Produce records over which it retains no control;
- Produce purely personal records; or
- Produce future records.

## Part 2.B.i. Requests Possibly Not for Agency Records

The FOIA does not require the Agency to create new records. An example of this type of improper request includes:

- “Make me a list of all Agency actions that . . .”;
- “I want to know what the Agency is doing about . . .”, and
- “Provide me with information about who is working on. . .”

EPA also does not have to produce records over which it retains no control. Requests for records involving EPA contractors should be reviewed carefully as EPA does not have custody or control over many contractor-generated records.

EPA does not have to produce other entities’ records that it does not control or possess.

- “Please provide me with the County’s records on this issue unrelated to EPA.”

EPA does not have to produce purely personal records. Recall that the FOIA only requires the release of “agency records,” i.e., records under the Agency’s control at the time of the request that the Agency created or obtained. In distinguishing between “personal” and “agency” records, one should examine the totality of the circumstances. Factors to consider when differentiating “personal records” from “Agency records” include:

- The purpose for which the record was created;
- The degree of integration of the record into the agency’s filing systems; and
- The extent to which the record’s author or other employees used the record to conduct agency business.

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*Practice Tip: See Dep’t of Justice, Office Info. Policy, “Agency Records” vs. “Personal Records” (Jan. 1, 1984), <https://www.justice.gov/oip/blog/foia-update-oip-guidance-agency-records-vs-personal-records>, for more information about distinguishing between agency and personal records.*

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EPA does not have to create new or additional explanations regarding agency decisions. Examples of this type of improper request:

- “Provide the basis for the Agency’s decision to . . .”; and
- “Provide any records supporting the statement that. . .”

EPA does not have to “hold” a request open for records that EPA may create at some point in the future (i.e., records that do not exist at the time the Agency receives the request).

Examples of this type of improper request:

- “Provide the final XYZ Report when it is finished next month”; and
- “This is a request for EPA to send me each quarterly report on topic X.”

## Part 2.B.ii. Asserting that a Request Does Not Seek Agency Records

If the request does not seek Agency records, begin the close-out process using the Not an Agency Record Letter template. However, if part of the request is proper (i.e., seeks Agency records and is reasonably described), we are obligated to respond to that part of the request.

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## Template E—Not an Agency Record Letter

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### Part 2.C. Publicly Available Information

If a request only seeks information that is already publicly available, your FOIA Program can close the request after you direct the requester, in writing, to the specific location where EPA has made the information publicly available. Locations may include:

- EPA’s website;
  - EnviroFacts;
  - ECHO;
  - MyProperty;
  - FOIAonline; and
  - ChemView.
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## Template G—All Records Publicly Available

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### Part 2.D. Managing the FOIA Response Deadline

#### Part 2.D.i. FOIA Response Deadlines

Under the FOIA, you have 20 working days to process a request unless unusual circumstances exist, the requester agrees to an alternative deadline, or you “toll the clock” (i.e., pause the response deadline). *See generally* 5 U.S.C. § 552(a)(6)(A)(i); [Part 2.D.ii, Stopping the Clock](#); [Part 2.D.iii, Extending the FOIA Response Deadline](#). In FOIAonline, the clock in the upper right-hand corner reflects the FOIA response deadline. You should use this clock to keep track of how many days remain until your deadline. Depending on the request, you may extend the deadline for processing the request, toll the clock, or both.

It is important to pay attention to statutory deadlines. Failing to respond to a FOIA request within the statutory timeframe enables requesters to go directly to district court for relief. 5 U.S.C. § 552(a)(6)(C)(i). Failing to respond within statutory timeframes can also preclude the Agency from being able to charge fees. *See* 5 U.S.C. § 552(a)(4)(A)(viii).

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**Practice Tip:** Be sure to think about whether you will need additional time beyond the statutory 20 working days when you receive the request. Do not wait! Many complex FOIA requests cannot be processed in 20 working days, so take appropriate steps to notify the requester and arrange for additional time as soon as possible. *See* [Part 2.D, Managing the FOIA Response Deadline](#).

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#### Part 2.D.ii. Stopping the Clock

Time limits can be tolled (i.e., stopped) for clarification or fee-related reasons. You can stop the clock once while you are waiting for clarification from a requester. *See* 5 U.S.C. § 552(a)(6)(A)(ii); [Part 2.G, Clarifying FOIA Requests](#). The clock can be tolled as many times as necessary to resolve fee-related issues. *See* [Part 3, Fees](#). Once the request is clarified or the fee-related issue is resolved, be sure to go back into FOIAonline and select “Start the Clock.”

To toll the clock, inform the requester in writing that you are tolling the clock, upload that correspondence to FOIAonline, and toll the clock in FOIAonline. To toll the clock in FOIAonline, select “Stop the Clock” in FOIAonline and select the appropriate reason.

It is recommended that you discuss with your FOIA processing team the requester’s request and what additional information could be helpful. *See* [Part 2.E, Building a FOIA Processing Team](#).

#### Part 2.D.iii. Extending the FOIA Response Deadline

The clock can be extended by negotiating a new due date with the requester or asserting unusual circumstances.

By maintaining an open line of communication with the requester, you can always discuss the anticipated completion date and ask the requester to agree to a new due date. The requester should expressly agree to any negotiated due date. If you can reach an agreement, memorialize that agreement in writing. If the requester agrees to the new negotiated due date orally, you should send a communication to the requester via FOIAonline summarizing the conversation and providing the agreed-upon due date. Remember to also update the due date in FOIAonline.

The clock can also be extended if unusual circumstances exist. It is recommended that you examine and, if applicable, assert unusual circumstances early in your process. The FOIA identifies three unusual circumstances:

1. The request requires EPA to collect responsive records from a field office or other entity separate from the office processing the request;
2. The request involves a "voluminous" amount of records that must be located, compiled, and reviewed; and
3. The request requires EPA to consult with another federal agency or other EPA components that have a substantial interest in the responsive information.

5 U.S.C. § 552(a)(6)(B)(iii).

To assert unusual circumstances, you must send a notice to the requester that:

- Is in writing;
- States which of the three unusual circumstances outlined above apply (more than one could apply);
- Provides the requester with an opportunity to limit the scope of the request, modify the request, or agree to an alternative time period for processing the request;
- Provides contact information for its FOIA Public Liaison; and
- Notifies the requester of their right to seek dispute resolution services from the Office of Government Information Services within the National Archives and Records Administration.

The Lead FOIA Program will enter the new due date and the justification for the extension into FOIAonline. The justification should include whether an opportunity to clarify the request was provided to the requester. The Lead FOIA Program will communicate the new due date to the requester and document all communication in FOIAonline.

If you are unable to complete the agency’s response to the request on or before the 20th working day, you may be able to seek an extension of time if unusual circumstances exist. If unusual circumstances exist, and you need an additional 10 or fewer days to complete the response to the request, you may assert unusual circumstances and extend the processing clock an additional ten working days. If unusual circumstances exist, and you need more than 10 additional working days to complete the response to the request, you may assert unusual circumstances and extend the processing clock for the necessary number of days, as long as you notify the requester and provide them with an opportunity to limit the scope of the request so that it may be processed within that time limit.

In both cases, it is a best practice to develop an estimated date of completion within the 20 working days so you can arrange for the appropriate extension request. However, if you are unable to provide a sufficiently accurate estimated date of completion within the 20 days because, for example, you are still identifying the number of potential custodians, the locations of records, or you cannot estimate the resources you will have to review the records, you may first extend the deadline 10 days to allow for adequate time to estimate the completion date within the 30 working days.

If your FOIA Program or the NFO has asserted unusual circumstances to extend the due date by 10 working days (for a total of 30 days), you may reassert unusual circumstances to extend the due date further if you need additional time beyond the 30 working days.

#### Possible Due Dates

- < 20 Days
- < 30 Days—Unusual Circumstances AND
  - The request can be completed within 30 days
  - OR
  - The requester modified the request so that it can be completed within 30 days.
- > 30 Days—Unusual Circumstances AND
  - An estimated date of completion was provided to the requester, and the requester did not modify the request
  - OR
  - The requester agreed to an alternative due date.

#### Part 2.E. Building a FOIA Processing Team

Building your FOIA processing team requires you to assess which FOIA Programs may have responsive records, the types of records that may exist, and the complexity of the request. The Lead FOIA Program will coordinate with other FOIA Programs who may have responsive records—i.e., Contributing FOIA Programs.

The most important question you should keep asking as you identify the correct Contributing FOIA Programs: are there any other Contributing FOIA Programs or custodians that are likely to have responsive records? Identifying any Contributing FOIA Programs at the beginning of the request will save you time and hassle later! Coordinating with any Contributing FOIA Program at the outset is critical for efficient FOIA processing across the Agency.

### Part 2.E.i. FOIA Processing Team Members

Individuals from both the Lead and Contributing FOIA Program can make up your FOIA processing team. Those individuals may be subject matter experts—having knowledge of the issues and records. They may also be individuals tasked with assisting in the collection of records, the review of records, or both.

For example, your FOIA processing team may be made up of:

1. FOIA Coordinator or FOIA Officer from the Lead FOIA Program and Contributing FOIA Programs;
2. Relevant staff assigned to perform FOIA-related tasks in the Lead FOIA Program and Contributing FOIA Programs;
3. Subject Matter Experts from your FOIA Program and Contributing FOIA Programs;
4. The designated criminal enforcement contacts in the Lead FOIA Program and any Contributing FOIA Programs when the scope of the request includes collection from criminal enforcement custodians or records that involve criminal enforcement custodians are located during the review of records;
5. Staff assigned to assist in the search for records, review of records, or both;
6. Attorneys that have knowledge about the subject matter;
7. FOIA Attorneys; and
8. FOIA Management.

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**Practice Tip:** Be sure to coordinate with your subject-matter expert or experts early and often, even on simple requests! Subject matter experts are a great resource for identifying whether, where, and what records exist that may be responsive to the FOIA request.

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### Part 2.E.ii. FOIA Processing Team Planning

Your FOIA processing team should come to a mutual understanding on a plan of action for communicating with the requester, any potential hurdles to processing the request in a timely manner, and a mutual understanding of the scope of the request. *See Part 4.A, Develop and Implement a Search Strategy; Part 5.A, Develop your Review Strategy.*

If applicable, your FOIA processing team should initially attempt to answer the following questions:

- Confirm that the request is proper? *See Part 2, FOIA Program Initial Review.*
- Are any potentially responsive records already publicly available through FOIAonline or the EPA website? *See Part 2.C, Publicly Available Information.*
- Could the request benefit from additional clarification? *See Part 2.G, Clarifying FOIA Requests.*
- How long will it take to fully process the request, considering the scope of the request, estimated number of responsive records, etc.?
- Are there any associated sensitive issues (e.g., litigation, parallel criminal enforcement proceeding)?
- Are there any resource concerns, such as a competing large project?

With these questions answered, your FOIA processing team should be able to create search and review strategies. *See* [Part 4.A, Develop and Implement a Search Strategy](#); [Part 5.A, Develop your Review Strategy](#). For instance, if you determined that the request could benefit from additional clarification, you should set up a call with the requester and any subject-matter experts to discuss clarifying the request. *See* [Part 2.G, Clarifying FOIA Requests](#). Or, for example, if a Contributing FOIA Program has identified publicly available records on EPA’s website, the Lead FOIA Program can send those records to the requester as soon as possible. *See* [Part 6, Producing Records](#).

Upfront coordination helps to avoid multiple offices reaching out to the same requester and clarifying the request in different ways. Remember, the Lead FOIA Program is responsible for clarifying the FOIA request based on input from all Contributing FOIA Programs. *See* [Part 2.G, Clarifying FOIA Requests](#).

For a large, complex FOIA request, it is a recommended practice for the Lead FOIA Program to convene meetings with assigned staff in the Lead FOIA Program and any Contributing FOIA Programs to clarify responsibilities, methods to be used for collection, and other issues. *See* [Part 4.A, Develop and Implement a Search Strategy](#); [Part 5.A, Develop your Review Strategy](#). Consider also using a checklist when seeking initial feedback or as an agenda for a meeting of your FOIA processing team.

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#### [Resource A, FOIA Project Checklist.](#)

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When multiple requesters are seeking the same or similar records, you can use a single FOIA request’s FOIAonline case file as a repository for the records (the “lead” FOIA request) and direct other requesters to that lead FOIA request’s public facing webpage. You can find this public facing webpage by logging out of FOIAonline and searching for the FOIA request’s FOIA number. If you use this approach, please indicate the lead FOIA case’s ID number in the comments section for each of the requests you direct to the lead FOIA case. When a particular topic is expected to generate many requests, make use of interim releases of previously processed records on that topic. *See* [Part 6.D, Interim Responses](#).

When there is agreement on who will assist with collection and review, which may occur earlier or later in the process, those agreements and responsibilities should be memorialized in FOIAonline as tasks. It is the responsibility of the Lead FOIA Program to ensure that all FOIAonline tasks are completed and closed out before the request is closed out. If necessary, the FOIA Manager, FOIA Coordinator, or FOIA Officer in the Lead FOIA Program may obtain NFO assistance in coordinating the completion and closing of tasks.

#### **Part 2.F. Working with the Requester**

After ensuring that the request is properly assigned to the Lead FOIA Program, as a best practice you should reach out to the requester by sending a short note through FOIAonline, providing the requester with your contact information and immediate next steps that you will take. This can be accomplished by clicking the “Create Correspondence” in FOIAonline.

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## Template B—Initial Letter

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**Practice Tip:** Regular communication with the requester is fundamental to good FOIA processing. Start early!

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The Office of Government Information Services (OGIS) is a FOIA resource for the public and the government. See U.S. Nat'l Archives and Records Admin., *Office of Gov't Info. Servs.*, <https://www.archives.gov/ogis> (last visited Oct. 19, 2020). The FOIA Improvement Act of 2016 (the 2016 Amendments to FOIA) requires agencies to notify requesters of their right to pursue alternative dispute resolution through OGIS at certain points in the FOIA process, as explained below. See Dep't of Justice, Office of Policy, *OIP Summary of the FOIA Improvement Act of 2016 (updated Aug. 17, 2016)*, <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016>.

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**Practice Tip:** Be sure to turn on the notification feature under the “My Account” tab in FOIAonline, as the system will then generate emails to your EPA Outlook account notifying you to check FOIAonline for requests or tasks that have been assigned to you. Be sure also to check regularly the “My Cases” tab in FOIAonline, as you will find all pending requests and tasks listed here.

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**Call or email the requester.** Most requesters are glad to hear from the Agency about the status of their FOIA requests. Consider making a regular practice to reach out to a requester to discuss the request, even if the scope of the request seems clear.

- Communication with the requester is very important because the Agency can help manage the requester's expectations. Most requesters are not familiar with EPA's records, organizational structure, or technical capabilities. Educating requesters about EPA is often productive for the FOIA requester and helps inform the public about the Agency.
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**Practice Tip:** If you are managing multiple requests on a similar topic, and another requester submits a narrower request or you have worked with another requester to clarify/narrow a request, consider proffering those ideas to the other requesters. The more similar you can get related requests, the more straightforward your management of the FOIA project will be.

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**Engage in an open discussion with the requester.** An adversarial approach will not go far. Requesters are more likely to participate in some give and take if they understand that the Agency staff wants to assist them in fulfilling their FOIA requests.

**Document your communication with the requester.** If communication occurs via email, be sure to upload all email communications to FOIAonline. If communication occurs via telephone, be sure to memorialize your discussion in an email to the requester and upload the email to FOIAonline. You may also communicate with the requester directly through the correspondence tab in FOIAonline. If for some reason you are unable to document your

communications via email with the requester, at the very least, create a comment in FOIAonline recording the details of your communication.

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**Practice Tip:** If you need to contact multiple requesters, make sure to reach out to the requesters with expedited FOIA requests first, and document your communication!

If at any point in processing the request, the team is unsure or feels a sense of hesitation about how to resolve a question about the scope of the request, it is best to reach out to the requester for clarification and discussion. Such an approach will go far in establishing a positive relationship with the requester and is good customer service.

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As a best practice, you should periodically contact the requester to provide updates on the status of the Agency's processing of the request, particularly if it will take longer than 20 working days to issue a final response. Communication with the requester is important so that the requester understands that the Agency is actively working to complete its response to the request.

Consider providing interim or partial releases to demonstrate to requesters that you are actively processing the request. Such releases also give the requester insight into the types of records responsive to the request and may result in the requester narrowing the request.

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#### Template T—Interim Response

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As a best practice, document your search strategy and update it as you implement the search. This will enable you to track the process and build a strong administrative record, which is important if the requester appeals and/or later sues EPA challenging the adequacy of the Agency's search. *See Resource I, FOIA Search Guide: Best Practices.*

#### Part 2.G. Clarifying FOIA Requests

The Lead FOIA Program may need to take actions to, among other things, better understand what records the request seeks or improve the Agency's ability to respond to the request. For example, the Lead FOIA Program may evaluate whether clarification by the requester would benefit the processing of the request and if so, contact the requester. It is a best practice to engage subject matter experts in the Lead FOIA Program and any Contributing FOIA Programs in discussions identifying what additional clarification is needed to process the FOIA request. The NFO is available to assist the Lead FOIA Program with seeking clarification from the requester.

### How many times may I stop the clock to clarify the request?

The clock may only be stopped once to clarify the scope of the request—either by the FOIA Program or by the NFO as noted in [Part 1.B, NFO and Lead FOIA Program Intake Coordination](#). Once the clock has been stopped, it should not be restarted until the information or clarification is provided by the requester. Nevertheless, a FOIA Program may contact a requester as many times as needed to clarify the scope of the request without stopping the clock.

FOIA Programs should document all communications, including a description of the modified scope of the request, for the official record in FOIAonline. Further, the Lead FOIA Programs should ensure that FOIAonline reflects any updated deadlines.

The more categories on which you and the requester can agree, the more straightforward processing the request will be. Consider using this checklist when considering how a request could be clarified:

- Type(s) of Records: Emails, Documents, Memoranda, Notes, Presentations, Text Messages, Schedule, Voicemail, Data, Logs, etc.
- Subject Matter/Topic/Search Terms
- Date Range
- Specific Departments/Custodians/Positions

#### Part 2.G.i. Prepare for your communication with the requester

Upfront preparation is imperative regardless of whether you will make contact by email or telephone.

- If you seek clarification on the types of records sought, gather information about the types of records the custodians create, the record systems, how the records are organized, and how the records are maintained.
- If you seek clarification on the topics of records sought, gather information about the issues on which the relevant offices are focused. Consider any relevant/timely issues affecting the offices, recent or upcoming projects, and similar issues.
- Sometimes the requester deliberately submits a very broad request without much direction about a topic because, while they have an idea in their mind about the topic, the requester does not know quite how to couch the request to capture the information they seek. Having current topics on hand when contacting the requester can be useful, so you can ask questions like, “You mention X in your request, but X is a very broad topic. Our office is working on a rulemaking related to issues like X, are you interested in documents about the rulemaking?”
- If you seek clarification regarding custodians, consider who are the individuals in your FOIA Program most likely to have relevant records. While the entire program office might have responsive emails, for example, helping the requester to nail down the custodian list to the primary individuals with relevant responsive documents increases the likelihood that the requester will receive the relevant information they seek.

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Practice Tip: Want to know where to find information about EPA’s record systems? A suitable place to start is EPA’s Federal Information Systems that can be found here: <https://www.epa.gov/privacy/epa-federal-information-systems>.

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## Part 2.G.ii. Office of Government Information Services

What if the Requester Does Not Want to Clarify? The Office of Government Information Services (OGIS) provides mediation services to resolve disputes between FOIA requesters and Federal agencies. FOIA requesters and agencies may request OGIS’s assistance in resolving a dispute at any point in the FOIA process. OGIS works with the parties to attempt to reach a mutually agreeable resolution.

Remember, under the 2016 Amendments to FOIA, the Agency must notify requesters of their right to pursue alternative dispute resolution through OGIS at three points in the FOIA process in response to:

- Initial determination letters;
- Appeal response letters; and
- Letters regarding requests in which unusual circumstances allow for 10 additional working days to respond.

Below is the language regarding OGIS to include in letters to the requester:

*You may seek dispute resolution services from EPA's FOIA Public Liaison at [hq.foia@epa.gov](mailto:hq.foia@epa.gov) or (202) 566-1667, or from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; email, [ogis@nara.gov](mailto:ogis@nara.gov); telephone, (202) 741-5770 or (877) 684-6448; or fax, (202) 741-5769.*

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Practice Tip: Remember to document the efforts you have taken to get the requester to narrow/clarify the request and to identify any aspects of the request that are improper/unclear.

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Practice Tip: We still have an obligation to respond to the request if it reasonably describes the records sought, even if the request would benefit from further clarification.

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### Part 3. Fees

The FOIA allows agencies to charge certain fees to requesters to process their FOIA requests. Requesters are placed into one of four fee categories. *See Part 3.B, Categories of Requesters.* Which types of fees (*see Part 3.A, Types of Fees*) an agency may charge is based on the requester’s fee category. Further, in some circumstances, the FOIA allows for a waiver or reduction of fees. *See Part 3.C, Fee Waivers.* Remember, you can toll the clock as many times as needed for fee-related reasons, such as when you seek an assurance of payment from the requester. *See Part 3.D, Advanced Payments and Assurances of Payment.* Finally, certain restrictions apply to an agency’s ability to charge fees, as discussed below. *See Part 3.E, Charging Fees After Missing Deadline.*

You should estimate request processing fees if the NFO has denied the requester’s fee waiver, or the requester did not request a fee waiver. Contributing FOIA Programs must also provide you with their respective estimated fees. The Lead FOIA Program must provide written notice to requesters of anticipated fees that are more than \$25 or, if applicable, a higher amount the requester agreed to pay. *See 40 C.F.R. §§ 2.102(d), 2.107(e).* EPA then requires a written assurance of payment from the FOIA requester, unless an advance payment was received. *See 40 C.F.R. § 2.107(e); see Part 3.D, Advanced Payments and Assurances of Payment.*

Types of Fees that May be Charged by Fee Category			
Type of Requester	Search	Review	Duplication
Commercial	Yes*	Yes	Yes
Educational, Non-Commercial Scientific	No	No	Yes (100 pages free)*
News Media	No	No	Yes (100 pages free)*
All Others	Yes (First 2 hours free)*	No	Yes (100 pages free)

\* Fees shaded in grey above cannot be charged if the Agency fails to comply with the response time period and the requirements of the FOIA Regulations, 40 C.F.R. § 2.107(d)(6).

#### Part 3.A. Types of Fees

The FOIA allows agencies to charge three types of fees for processing FOIA requests: search, review, and duplication.

**Search fees.** Search fees may be charged for the time spent looking for documents that are responsive to a request. Note that search fees may be charged even if the Agency does not locate any responsive documents or if the documents are withheld under a FOIA exemption. Examples of actions that are chargeable as “search fees” include time spent for meetings to discuss search strings/how to conduct searches, time spent searching one’s computer and hard copy files, and time spent looking at the records to see if they are responsive (i.e. responsiveness review).

**Review fees.** Review fees may be charged for “direct costs incurred during the initial examination of a document for the purposes of determining whether [it] must be disclosed [under the FOIA].” This includes reviewing documents to determine which, if any, exemptions apply

and applying redactions to documents. Review fees may *not* be charged for subsequent levels of review, including legal review.

**Duplication fees.** Duplication fees include the direct costs of making physical copies of the documents. They also include, if documents are scanned, the staff time spent scanning the documents. For paper copies, EPA currently charges 15 cents per page. For electronic copies, you may charge for a physical medium, such as a CD, but not for uploading documents into FOIAonline.

Type of Personnel	Charges
Clerical	\$4.00/quarter hour
Professional	\$7.00/quarter hour
Managerial	\$10.25/quarter hour

Note: Some FOIA requesters may also ask that EPA certify the records are “true and correct copies” or certify the authenticity of the records. This is a special service for which the OMB Fee Guidelines allows agencies to charge fees. *See* 40 C.F.R. § 2.107(f). EPA charges \$25 to certify records. To certify the authenticity of headquarters records, or questions on potential fees for certification, contact the Program Specialist in the General Law Office in the Office of General Counsel. To certify the authenticity of regional records, contact the appropriate Office of Regional Counsel.

### Part 3.B. Categories of Requesters

Which types of fees an agency may charge for processing a FOIA request depends on the category into which the requester falls. The FOIA provides four fee categories: (1) commercial use requesters, (2) educational institutions and noncommercial scientific institutions; (3) representatives of the news media; and, (4) other (requesters who do not fall into the categories above). While the HQ FOIA office makes initial determinations on fee categories, you should work with your FOIA Coordinator along with the National FOIA Program Office if you believe a different fee category is more appropriate.

**Category 1—Commercial Use Requesters.** According to the OMB Fee Guidelines, “commercial use” requesters are those who ask for records for “a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is being made.” The focus is how the requested information will be used, not the identity of the requester. Accordingly, the fact that a request has been placed in a “commercial use” category in the past does not mean that a subsequent request submitted by the same requester will be similarly placed in the future. When the intended use of the records is not clear from the wording of the request, an agency can seek additional information from the requester to make a fee category determination. Common uses of the requested records that result in a “commercial use” fee categorization include using the documents in litigation. Commercial use requesters are charged all three types of fees (search, review and duplication).

**Category 2—Educational institutions and noncommercial scientific institutions.** Educational Institutions include schools such as universities and vocational institutions. The OMB Fee Guidelines require the institution to operate a program of scholarly research. The OMB Fee Guidelines further specify that to qualify for this fee category, the purpose of the

request must relate to the goal of the educational institution, not the goal of the individual requester. For example, a requester asking for documents to write a term paper would not qualify for the “educational institution” fee category. However, a professor requesting records related to the professor’s field of study for use in instructing students might qualify.

Noncommercial scientific institutions are defined by the OMB Fee Guidelines as simply a noncommercial institution that is “operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.”

Requesters in the Category 2 fee category are only charged duplication fees but receive the first 100 pages of paper copies for free.

**Category 3—Representative of the News Media.** The FOIA defines a “representative of the news media” as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” The FOIA also explains that this category includes news agencies as well as freelance journalists if they “can demonstrate a solid basis for expecting publication through [a news media] entity, whether or not the journalist is actually employed by the entity.”

Requesters in the Category 3 fee category are only charged duplication fees but receive the first 100 pages of paper copies for free.

**Category 4—Other Requesters.** The “other” category is simply a catchall category for any requester that does not fall into any of the other three categories. Requesters in this fee category are charged search fees and duplication fees; however, they receive the first two hours of search time and the first 100 pages of paper copies for free.

The table below summarizes which fees an agency can charge for the processing of a FOIA request based on the fee category of the requester.

Requester Category	Search	Review	Duplication
<b>Commercial Use</b>	Yes	Yes	Yes
<b>Educational/Scientific/News</b>	No	No	Yes*
<b>Other</b>	Yes†	No	Yes*
*Requesters in the “Educational/Scientific/News” category and requesters in the “Other” category receive the first 100 pages free of charge.			
† Requesters in the “Other” category receive the first two hours of search time free of charge.			

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**Practice Tip:** FOIAonline will automatically calculate the fee total when you enter the type of fee and hours spent under the “Admin Costs” tab. Note that FOIAonline will not allow a request to be closed unless time spent processing the request is accounted for in the “Admin Costs” tab. However, when entering time, you can select “No” in the “Billable?” drop down menu if such costs are not billable to the requester.

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### Part 3.C. Fee Waivers

You should be aware of the requester's fee category and whether a fee waiver has been granted when evaluating the request. *See also* [Part 1.B, NFO and Lead FOIA Program Intake Coordination](#). If a fee waiver has been granted, then no fees will be charged. Although the Agency will not bill the requester, you should track administrative costs in FOIAonline. Please note that the NFO may initially deny a fee waiver, the requester may appeal that determination, and the fee waiver may ultimately be granted.

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**Practice Tip:** The main request page in FOIAonline indicates whether a fee waiver has been granted.

**Request Handling**

- Requester Info: Yes
- Available to the Public:
- Request Track: Complex
- Fee Category: Media/Educational
- Fee Waiver: Yes
- Requested:
- Fee Waiver Status: Full Grant

### Part 3.D. Advanced Payments and Assurances of Payment

EPA can ask for an advance payment of fees from the requester in two circumstances: (1) when the fees will exceed \$250, or (2) when the requester has previously failed to pay fees in a timely fashion. If you are working with a requester who has a history of prompt payment, you may simply ask for an assurance of payment, discussed below. If you are working with a requester with no history of payment, you may either ask for an assurance of payment or an advance payment. For requesters who have failed to pay in a timely fashion in the past, you should ask for an advance payment.

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#### Template H—Advanced Payment Assurance of Payment

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Per EPA regulations, you must provide written notice to requesters of anticipated fees more than \$25 if the requester did not agree to pay a higher amount in the initial FOIA request or subsequently. A requester can also designate a fee limit with its FOIA request. An assurance of payment is required if the estimated costs of processing the request exceeds the fee limit. EPA then requires a written assurance of payment from the FOIA requester unless an advance payment was received.

The Lead FOIA Program may stop the clock as many times as needed for fee-related reasons, including when the requester is required to provide a written assurance of payment and has failed to do so. The Lead FOIA Program should notify the requester when the Lead FOIA Program stops the clock for fee-related reasons.

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**Practice Tip:** The main request page in FOIAonline indicates whether the requester set a fee limit.

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Submitted Date : 02/04/2015  
Perfected Date : 02/04/2015  
Last Assigned Date : 02/04/2015  
Fee Limit : \$150.00

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Assigned Tasks    Comments (1)    Review

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Note that if a FOIA requester is delinquent in paying fees, it is placed on a “Do Not Serve” list. Ensure that you do not process requests for any requester included on the Do Not Serve list. Your FOIA Coordinator or FOIA Officer has access to the list, which is located here: [Do Not Serve List, NFO SharePoint](#).

### Part 3.E. Charging Fees After Missing Deadline

The 2016 Amendments to FOIA added a new limitation to the ability of agencies to charge search fees. Generally, agencies can no longer charge search fees if the response is beyond the 20-day deadline (or 30-day in the case of “unusual circumstances”), even with an agreement from the requester.

The exception to this rule is that agencies may charge search fees (or duplication fees for “news media” or “educational” requesters) if:

- “unusual circumstances” apply,
- “more than 5,000 pages are necessary to respond to the request,”<sup>1</sup>
- timely written notice has been made to the requester, and
- “the agency has discussed with the requester how the requester could effectively limit the scope of the request” or the Agency made at least three good faith attempts to discuss limiting the scope of the request with the requester and the communication must be by written mail, electronic mail, or telephone.

If you expect the final FOIA response to occur beyond the 10-day extension and more than 5,000 pages are necessary to respond, notify the requester before the 10 days expires and discuss how the requester can limit the scope of the request. If you know that unusual circumstances will apply when you receive the request, invoke the additional 10 days in your acknowledgement letter and invite the requester to narrow. This will satisfy the “timely notice”

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<sup>1</sup> Note: “5,000 pages” refers to the number of pages in the total universe of documents required for review (i.e., “collected” documents), *not* the number of pages that will be ultimately released to the requester.

requirement and will qualify as your first attempt to discuss with the requester how to limit the scope of the request.

If a fee assurance letter is sent later, include another opportunity for the requester to discuss how to limit the scope. This will qualify as your second attempt to discuss with the requester how to limit the scope of the request if the first attempt went unanswered. If the requester has not responded to either attempt, you will only need to make one additional attempt to contact the requester before satisfying the requirement that the Agency make three good-faith attempts. If in response to any attempt to discuss how to limit the scope of the request, the requester refuses to limit the scope, it is not necessary to make additional attempts.

## Part 4. Searching for Responsive Records

It is important to understand the roles and responsibilities of each FOIA Program in processing a FOIA request. The Lead FOIA Program, which is the FOIA Program that the NFO has assigned the FOIA request to for processing, is responsible for taking the lead in developing and implementing the search strategy. The Lead FOIA Program needs to identify any Contributing FOIA Programs where responsive records may reasonably be located. If the Lead FOIA Program determines that another FOIA Program may have potentially responsive documents, the Lead FOIA Program needs to work with the FOIA Officer or Coordinator in those Contributing FOIA Programs, as discussed below, to develop and implement a search strategy.

Throughout this part, we will refer to the Lead FOIA Program and any Contributing FOIA Programs and discuss each programs' role in the search process. To ensure efficient processing and avoid duplication, the Lead FOIA Program should take the lead in developing the agreed-upon search strategy and disseminating clear and consistent direction to the Contributing FOIA Programs. You want to avoid situations where Contributing FOIA Programs have different interpretations of a FOIA request and thus use different search strategies or terms in processing the request. An effective search is the natural byproduct of proper planning and coordination.

### Part 4.A. Develop and Implement a Search Strategy

#### Part 4.A.i. Legal Requirements for a Search under the FOIA

The FOIA requires federal agencies to make available to a requester any agency record that is responsive to a proper request. *See* 5 U.S.C. § 552(a)(3)(A). To locate responsive records, agencies must conduct a *reasonable* search for records, i.e., a search that is reasonably calculated to uncover all relevant documents. A “reasonably calculated” search does not require a “perfect search,” and failure to produce “one specific document” does not deem a search inadequate. *See, e.g., Defenders of Wildlife v. Dep’t of Agric.*, 311 F. Supp. 2d 44, 54 (D.D.C. 2004); *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

Rather, the adequacy of the search is examined based on the reasonableness of the search given the totality of the circumstances. *Weisberg v. U.S. Dep’t. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The Lead FOIA Program needs to ensure that the Agency makes a good faith effort to conduct a search through methods that can be reasonably expected to produce the information requested. *See Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 67–68 (D.C. Cir. 1990).

#### Part 4.A.ii. Schedule Meeting and Develop the Search Strategy.

By the time you get to the tasks described in Part 4, you should have already confirmed that the FOIA request is a proper request and, if it is not, sought modification from the requester. *See Part 2, FOIA Program Initial Review*. Before you start to develop your search strategy, review the request again and remind yourself what the request seeks.

Regardless of whether your FOIA involves a request for records in a single office or multiple offices, you need to identify where to search, determine who should search, and determine how to conduct the search. These three items represent the core elements of your search strategy.

You might be thinking: where do I start? As always, start with the FOIA request, and any modifications. If the request seeks only Outlook emails, then you should focus your search on Outlook emails. Frequently, however, FOIA requests are broad and seek, for example, all documents regarding a topic during a particular time frame.

In formulating an effective search strategy, the Lead FOIA Program considers the following:

- What individuals and offices might have documents? *See Part 4.B, Identifying Custodians.*
- How much to search? *See Part 4.C, Date Range.*
- What terms to search? *See Part 4.D, Search Terms.*
- Where to search? *See Part 4.E, Search Locations and Tools*

The Lead FOIA Program should schedule a meeting to develop the search strategy. This meeting should include the necessary FOIA Officers, FOIA Coordinators and subject matter experts in the Lead FOIA Program and any Contributing FOIA Programs, the designated criminal enforcement contacts in the Lead FOIA Program and any Contributing FOIA Programs, if applicable, and the case attorney and FOIA attorney from the Lead FOIA Program.

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**Practice Tip:** If multiple offices are involved, then the Lead FOIA Program takes the lead in developing the search strategy, in coordination with the Contributing FOIA Programs.

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#### Part 4.A.iii. Developing and Documenting the Search Strategy.

It is important to track and document the search that was conducted. It is recommended that the lead for the Lead FOIA Program develop a memorandum or checklist to track the search. Specifically, the lead for the Lead FOIA Program would note: the Contributing Office custodians searched; the Lead FOIA Program custodians searched; the locations searched; whether the search of custodian records has been completed; and the number of responsive records. The Appendix includes a sample memorandum that offers an example of what information you may want to track and how you might consider organizing this information.

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[Resource D, Search Tracking Memo.](#)

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#### Part 4.B. Identifying Custodians

Once the Lead FOIA Program identifies which offices potentially have responsive documents and where to search for those documents, the Lead FOIA Program next needs to identify individuals likely to have responsive records—often referred to as custodians. In identifying this list of individuals, include any custodians who the requester names in the FOIA request or whose positions at the Agency suggest that they are reasonably likely to possess responsive records. Also, consult with subject matter experts to determine which other custodians may have potentially responsive documents. Remember, you must identify custodians necessary to conduct a search reasonably calculated to uncover all relevant documents.

To ensure efficient processing of the FOIA request, work to ensure that you have identified a complete list of custodians. Below are some practice tips that may be helpful in working with Contributing FOIA Programs:

- The Lead FOIA Program, via FOIAonline, tasks the FOIA Officer or Coordinator in each Contributing FOIA Program and asks the Contributing FOIA Programs: (a) to identify a subject matter expert that will serve as the point of contact for the Lead FOIA Program. (That individual should contact the lead for the Lead FOIA Program so that they can discuss the FOIA request and ensure a common understanding of the information requested); and (b) to identify a list of potential custodians (individuals who may have potentially responsive documents), including any criminal enforcement custodians if the scope of the request involves a criminal enforcement matter.
- In issuing the task, provide information on the FOIA, including any clarifications or modifications provided by the requester.

Once the Lead FOIA Program has coordinated with the Contributing FOIA Programs and has received the lists of potential custodians from Contributing FOIA Programs, the Lead FOIA Program should compile the complete list of custodians and document that list in the search memorandum.

Before moving on to the next step in developing the search strategy, take a moment and document in FOIAonline: (1) which offices beyond the Lead FOIA Program may contain potentially responsive documents; (2) where to search for those documents; and (3) the list of custodians (including custodians from the Lead FOIA Program and all Contributing FOIA Programs).

In evaluating which custodians may have responsive documents, remember to consider former employees, employees who transferred to a different office, and contractors or grantees with EPA-issued email accounts, and assess whether any of these individuals would be potential custodians based on the information requested. The Lead FOIA Program and any Contributing FOIA Program should evaluate whether the scope of the request may involve a criminal enforcement matter and, if necessary, include relevant criminal enforcement staff in the list of custodians. The FOIA Officer or Coordinator in the Lead FOIA Program and any Contributing FOIA Programs should reach out to their designated criminal enforcement contact if they need to search for agency records from criminal enforcement custodians.

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**Practice Tip:** If more than one office has potentially responsive documents to a FOIA request, the Lead FOIA Program and Contributing FOIA Programs should communicate regularly to ensure that the search strategy is complete before moving forward with implementation of that strategy.

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#### Part 4.C. Date Range

To determine which records are within the scope of a request, the Agency will ordinarily include only those records in its possession as of the date the request was received by one of the methods described in 40 C.F.R. § 2.103(a). The Lead FOIA Program will inform the requester if any other date is used, such as:

- An earlier date if it is reasonable to determine that all responsive records were created prior to the date that the FOIA request was received; or
- A later date, such as the date the search is initiated.

40 C.F.R. § 2.103(a).

#### Part 4.D. Search Terms

The Lead FOIA Program should coordinate with their Search Point of Contact (SPOC) and subject matter experts to identify search terms that are likely to locate responsive records. Subject matter experts may be able to identify common terms, shorthand, abbreviations, or key phrases used by custodians working on the matter that can help you target exactly the right documents. Visit the SPOC Training & Resources section of EDD's SharePoint site, [https://usepa.sharepoint.com/sites/oei\\_Work/ediscovery/SitePages/Home.aspx#!/home](https://usepa.sharepoint.com/sites/oei_Work/ediscovery/SitePages/Home.aspx#!/home), to view advice on how to construct a search request with Boolean logic. The Lead FOIA Program and SPOC may seek assistance from the eDiscovery Division's eDiscovery Assistance Team (eDAT) to refine the search parameters, including the identification of keywords, date ranges, custodians, and the sources and locations of the electronically stored information (ESI) to be collected.

#### Part 4.E. Search Locations and Tools

Once you identify the locations of potentially responsive documents and the custodians of those documents, it is time to evaluate how to search. The first section below addresses centralized searches conducted by the eDiscovery Division (EDD). The second sections address how to conduct searches for other locations not included in the centralized search.

Once the Lead FOIA Program has identified whether records are located in one or multiple offices, it next evaluates where to search for records within each office, e.g. repositories for paper files, emails, electronic documents. In doing this, again refer to the FOIA request. If the FOIA request asks for documents in only one repository, e.g., Outlook emails, you can tailor the search accordingly. If the request is not limited to emails but rather seeks all documents on a topic in a particular time frame, be sure to evaluate the locations where responsive records are likely to be located. It is recommended that the Lead FOIA Program coordinate with the Contributing FOIA Programs to identify all locations likely to contain potentially responsive records.

Potential locations include, for example:

- Outlook email, calendars
- Skype/Lync/Teams Chats
- Microsoft Stream
- Lotus Notes mailboxes or calendars, other Lotus Notes databases
- Enterprise Content Management System (ECMS or EZ-records)
- Superfund Enterprise Management System (SEMS)
- Correspondence Management System (CMS)
- Local or shared computer drives (e.g., C:, F:, G:)
- SharePoint sites
- Microsoft Teams sites
- OneDrive
- Mobile devices (e.g., text messages and photographs)
- External drives and discs

- Hard-copy files (at EPA offices or stored at a Federal Records Center)
  - And other locations reasonably likely to contain responsive records.
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## Resource E, Instructions for Searching & Collecting Other Electronic Files.

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### Part 4.E.i. Centralized Searching

EDD provides electronic centralized search service to support the Agency's FOIA Programs. Visit the eDiscovery Division's SharePoint page for an updated list of sources that EDD will search by matter type. *See*, eDiscovery Division, *About EDD*, [https://usepa.sharepoint.com/sites/oei\\_Work/ediscovery/SitePages/Home.aspx#!/about](https://usepa.sharepoint.com/sites/oei_Work/ediscovery/SitePages/Home.aspx#!/about). For example, EDD will search, among other sources, Outlook email messages, Outlook calendar entries, and Skype Chats; OneDrive; SharePoint; network locations; and workstations.

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**Practice Tip:** If there is pending litigation on a FOIA, or if the request has been referred to the National FOIA Office's FOIA Expert Assistance Team (FEAT), consult with OGC before initiating a centralized search for the FOIA.

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The Lead FOIA Program should submit search requests to collect electronic documents from the identified record source locations covered by EDD's centralized search, unless a more targeted collection is more likely to locate all responsive documents, such as where all responsive records are located in a specific folder within an email account. For example, if a FOIA request seeks a specific document, the document could be retrieved and produced without a centralized search. By contrast, if the FOIA request seeks all communications between two EPA individuals for a one-year period, the Lead FOIA Program would pursue a centralized search request.

Each organization has at least one SPOC, and that SPOC works directly with EDD in submitting and processing centralized search requests. The Lead FOIA Program should consult with EDD about the estimated timeframes for beginning and completing a requested search/collection, so other steps in the process can be planned accordingly. For most FOIA requests, the Lead FOIA Program will submit the centralized search requests.

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**Practice Tip:** Instructions on how to submit a centralized search request through your SPOC are located at:

[https://usepa.sharepoint.com/sites/oei\\_Work/ediscovery/SitePages/Home.aspx#!/spocs/training](https://usepa.sharepoint.com/sites/oei_Work/ediscovery/SitePages/Home.aspx#!/spocs/training).

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Wait! Before initiating the centralized search, the Lead FOIA Program should provide to the SPOC—who, in turn, will include in the search request to EDD:

1. Names and email addresses of all custodians being searched;
2. Electronic source locations/repositories; and
3. The search criteria reasonably likely to yield responsive records (date range; keywords).

It is important for the Lead FOIA Program to coordinate effectively with the Contributing FOIA Programs to ensure that the search terms capture the scope of records sought.

#### Part 4.E.ii. Searching Non-EDD Document Repositories

The Lead FOIA Program's search strategy should include the process for collecting hard copy records and electronic records from any source locations or repositories that are not included in EDD's centralized search service.

Consistent with its search strategy, the Lead FOIA Program should develop an email to all custodians providing specific search instructions to be followed regarding all document repositories that were not included in the centralized search. The instructions to the custodians should explain that the Agency has received a FOIA request for which the custodian may have responsive documents and that a centralized search for the following records: [insert applicable source locations, such as Outlook, OneDrive, or network drives] is already being conducted. The instructions should further explain that the custodian should conduct a manual search for documents potentially responsive to the FOIA request in the following locations: [insert applicable list of locations, such as ECMS, SEMS, hardcopy files]. The search instructions should include:

- The FOIA request number;
- A clear description of the FOIA request (and any modification/clarification);
- A copy of the FOIA request and any relevant correspondence with the requester;
- Recommended search locations and instructions for each search location;
- Recommended search criteria including date range and search terms;
- Recommended document collection method (i.e., instructions for retrieving Lotus Notes emails or calendars); and

Date by which documents collected are to be transferred to the Lead FOIA Program

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[Resource C, Sample Search Instructions for Potential Custodians.](#)

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After distributing the search instructions, and before the collection period ends, the Lead FOIA Program should be in contact with the custodians to ensure that they understand their responsibilities and how to conduct the search.

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**Practice Tip:** Also consider creating a SharePoint location to collect and temporarily store documents. Depending on your review strategy, [Part 5.A, Develop your Review Strategy](#), you could provide a link to the eDiscovery Division to collect those documents in the SharePoint location as part of the centralized search, or you could provide limited access to the SharePoint location to allow multiple FOIA Programs that have an equity interest in the documents to review and redact these documents in Adobe Acrobat Pro. To provide custodians ample time to search for documents, it is recommended that the Lead FOIA Program provide custodians the search instructions at or shortly after the Lead FOIA Program submits the centralized search request. In the search instructions, ask custodians to document, with as much specificity as possible, how they conducted their search.

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Below are tips the Lead FOIA Program may want to consider as it develops search instructions to custodians to search for responsive records.

It is important for custodians to evaluate all repositories that are reasonably likely to contain responsive records. Consistent with the Federal Records Act Amendments of 2014 and the Agency's Records Policy, any employee who uses a personal messaging system, such as email, to conduct government business has 20 days to forward that information to their EPA email account. Once forwarded into EPA's email system, EDD can capture the information via the centralized search.

EDD's centralized search also does not extend to data uniquely retained on mobile devices, such as text messages, photos, or notes that are unique to the mobile device. You, or someone in your FOIA program, should remind custodians of the Agency's direction regarding forwarding text messages to their EPA email account so that EDD can capture such messages via the centralized search.<sup>2</sup>

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**Practice Tip:** [Instructions on how to forward text messages to EPA email accounts are located at: http://intranet.epa.gov/mobiledevices/pdf/Instructions-Saving-Text-Messages.pdf](http://intranet.epa.gov/mobiledevices/pdf/Instructions-Saving-Text-Messages.pdf).

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#### Part 4.E.iii. Lotus Notes

For routine FOIA requests, the EDD will not search Lotus Notes mailboxes or calendars, or other Lotus Notes databases. If a FOIA request seeks emails or information located in Lotus Notes, the Lead FOIA Program and the FOIA Officer or Coordinator in any Contributing FOIA Programs should provide custodians the step-by-step instructions for searching Lotus Notes.

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<sup>2</sup> EPA *discourages* the use of text messages for transmitting substantive (or non-transitory) federal records. In accordance with the Agency's policy, if a substantive (or non-transitory) text message is sent or received on your mobile device, it should be forwarded into the Agency's email system within 20 days.

### Part 4.E.iv. EZ Email Records

Even though emails saved through EZ Email Records are archived into the Electronic Content Management System (ECMS) as Agency records, they are not captured by EDD's centralized search. If a responsive outlook email message was saved to ECMS and then deleted from the user's Outlook account, a centralized search will not retrieve that record in Outlook. Thus, it is important to remind custodians to search ECMS manually for any non-duplicative emails that may be responsive to the request.

Depending on the office, the Records Liaison Officer (RLO) may be able to conduct a centralized ECMS search for the RLO's office. If there are multiple offices, you may need to coordinate with RLOs from each office. Contact your RLO or the RLO from the relevant office for more information. Detailed search instructions for ECMS are available at: <https://usepa.sharepoint.com/sites/oei/ermd/ECMS/SitePages/Search-Records-User-Guide.aspx>.

### Part 4.E.v. Correspondence Management System (CMS)

CMS is an electronic document management system that captures, stores, and tracks correspondence that is addressed to EPA or any of its employees in their official capacity. Some offices may use CMS, for example, to document correspondence received, including responses to such correspondence. If a custodian determines that CMS may contain records responsive to the request, CMS should be searched.

Custodians may not have used CMS previously and may not have access to the system. In this case, the custodian can identify the individual in the office responsible for maintaining CMS and work with that person to complete the search. All CMS records are full text indexed and searchable by any data element.

### Part 4.E.vi. Extended Leave or Detail and Separated Employees

If a potential custodian of responsive records is on detail or extended leave from the Lead FOIA Program or a Contributing FOIA Program during the time of the search, the Lead FOIA Program must ensure that the employee's records are searched in their absence. The Lead FOIA Program and Contributing FOIA Programs should work together to ensure that custodians' files are searched, even if those custodians are on detail, extended leave, or have separated from the Agency.

You may include separated employees as custodians in your centralized search request for Outlook emails, Outlook calendar entries, Skype chats, and records on OneDrive, SharePoint, network drive(s), and workstations. The Office of Mission Support (OMS) has a procedure on approving access to the email and electronic records of separated or absent employees outside of the EDD centralized search process.

To request access to records of employees who are on leave or separated, the Lead FOIA Program processing the request must send an email to the custodian's manager (or former manager, in the case of separated personnel). If the manager approves the request, they then

forward the request, via email, to their Information Resources Management Branch Chief (IRM BC) or Information Management Official (IMO). If the IRM BC or IMO approves the request, they forward the request to [OEI\\_FILE\\_ACCESS\\_REQUEST@epa.gov](mailto:OEI_FILE_ACCESS_REQUEST@epa.gov).

The email requesting access should include the information in the table below. The email subject line should include the nature of the request (i.e. Access to email). Please note that access to the OEI File Access Request mailbox includes federal and contractor email staff necessary to support the request.

Request for Access to Records of Employees Who are on Leave or Separated	
Role	Name
Approver	John Doe (IMO, IRM BCs or their designee whose name has been provided as authorized approvers)
Mail Box Name	Doe.Jane@epa.gov
Employee's full name	Jane Any Doe
Employee's LAN ID	Jdoe
Telephone number	111-222-3333
Person Receiving Access (Include email address)	Steven Jones (Jones.StevenT@epa.gov)
Access Needed for the Following Applications (as applicable):	<ul style="list-style-type: none"> <li>○ Lotus Notes</li> <li>○ Office 365 (Including OneDrive)</li> <li>○ Data Files (network drives, F: and/or G:.</li> <li>○ EZ Tech</li> <li>○ HQ Voice mail files</li> <li>○ HQ VoIP Call logs</li> <li>○ Mobile device data</li> <li>○ Login Events (EZ Tech)</li> </ul>
<p>The Approver (IRM BC or IMO) must complete this table and submit the table via email to <a href="mailto:OEI_FILE_ACCESS_REQUEST@epa.gov">OEI_FILE_ACCESS_REQUEST@epa.gov</a>. The email Subject must include the nature of the request (i.e. email access).</p>	

Managers may request access to an absent or separated employee's email files (Lotus Notes and Office 365), data files contained on OneDrive or network drives, voice mail files, call logs, and mobile devices by contacting OMS. Once the manager has received access to these files, the manager is responsible for manually searching these files. OMS will not perform searches, nor is OMS responsible for data contents of any files.

The table below depicts the type of information available and the time limit for requesting access to the related data. As each access request is completed, the IRM BC or IMO will notify

and provide any instructions to the Lead FOIA Program requesting the information, if necessary.<sup>3</sup>

Electronic Activities	Content	Request Time Limit
Lotus Notes	Emails, Calendars	Up to 2/29/2013
Office 365	Email, Calendar, OneDrive	2/29/2013– Forward
Data Files (network drives, “F:”, and/or “G:”)—EZ Tech Users	File and Folders	Unlimited
HQ Voice mail files	Voice mails	20 days
HQ VoIP Call logs	Outbound call/inbound calls	01/01/2014– Forward
Mobile device data	Call Detail Reports (including text messages logs)	7 years
Login Events—EZ Tech Users	Login activities	30 days

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<sup>3</sup> A list of IRM BCs and IMOs, by office, is available at [https://usepa.sharepoint.com/sites/oei\\_Community/CIOSAC/Documents/Admin/Member%20List/Official%20CIO%20SAC-SIO-IMO-SITL%20List.pdf](https://usepa.sharepoint.com/sites/oei_Community/CIOSAC/Documents/Admin/Member%20List/Official%20CIO%20SAC-SIO-IMO-SITL%20List.pdf).

## Part 5. Review Records

Regardless of the complexity of your FOIA, the review cycle of a FOIA should include consideration of all the steps below. Bear in mind that not every review will include documents that will require review at each of these steps; however, be mindful of these steps as you plan your review process.

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**Practice Tip:** It is imperative that you plan your review process early so reviewers at every step have adequate time to review the materials.

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### Part 5.A. Develop your Review Strategy

The Agency's FOIA procedures require the approval of a Division Director or equivalent for FOIA responses. The approval applies to both withholdings and releases. Before you begin to review the records, review your FOIA Program's local FOIA procedures, available at <http://intranet.epa.gov/foia/FOIA-Procedures.html>, and consider who will likely need to review the records.

Your review strategy depends on the size and complexity of the FOIA request and potentially responsive records. For the simplest request, you may only need to perform first-level review and your manager may perform the second-level review of the records. For more complex requests, multiple individuals or offices may review.

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**Practice Tip:** If there are multiple offices involved or if you are working on a FEAT FOIA, individual office procedures may need to be adapted to accommodate overall processing of the request.

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Lead and Contributing FOIA Programs should work together in developing a review strategy, considering:

- The number of records associated with each FOIA Program (i.e., EPA Region or Headquarters Program Office);
- The extent records associated with a Contributing FOIA Program overlap those associated with the Lead FOIA Programs;
- Whether a Contributing FOIA Program has specific resource issues that would limit its ability to timely complete the review; and
- The extent to which distributing review of records among the Lead FOIA Program and Contributing FOIA Programs would lead to greater consistency or efficiencies, such as accelerating equity reviews.

### Part 5.B. Document Review Tools

Relativity is EPA's standard document review platform for all records collected by an eDiscovery Division centralized search. EPA staff can access Relativity through a web browser from their office or from a remote location.

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## Resource L, eDiscovery Division Relativity Guidance.

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To review any records that are not collected by an eDiscovery Division centralized search, it is recommended that EPA staff use EPA-approved document review and redaction software, such as Adobe Acrobat Pro DC. Contact your local Information Security Officer or local Information Technology staff to obtain access to Adobe Acrobat Pro DC.

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## Resource M, Redacting in Adobe Acrobat Pro DC.

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### Part 5.C. Develop Coding Memo

For complex or even straightforward requests, a memorandum with review instructions (known as a “coding memo”) can help your team achieve consistency in its document review. The coding memo serves as a protocol for how reviewers make determinations on documents, whether reviewing in Adobe Pro DC or Relativity. A coding memo can include, for example:

- Responsiveness
  - Describe the scope of the FOIA request.
  - Include a list of keywords and acronyms that can help reviewers identify responsive material.  
**Tip:** use this list to help develop your persistent highlighting set for Relativity.
  - Include a list of key events and/or background on the issue that can help put the documents in context.
  - Include a list of key custodians and their roles in the issue.
  - Identify names of key attorneys (for attorney-client and attorney work product designations).  
**Tip:** consider including these names in your Relativity persistent highlighting set as a unique color.
  - Identify names of key people outside the Agency to assist with identifying records that are internal vs. external, and records that would need consultation from the White House or other agencies.
  - As a reminder, EPA organizations may not redact non-responsive information within a responsive FOIA record. Where a FOIA requester has narrowed their FOIA request to exclude non-responsive information within a responsive record, such narrowing should be memorialized in writing to ensure clarity.
- FOIA Exemptions
  - Describe the FOIA exemptions and provide any key information specific to the FOIA request that will benefit reviewers in applying exemptions properly.
  - If a FOIA Exemption is not applicable to the FOIA request, do not include in the memo.
- Upper Management Review
  - Documents may need to be flagged for upper management review. Providing this review enables management to be aware of documents that will be released and that may garner public or media attention.

## Part 5.D. Levels of Review

Once you have collected potentially responsive records, you must review the records to determine whether they are *actually* responsive to the request and you must review the records to determine which, if any, FOIA exemptions apply.

For most FOIA requests, responsiveness review and the FOIA exemption review are done concurrently during the first-level review. During a first-level review, reviewers will determine if documents are responsive to the request (as narrowed or modified), if any FOIA exemptions apply, whether other EPA offices need to review the documents (“EPA Equity Review”), whether other Federal agencies or the White House need to review the documents (“Interagency Consultation”), and whether any documents should be flagged for upper management awareness.

The levels of additional review beyond the first-level review will depend upon the scope of the FOIA and the need for equity reviews as set forth above. The review process should be set forth in the Review Strategy. *See* [Part 5.A, Develop your Review Strategy](#).

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### Practice Tip: Don’t Forget About the Requester!

Manage expectations! Contact the requester right before you begin the Review Phase and discuss the results of your document collection. You can discuss the number of documents collected, your review process, and give candid time estimates for production. This gives the requester another opportunity to narrow their request or steer the review if they are unsatisfied with the time to complete review.

As you progress through the Review Phase, consider scheduling standing updates with the requester to discuss the status and progress of the request. For voluminous records requests, it can be very valuable to have the requester weigh in on how they would like the review of records to be prioritized. For example, perhaps the universe of documents to review includes 25,000 emails from 35 custodians. Ask the requester if there are custodians or timeframes the requester would like reviewed and released first; this is good customer service, and you know your review time is well spent.

As always, document these communications and upload any written communication with the requester into FOIAonline.

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The FOIA Policy provides: “All records released or withheld in response to a FOIA request must be reviewed by at least two knowledgeable individuals, including one manager or supervisor, to ensure openness, transparency, consistency, and the appropriate application of FOIA exemptions. One of the reviews may be performed by the individual who processes the request.” *See* FOIA Policy, 6.F.

For many FOIA requests, particularly those that are complex or voluminous, there may be other layers of review prior to the final management review. For example, your office may decide that a request warrants a second-level review at the staff level or by an attorney prior to documents going through management review. Second-level review can take many forms. Below

are types of reviews that may be completed. This should be discussed with the FOIA team in conjunction with your management.

#### Part 5.D.i. First-level Review

During first-level review, you (and your team if you have one) take the first step to review the records. In doing so, evaluate the following:

**Responsiveness:** Responsive documents are those documents that match the description in the request. Be sure you clearly understand what the requester wants. Non-responsive records do not need to be produced.

Once you have collected documents potentially responsive to a FOIA request, you must make sure that all reviewers have a single unified interpretation of the request. This ensures consistent responsiveness calls throughout the review process. If multiple people are reviewing documents to determine whether they are responsive to the request, consider having an initial meeting to discuss the FOIA request and what constitutes a responsive document.

Occasionally, you may come across documents that are technically responsive (e.g., one of the search terms appears in an email) but that might have little to no informative value to the requester. Under the FOIA, agencies may not make value judgments on the utility of documents to the requester. Accordingly, such documents should be considered responsive. However, you may ask the requester whether it wants certain categories of minimally informative documents (e.g., newspaper clips) to be processed. If you come across large numbers of such documents, the requester may want to narrow its request to exclude those documents, which may enable the Agency to process the FOIA more quickly with fewer fees.

You also may come across documents that discuss several different subjects in a single document, only some of which are responsive to the FOIA request. An example could include a staff meeting agenda addressing multiple topics. Under the FOIA, if a FOIA record contains information responsive to the FOIA, the entire record is responsive, including the arguably non-responsive information. Information in the record can, however, be withheld based on one of the FOIA exemptions. If you identify large portions of material that are not responsive to the FOIA, consider meeting with the requester to determine if the requester is interested in narrowing the scope of the FOIA request to remove the material. Where a FOIA requester has narrowed their request to exclude non-responsive information within a responsive record, such narrowing should be memorialized in writing to ensure clarity.

**Disposition:** If the record is responsive, the first-level reviewer then evaluates the documents to determine what, if any, FOIA exemptions apply and based on that analysis, whether a document should be released in full, withheld in full, or released with redactions.

**Exemptions:** The FOIA provides for nine exemptions that agencies may use to protect specific types of information. If the record is responsive and should be withheld or redacted, identify the exemption(s) that applies(apply) and redact the document consistent with the claimed exemption(s).

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## Resource J, FOIA Exemptions Review.

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**Equity Review by Other FOIA Programs:** If the record is responsive and contains discussions or information from another EPA office, identify those records for internal equity review, as described below.

**Consultations with Other Federal Agencies or the White House:** If the record is responsive and contains discussions or information from another federal agency or involves the White House, you will need to identify those records for external equity review, as described below.

**Upper Management Review:** During first-level review, you should mark records for further review if you think management may have a specific interest in being aware of prior to release.

### Part 5.D.ii. CBI Review

FOIA Exemption 4 covers two categories of information, (1) trade secrets and (2) Confidential Business Information (CBI).

CBI is commercial or financial information obtained from a person that is privileged or confidential. *See* 5 U.S.C § 552(b)(4).

Trade secrets are a “secret, commercially valuable plan, formula, process, or device that is used in making, preparing, compounding or processing of a trade commodity, and that can be said to be the end product of either innovation, or substantial effort.” *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

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**Practice Tip:** For example, trade secret data may be found in contracts, manufacturing descriptions, schematics, product formulas, software, or quality control data/quality assurance procedures.

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A business may explicitly assert a CBI claim, such as by marking or stamping a document with a confidential or proprietary business information label. Even if no explicit claim was made, the information can still be potential CBI. If no claim was made, EPA regulations require the reviewer to apply the following standard to the business information to identify potential CBI: “[A]lthough [the business] has not asserted a claim, [it] might be expected to assert a claim if it knew EPA proposed to disclose the information.” *See* 40 C.F.R. § 2.204(c)(2)(i).

If you have identified potential CBI, you *must* reach out to the affected business via telephone, email, or letter, and ask if they claim the information as CBI. The affected business has three working days to respond to your inquiry pursuant to EPA’s regulations. *See* 40 C.F.R. § 2.204(c)(2)(ii).

Please note that this standard does not apply in some circumstances. Specifically, if EPA follows the notice requirements of 40 C.F.R. § 2.203(a) when it collects the information (such as including the required notice on a form), EPA may make the information available to the public without further notice to the business. *See* 40 C.F.R. §§ 2.203(c), 2.204(c).

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Practice Tip: Look for labels on documents that indicate that a business intended for information to remain confidential, such as “trade secret,” “proprietary,” “controlled unclassified information,” or “confidential.” Also, a coversheet may contain a CBI claim for the attached material. Examples of information typically determined to be CBI include pricing information, information related to production, volume, and the manufacturing process, and customer lists.

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Note that an affected business may waive its right to assert a CBI claim in which case you may release the information. You may always check with an affected business to see if the business will waive its claim. If an affected business claims, or waives, confidentiality verbally, follow up in writing.

When potential CBI is identified, the Lead FOIA Program must include the initial denial language, found in the PBI Case Tracking Procedures, final determination letter and follow the proper procedures for tracking and processing a request for CBI as outlined in PBI Case Tracking Procedures. After the creation of the PBI case in FOIAonline, the Lead FOIA Program works with OGC/ORC to send affected businesses substantiation requests, draft program recommendations, and revise the treatment of responsive records where necessary due to the final confidentiality determination. EPA’s CBI Regulations are accessible at <https://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=40:1.0.1.1.2>.

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Resource K, Proprietary Business Information (PBI) Case Tracking.

Template N—CBI Substantiation Request Letter Sample A - FOIA

Template O—CBI Substantiation Request Letter Sample B - Non-FOIA

Template P—CBI Substantiation Request Letter Sample C - FIFRA, FOIA

Template Q—CBI Substantiation Request Letter Sample D - FIFRA, non-FOIA

Template R—CBI Substantiation Request Letter Sample E - TSCA

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#### Part 5.D.iii. Segregate Non-Exempt Information and Redact Exempt Information

The FOIA requires that “any reasonably segregable portion of a record” must be released “after deletion of the portions which are exempt” under the Act’s nine exemptions. This requires you to redact the exempt information while producing the non-exempt information.

The FOIA states “[t]he amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.” Redaction marks should be visible and the exemption under which you are withholding information should be indicated. If information in a responsive FOIA record does not fall within one of the nine exemptions, it should be released.

Once you have determined which FOIA exemptions apply to a document and what information needs to be redacted, use the redaction tools in Adobe Pro DC or Relativity to “redact” the content subject to a FOIA exemption, as discussed below.

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[Resource L, eDiscovery Division Relativity Guidance.](#)

[Resource M, Redacting in Adobe Acrobat Pro DC.](#)

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**Practice Tip: Redact the exempt information in the document and release the remainder.**

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#### Part 5.D.iv. Quality Assurance/Quality Control

Throughout the review process, you will need to ensure that responsiveness determinations, FOIA exemption determinations, and redactions are made consistently. This is called quality assurance/quality control (QA/QC). Below are some Adobe Pro DC and Relativity Practice Tips for smoother, more efficient QA/QC process.

**QA/QC in Adobe Pro DC.** By using the “Create Comment Summary” option in the Comment tool, you can more easily spot redaction issues such as redactions with improper or missing exemption or overlay text.

You can also use the search tool to conduct searches using relevant search terms to locate pages in responsive documents that may require review by other EPA offices or other agencies. You can even export the results to PDF or CSV. Some examples of search terms are below:

- White House equities
  - “WH” or “POTUS” or “White House” or “EOP” or “CEQ” or “OMB”
- Congressional relations equities
  - “Senate” or “Senator” or “Congress” or “Representative” or “Congressional” or “Hill”
- Union equities
  - “Union” or “NTEU” or “AFGE” or “280” or “NAIL” + any union officials or topic words that may be relevant.
- OEX equities
  - Include current administrator’s name and email addresses and any other relevant people in the Administrator’s office.

Note that these search terms can also be used for “batch-tagging” in Relativity, as discussed below.

**QA/QC in Relativity.** In Relativity, saved searches can be set up to capture common coding inconsistencies and/or missed equities. Common coding inconsistencies include:

- A document coded as “release in full” but the document contains one or more redactions; and
- A document coded as “release with redactions” but the document does not have any redactions.

EDD delivers a coding conflicts view and a coding conflicts saved search as part of its standard Relativity workspace delivery. The coding conflicts view and saved search allows you to look for coding conflicts within your workspace. Visit EDD's Relativity Resource Center to access quick reference guides on using the coding conflict checks view and the coding conflicts saved search.<sup>4</sup>

Additionally, you can create saved searches to identify other coding conflicts. When setting up a search to catch coding inconsistencies, it is a best practice to design the search to capture documents in the following categories:

- Release with redaction and no exemption selected
- Release with redaction and no redactions applied (if not using the EDD coding conflict view or saved search)
- Release in full and exemption selected
- Release in full and redactions applied (if not using the EDD coding conflict view or saved search)
- No disposition and exemption selected
- Withhold in full and no exemption selected
- Responsive and no disposition selected
- Not responsive and exemption selected
- Not responsive and has disposition selected
- Anything marked "additional review required" or similar

You can "batch tag" items in Relativity for easy retrieval when handling equities. Batch tagging, or "mass coding," allows you to apply a specific coding choice to an entire set of documents that share a common term. Examples of terms that should be batch tagged are the same as those that should be searched for in Adobe Pro DC, as mentioned above.

#### Part 5.D.v. Equity Review

An office other than the office that conducted the first-level review may have an interest, or equity, in certain documents. Many factors go into determining when an office has "equity" in a document:

- Are there emails involving personnel in another office?
- Are the documents created in another office?
- Are there comments/contributions to a document from personnel in another office?
- Are there opinions or legal advice given by an attorney in a legal office?

Any office with equity in the document should have the opportunity to review the document and weigh in on whether they agree with the determinations made with respect to responsiveness and FOIA exemptions.

If records are identified for equity review, an "equity review" task should be created in FOIAonline for the appropriate FOIA Program or Region. Records can be provided to the other FOIA Program or Region in several ways:

- Links to saved searches in Relativity
- Batches in Relativity

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<sup>4</sup> [https://usepa.sharepoint.com/sites/oei\\_Community/relativity/SitePages/Home.aspx](https://usepa.sharepoint.com/sites/oei_Community/relativity/SitePages/Home.aspx)

- PDF versions of the records through an informal export from Relativity

It is best to check with the FOIA Program or Region conducting the equity review how they would prefer to receive the records.

#### Best Practices for Equity Review:

- Having Program Offices/Regions conduct first-level review on their records for large multi-office FOIAs will reduce the need for equity review
- Check if the FOIA Program or Region conducting equity review wants to review “withhold in full” records. If they do not, this will reduce the number of records requiring equity review.

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**Practice Tip:** If there is another agency or EPA office involved, notify that agency or office early and find out where to send the records for review. If the request involves only a few documents, you may consider discussing the records over the phone.

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When in doubt about another office’s interest in conducting an internal equity review or reviewing a specific document, call and ask. The following provides some general guidelines to follow when developing instructions for reviewers on how to determine which offices may have equity in a document:

- OEX—Office of the Executive Secretariat
  - Any document from the Administrator’s primary or secondary email address
  - Any document generated by a senior member of the Administrator’s staff: Deputy Administrator, Chief of Staff, Deputy Chief of Staff, political appointees in the AO.
  - Prior Administrators
- OPA—Office of Public Affairs
  - Any document to or from a member of the press, or discussing a media or press inquiry
  - Any document related to the drafting of press releases or other press materials
- OCIR—Office of Congressional and Intergovernmental Affairs
  - Interactions between EPA employees and elected officials (or their staff). This includes mayors, governors, and members of Congress.
  - Interactions between congressional affairs staff and other arms of the government, including internal communications related to these interactions.
  - Congressional hearing preparation
  - Development of responses to formal correspondence from Congress
  - Development of responses to Questions for the Record
  - Substantive input from an OCIR employee
- OGC/ORC—Offices of General Counsel/Regional Counsel
  - Any document generated by OGC/ORC attorneys, except scheduling documents
  - Any document containing non-public information discussing litigation or legal strategy
  - Any communication between an attorney and program client containing legal advice

- Program Offices
  - Documents created or originating from that office
  - Substantive mail involving personnel from that office

#### Part 5.D.vi. External Consultations and Referrals

If you identify a record that originates from another federal agency, the Lead FOIA Program must either consult with that Federal agency or refer those records or portions of records to that Federal agency. *See* 40 C.F.R. § 2.103(d). It is ultimately the Lead FOIA Program’s responsibility to ensure this coordination occurs; however, when the Lead FOIA Program tasks a Contributing FOIA Program with document review, the FOIA Programs may agree that the Contributing FOIA Program is the one to reach out to the other agency.

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For assistance in determining whom to contact at another agency, please see the NFO’s SharePoint site or check with your fellow FOIA Officers and Coordinators.

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**Consultation.** The Lead FOIA Program, or where appropriate the Contributing FOIA Programs, will make records available for review to another federal agency or the White House when the documents include information of substantial interest to that agency or the White House. This includes documents created by, emails involving personnel from, and legal opinions or advice provided by that federal agency or the White House. This review is called a “consultation.” The purpose of the consultation is to ask another federal agency for a recommendation as to how to treat, and possibly redact or withhold, the record.

The Lead FOIA Program will coordinate with the NFO when there are consultations with other federal agencies. In performing consultations, the Lead FOIA Office will:

- Concurrently notify the NFO in writing for any consultation sent to an individual below the Deputy Assistant Secretary-level and will obtain the NFO’s concurrence prior to any consultation sent to an individual at the Deputy Assistant Secretary-level or higher, except for the OIG; and
- Contact the NFO for instructions on how to complete consultations with the White House.

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**Practice Tip:** You should request an informal export if you need to consult with another Federal Agency regarding the application of exemptions on records or portions of records where the other Federal Agency has equity. If you are referring records to another federal agency, you should submit a formal production request to EDD for those records. See Appendix, Section 5.G. for additional information regarding informal export and formal production requests.

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**Referrals.** The Lead FOIA Program should refer any record that originated with another federal agency to that agency for direct response to the requester. The Lead FOIA Program must obtain the NFO’s concurrence before they refer records to another federal agency. 40 C.F.R. § 2.103(d)(2).

If the referral is to a federal agency that uses FOIAonline, then the Lead FOIA Program should send the referral in FOIAonline. If the referral is to a federal agency that does not use FOIAonline, then the Lead FOIA Program should first send the referral either by email or mail and second document the communication making the referral in FOIAonline.

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Template L—To Requester, Close Out and Referral to Other Agency

Template M—To Agency, Cover Letter to Other Agency

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Practice Tip: If you have a large volume of records to share with other agencies, consider using the free platform OMB Max:

<https://max.omb.gov/maxportal/home.do>.

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## Part 6. Producing Records

### Part 6.A. Awareness Notification

If a request is designated for awareness notification, the Lead FOIA Program will follow the instructions outlined in the Awareness Notification memo before releasing records in FOIAonline. See EPA Chief of Staff Memorandum, Awareness Notification Process for Select Freedom of Information Act Releases (Nov. 16, 2018).

### Part 6.B. Final Approval

Consistent with 40 C.F.R. § 2.103(b) of the FOIA Regulations, Administrator, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, Deputy Regional Administrators, General Counsel, Deputy General Counsels, Regional Counsels, Deputy Regional Counsels, and Inspector General, or those individuals' delegates, are authorized to make final determinations required by 5 U.S.C. § 552(a)(6)(A). Those individuals' delegates may be officials at the headquarters division director-level or the second supervisory-level down from the Regional Administrator.

### Part 6.C. Upload Records to FOIAonline

FOIAonline is used to maintain records related to a FOIA request in accordance with records management requirements and as a record of how a request was processed should it be appealed or litigated.

The Lead FOIA Program and Contributing FOIA Programs will upload all responsive records into FOIAonline, including:

- Responsive records that will be released to the public;
- Records that are responsive but are being withheld in full per one or more FOIA exemptions; and
- The original, unredacted version of any record that is being released with redactions.

Responsive records that are being withheld in full and original, unredacted versions of any records that are being released with redactions should be coded appropriately so that access is limited to EPA staff.

It is important to upload all responsive records to FOIAonline, including those that are not releasable. Uploading records that will be withheld preserves the entire record so that it may be reviewed in full on appeal or during litigation. If a FOIA Program chooses to maintain non-releasable responsive records in another manner pursuant to EPA's FOIA records retention schedule, Schedule 1049, the FOIA Program must provide a notation in FOIAonline that identifies where such records are maintained.

To upload records to FOIAonline:

1. Log in to FOIAonline and search for the FOIA request.
2. Under the "Actions" tab on the left choose "Upload Responsive Records."
3. Click the "Select Files" button and navigate to the documents selected for uploading.
4. Select the documents to upload (can select and upload more than one document at

- a time).
5. Select the appropriate Release Type from the dropdown menu:
    - a. UU (unredacted, unreleasable) – select for any document that is being withheld in full pursuant to one or more FOIA exemption.
    - b. UR (unredacted, releasable to the general public) – select for any document that is being released in full within FOIAonline.
    - c. RR (redacted, releasable to the general public) – select for any document that has redactions and is being released in FOIAonline. Select the appropriate exemption(s).
    - d. REQ (release to requester only) – select for any document that is being released to the requester but will not be released to the public in FOIAonline.

Note: if records are consolidated into one PDF file make sure to choose all the exemptions that apply to the consolidated records.

6. Click Save.

Before closing a request, you should also upload all key correspondence to FOIAonline and download a copy of the invoice, if applicable, to send to the Cincinnati Finance Office.

#### Part 6.D. Interim Responses

Requesters are less likely to seek litigation to get the records they want if they know you are actively working on their FOIA request. In addition to regular contact and a relationship with your requester, interim or partial releases demonstrate progress to the requesters because actions (disclosing records) speak louder than words (“We are actively working on your request.”).

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#### Template T—Interim Response

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Interim responses can also be a valuable tool for narrowing requests. When requesters receive a partial release of records, they will have an opportunity to review them and identify the records or types of records in which they are not interested. You can then narrow the request to exclude those records going forward. In some cases, you may produce the record or records in an interim production, and the requester may determine, after review of the documents, that it needs nothing further from the Agency and that the request can be closed. It is sometimes helpful to ask the requester if there are particular records or custodians in which the requester is most interested to increase the possibility that the requester may be satisfied with an interim production as a conclusion to the request.

When making an interim production, it is important to accompany the records you are producing with correspondence that clearly explains to the requester what is being delivered and the status of the request. Below are five key elements to include in an email or letter to the requester when making an interim production.

**Information about the Request.** Make sure to reference the request by number and provide a brief summary of what is sought. If the requester has clarified the request or you have had other significant communication, note it in the summary of the request.

**Description of the Records.** Provide information about the records themselves. This will vary depending on the records, it may make sense to provide the total number of documents, the total number of pages, the total file size, or some other description.

**Schedule Going Forward.** Include the anticipated date that the request will be closed out, and if you will be making additional interim productions, inform the requester as to when it can expect the next interim production(s).

**Appeal Information.** Make clear that the request is not being closed now. Inform the requester that when the request is closed, information will be provided about appeal rights for any part of EPA's response, including all interim productions. The goal is to make sure the requester understands that this is an initial release and that the clock does not start on the appeal period until after the request is closed.

**Contact Information.** In addition to the FOIA Public Liaison, make sure the requester has the direct contact information for someone who knows substantively about the request, such as the project lead or the FOIA Coordinator or FOIA Officer. The requester may be confused or have questions about the interim production or the status of the request going forward, and the interim production letter should, therefore, provide the Agency point-of-contact.

#### Part 6.E. Final Release and Response to Requester

When all responsive records have been uploaded to FOIAonline, you will be ready to close out your request. It is important to follow your office's FOIA procedures which can be found on the intranet: <http://intranet.epa.gov/foia/FOIA-Procedures.html>.

When issuing a final response, the following dispositions are available in FOIAonline and one must be selected:

- All Records Referred to Another Agency. The EPA searched for records, and the records all belonged to another agency. The records were referred to the other agency for direct response to the requester and the request was closed out.
- Duplicate Request. In some instances, a requester submits more than one request with the same scope. EPA will process one of the requests and close the other request as a duplicate request upon notice to the requester.
- Records Not Reasonably Described. The EPA reached out to the requester indicating that the request did not reasonably describe the records sought, and the requester failed to provide the additional information necessary to clarify the scope of the request.
- Not an Agency Record. The EPA reached out to the requester indicating that the request is not seeking Agency records, and the requester failed to identify the Agency records sought.
- Full Grant. All responsive records are being released in full to the requester.
- Full Denial Based on Exemptions. All records will be withheld from release pursuant to one or more FOIA exemptions.
- Fee-Related Reasons. The request is being denied for a fee-related reason, such as:
  - EPA reached out to the requester to obtain payment assurance based on the Agency's estimated fees to process the request, and the requester has failed to provide a payment assurance; or

- The requester has not paid all fees for a prior FOIA request as required by the regulations.
- Glomar Response. In some instances, the EPA may expressly refuse to confirm or deny the existence of records responsive to a FOIA request; this is called a Glomar response. The Lead FOIA Program, except for the OIG, must obtain approval from OGC or ORC prior to issuing a Glomar response.
- No Records. If, after a reasonable search likely to uncover all responsive documents, no records are located that are responsive to the request, the requester will be informed in writing.
- Partial Grant/Partial Denial. Portions of the record will be withheld from the requester if covered by either one or multiple FOIA exemptions. The portions of the record that are not redacted are released to the requester.
- Request Withdrawn. The requester voluntarily withdraws the FOIA request
- Improper FOIA Request for Other Reasons. The request is being denied because it was not properly submitted per the Agency's FOIA regulations.
- Other.

In addition, if a final response is also a final determination pursuant to 40 C.F.R. §§ 2.103(b), 2.104(i), the final determination letter will include:

- The name and title or position of the person responsible for the determination;
- A brief statement of the reason or reasons for the denial, including an identification of records being withheld (either individually or, if a large number of similar records are being denied, described by category) and any FOIA exemption applied by the office in denying the request;
- An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through annotated deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption;
- A statement that an adverse determination may be appealed under 40 C.F.R. § 2.104(j) and description of the requirements for submitting an administrative appeal; and
- A statement that the requester has the right to seek dispute resolution services from an EPA FOIA Public Liaison or the Office of Government Information Service. 40 C.F.R. § 2.104(i).

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## Template S—Final Response Letter

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## Part 7. Administrative Appeals

### Part 7.A. What is an Administrative Appeal?

The FOIA and EPA's implementing regulations provide FOIA requesters the right to appeal any "adverse determination" that the Agency makes regarding a FOIA request. EPA's FOIA regulations, at 40 C.F.R. § 2.104(h), define "adverse determinations" as:

- A decision that the requested record is exempt from disclosure, in whole or in part;
- A decision that the information requested is not a record subject to the FOIA;
- A decision that the requested record does not exist or cannot be located;
- A decision that the requested record is not readily reproducible in the form or format sought by the requester;
- A determination on any disputed fee matter, including a denial of a request for a fee waiver; or
- A denial of a request for expedited processing.

Within 90 days of an adverse determination by the Agency, requesters may submit appeals, in writing, by email at [hq.foia@epa.gov](mailto:hq.foia@epa.gov), or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460, or through FOIAonline if the requester is an account holder. Consistent with 40 C.F.R. § 2.104(j), an appeal should "clearly identif[y] the determination being appealed" including the assigned FOIA request number.

### Part 7.B. What happens if the Agency's final FOIA response is appealed?

Administrative appeals are routed, via FOIAonline, to EPA's Information Law Practice Group, General Law Office, Office of General Counsel. Shortly after receipt, the requester is sent an acknowledgement letter and the appeal is assigned to an OGC attorney for processing. The OGC attorney will then contact the relevant program or regional staff to address any questions concerning the record.

EPA has 20 working days by statute to process an appeal, but this deadline can be extended for "unusual circumstances" pursuant to the same rules applicable to extension of FOIA request deadlines. Once the appeal determination is completed, OGC issues the decision to the requester through FOIAonline.

### Part 7.C. What is your role in the administrative appeal process?

When an appeal is received, OGC notifies the EPA manager who signed the final determination that an appeal has been filed. You may be notified by your FOIA Coordinator or Officer that an appeal relating to the FOIA request assigned to you has been received. Further, you will be contacted by the OGC attorney handling the appeal, as the attorney will likely have questions relating to the file and/or need additional information. The OGC attorney assigned to an appeal can be viewed in FOIAonline, so you can always reach out to the OGC attorney to provide any context or other information that may be helpful for processing the appeal.

Please follow the instructions provided by the OGC attorney concerning what action or information is needed in a timely manner. All communication regarding the processing of the FOIA request, as well as all documents responsive to the FOIA request (released, withheld in full

and withheld in part), should be included in FOIAonline. When contacted by OGC, please be sure to have the following information available if it is not already in FOIAonline:

- A complete set of the documents withheld in full, in unredacted form;
- A complete set of documents withheld in part (redacted documents) and a markup copy of the redactions not yet applied (these documents are needed to facilitate review of the material redacted);
- The complete organized file relevant to the FOIA, including communications with the requester; and
- Points of contact for staff in the Contributing Offices who worked on the request.

Pursuant to the 2016 Amendments to FOIA, the period to appeal an adverse determination is 90 days from the date of issuance of the adverse determination. As such, it is important to keep the above-noted information readily accessible in case an appeal is filed.

- For large volume responses, keep an organized electronic copy of the relevant materials to provide to OGC in the event of an appeal. FOIAonline currently does not permit bulk downloads of large volumes of documents, which complicates an expeditious review of a file.

Common issues on appeal include the adequacy of the search, the propriety of the withholdings, the propriety of denying a fee waiver or expedited processing request, and the adequacy of the Agency's description of withholdings in the response letter.

#### Part 7.D. What are the potential outcomes in resolving an administrative appeal?

- Appeal is Denied in Full: OGC determines that all challenged actions were performed in compliance with statutory and regulatory requirements. No further action is needed.
- Appeal is Granted in Full or In Part: OGC determines that one or more challenged actions were not performed in full compliance with statutory and regulatory requirements in all aspects of the response.
  - *Without Remand*: OGC determination will complete the corrective action by attaching the releasable records or portions of records, or otherwise complete the corrective action for the Agency.
  - *With Remand*: Pursuant to 40 C.F.R. § 2.104(k), OGC determination will provide instructions for completing corrective action by remanding the request to the Lead FOIA Program (the program office assigned to the request). That office should then address the instructions on remand.
    - Timing on remand: the instructions will either include a) a timeframe for completing the corrective action(s), or b) a timeframe for the program office to communicate a schedule for completion to the requester.
    - OGC will re-open the FOIAonline case file for the request. New information, such as additional responsive documents or an updated response letter, should be uploaded to the reopened request case file.
    - In most cases, you should issue a new determination letter. Please contact OGC if you have questions about whether to include appeal rights after a remand. Be sure to upload any correspondence to the requester to FOIAonline before closing the request again.

## Part 8. Litigation

FOIA requesters can initiate litigation if the Agency denies their administrative appeal, or if the Agency fails to respond to their FOIA request within the statutory time frame. The attorneys in OGC's General Law Office handle all FOIA litigation filed against EPA. Office of Regional Counsel Attorneys may also actively assist with FOIA litigation under the direction of the General Law Office. These attorneys work directly with Department of Justice (DOJ) attorneys to litigate the cases.

For a court to have jurisdiction to hear a case, the FOIA requester must allege that the agency has improperly withheld records. Allegations that an agency "improperly withheld records" may include:

- Failing to respond to a FOIA request within the statutory timeframe;
- Improperly withholding records, or portions of records, under a FOIA exemption;
- Not conducting a reasonable search for records;
- Denying a fee waiver or expedited processing; or
- Challenging a fee category designation.

### Part 8.A. General Overview of the Litigation Process

If the Agency is sued over a FOIA request, an attorney from OGC's General Law Office will reach out to the lead contact for the Lead FOIA Program to discuss the administrative record supporting the FOIA action. If EPA has not provided a response to the FOIA requester, the OGC attorney will discuss with the lead contact for the Lead FOIA Program the status of the Agency's processing of the FOIA request, including information on the search and production activities.

The following provides a general overview of the primary steps in litigation:

**The Complaint.** A FOIA requester initiates litigation by filing a Complaint. In the Complaint, the plaintiff (FOIA requester) will identify the FOIA request(s) at issue and the bases for filing suit (e.g., agency's failure to respond to the FOIA, or a challenge to the agency's search and/or withholdings).

**The Answer.** EPA has 30 days (from the date the plaintiff serves the United States Attorney's Office) to respond to the Complaint in the form of an Answer. An Answer is generally EPA's first pleading, and it responds, point by point, to the allegations in the Complaint. The Answer also includes any affirmative defenses or counterclaims EPA may have.

**Schedule for the Production of Documents (failure to respond cases).** If the case concerns EPA's failure to respond to a FOIA request, OGC and DOJ will initiate discussions with the plaintiff regarding a production schedule for any documents remaining to be produced. Once documents are produced, the plaintiff has an opportunity to review the documents to determine if the case can be resolved without further briefing. If the plaintiff reviews the documents and seeks to litigate any issue, such as the Agency's withholdings, the case proceeds to substantive briefing.

**Substantive Briefing.** If the plaintiff challenges the Agency's search or withholdings or raises any other issues, the case will proceed to briefing. Generally, FOIA cases are resolved when one or both parties file Motions for Summary Judgment. A Motion for Summary Judgment is a motion whereby the party filing the motion (the movant) asks the court to rule in its favor and dismiss all, or part, of the litigation. A Motion for Summary Judgment includes a motion

asking the court to rule in the moving party's favor and a brief called a Memorandum of Law in Support of the Motion for Summary Judgment. The Memorandum in Support of the Motion for Summary Judgment is the Agency's opportunity to make its case and explain why the Agency met the relevant requirements in processing the FOIA request in dispute. In support of a Motion for Summary Judgment, EPA will file a declaration and *Vaughn* Index.

The content of the declaration depends on the issues the plaintiff has raised. A declaration contains factual statements and the declarant attests to the facts in the declaration under **penalty of perjury**. For example, in a case challenging the Agency's search, the declaration would address how the Agency searched for responsive records. The Agency's brief would, in turn, cite to the declaration and explain why the Agency's search was reasonable. In a case challenging the application of the FOIA exemptions to certain documents, the declaration would explain the nature of the documents at issue and the basis for the claimed exemption(s). The declaration assists the court in resolving the case without the need to review the documents in question in the underlying FOIA. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)).

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**Practice Tip: Who can be a declarant?** The declarant must have "personal knowledge" of the facts presented. *See Fed. R. Civ. P. 56(c)(4)*. Personal knowledge includes information provided to the declarant by co-workers or subordinates. Generally, the declarant is an individual in management who has personal knowledge of the processing of the FOIA request at issue.

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Briefing in a FOIA case may occur several months after the case is filed, especially in cases alleging a failure by EPA to respond to the FOIA request. It is important to maintain a well-documented case file, as that file will be useful in preparing the declaration.

Generally, the declaration references the Agency's *Vaughn* Index. A *Vaughn* Index is an index that describes the records withheld and the basis for the withholdings. There are different formats for a *Vaughn* Index, including, for example, an itemized description of each document, and a categorical approach, where similar documents are described together (as opposed to the itemized document-by-document approach).

An example of an excerpt from a *Vaughn* Index is below.

ED 004712 00005410	ESA BiOps 8.3. 2018 .docx	Ex. 5 - Deliberative Process (DP)
<p>The withheld information is internal to EPA and was provided as a briefing document to Administrator Wheeler and other Agency leaders. The one-page document is titled, "Endangered Species Act (ESA) Biological Opinions (BiOps)." The document contains a footer that reads, "Internal, Deliberative, Do Not Distribute." The document is organized into three sections: (1) "Background," (2) "Issue," and (3) "Timeline." EPA staff used the document to brief the Administrator, and other senior leaders, in order to facilitate decision-making related to the registration review for the pesticide Chlorpyrifos. The "Issue" and "Timeline" sections of the document are withheld pursuant to Exemption 5, deliberative process privilege. The withheld information is pre-decisional because it was generated prior to arriving at a final decision concerning EPA's actions regarding the registration review for the pesticide Chlorpyrifos. At the time, EPA was still deliberating about the then-ongoing pesticide registration review, and the ESA consultation with the National Marine Fisheries Service (NMFS) was part of that registration review process.</p> <p>The withheld information is deliberative because it reflects internal Agency discussion and deliberation relating to the Agency's work, including tentative plans and estimated timelines, on the continued coordination with the NMFS that is required as part of the pesticide registration review. The information does not reflect an official Agency decision or policy, instead it reflects analysis, opinions, and tentative plans and estimated timelines on actions still in development. The document was used to brief Administrator Wheeler, and other relevant senior Agency leaders, before making a final decision on the Agency's approach to this topic.</p> <p>The foreseeable harm associated with release of the withheld information is that disclosure would impair agency staff's ability to brief issues with candor and provide advice and options to senior level decisionmakers. If the withheld information were released, staff would be more circumspect in providing their views and opinions, which would impair the Agency's ability to foster forthright,</p>		

## Part 8.B. Key Roles of the FOIA Programs in Litigation

The Lead FOIA Program and Contributing FOIA Programs are responsible for:

- Ensuring that the OGC attorney assigned to the case has a copy of the entire FOIA file, including information about the search (e.g., dates, terms, custodians, repositories, scope etc.); information related to the Agency's collection efforts; emails and other correspondence with the FOIA requester; and copies of the responsive records (both with and without redactions applied);
- Responding to any questions OGC has regarding the record;
- Completing the document production, which is relevant in cases involving a failure to produce records; and
- Reviewing all draft pleadings in the case and preparing the declaration in support of the Motion for Summary Judgment.

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**Practice Tip:** Litigation is time-consuming. EPA is also under court-ordered deadlines to submit briefs. As such, it is important that the FOIA team works together closely to ensure the deadlines are met.

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## Part 8.C. Potential Outcomes

Courts generally dispose of FOIA cases based on Motions for Summary Judgment. If a court rules for EPA by granting the Agency's Motion for Summary Judgment, in full, the case

will be dismissed. If the Court rules against EPA, in whole, or in part, there are different potential outcomes. For example, the court could ask EPA to submit the documents withheld under FOIA for *in camera* inspection so the court can assess the Agency's withholdings. EPA would then submit the documents at issue for the court to review. *In camera* inspection is not common. During *in camera* inspection, plaintiff and plaintiff's counsel are not allowed to view the records; only the court views the records. If the court rules against EPA, another potential outcome is for the court to order the Agency to release some or all of the withheld records. If the court finds that the Agency failed to conduct a reasonable search, it could order the Agency to conduct a new search.

#### Part 8.D. Attorney's Fees—What you need to know

A party seeking attorney's fees and costs in a FOIA action must show that it is both eligible for, and entitled to, such fees. The plaintiff also bears the burden of demonstrating the reasonableness of its fees. In assessing whether a plaintiff is eligible for attorney's fees, the court evaluates whether the plaintiff "substantially prevailed." If a plaintiff is eligible for attorney's fees, the court must then determine if the plaintiff is entitled to fees by evaluating four factors:

- the public benefit derived from the case;
- the commercial benefit to the plaintiff;
- the nature of the plaintiff's interest in the records sought; and
- whether the government's withholding had a reasonable basis in law.

Under FOIA, if payment of attorney's fees is required, those fees are paid by EPA. See OCFO's Procedure 3 ([http://intranet.epa.gov/fmdvally/policies/direct/2540/2540-08-p3\\_payment\\_of\\_eaja.pdf](http://intranet.epa.gov/fmdvally/policies/direct/2540/2540-08-p3_payment_of_eaja.pdf)), which provides that payment of FOIA attorney's fees is made from funds appropriated to the Responsible Planning and Implementation Office (RPIO) involved in the FOIA judgment. The RPIO is generally the regional or program office designated by the FOIA Coordinator or FOIA Officer as the lead office (Lead FOIA Program) for the FOIA request.



# Toolkit Appendices



You may use this checklist when you are acting as the Lead FOIA Program and coordinating the initial meeting with a Contributing FOIA Program

**Participants for an initial discussion:** Lead contact and subject matter experts from the Lead FOIA Program, and FOIA Coordinator and subject matter experts from any Contributing FOIA Programs.

- Identify and clarify roles:
  - FOIA Coordinator for each office; and
  - Contact in the Lead FOIA Program and any other lead contact(s) from Contributing FOIA Programs to include on all internal correspondence.
  
- Understand the FOIA Request. Discuss:
  - Time period;
  - Potential custodians;
  - Record types, locations, and systems;
  - Potential search terms; and
  - Whether the request could benefit from clarification.
  
- Timing to Respond:
  - FOIA clock
    - How many days remain on the FOIA clock; and
    - Are there unusual circumstances permitting the Agency to extend the due date? *See Part 2.D.iii, Extending the FOIA Response Deadline.*
  - Potential resource concerns
    - What do the team's resources look like?
    - Any upcoming large projects?
    - Emergency project or anticipated resource issues?
    - Familiarity with Relativity?
  - Criminal enforcement custodians and topics
    - Does the scope of the request encompass a topic that may be related to or implicate a criminal enforcement effort?
    - Does the scope of the request include custodians who are criminal enforcement staff?

These are model search instructions for the Lead FOIA Program to provide to potential record custodians, both in the Lead FOIA Program and to the FOIA Officer or Coordinator in any Contributing FOIA Programs. These instructions should be customized to reflect the search plan that the Lead FOIA Program and Contributing FOIA Programs develop to search for and collect from any relevant sources that were not included in the eDiscovery Division centralized search. As part of the Search Plan, the Lead FOIA Program should identify a Point of Contact (POC) who will collect all potentially responsive records and upload releasable, responsive records to FOIAonline. Each Contributing FOIA Program should also identify a POC who will collect records from Contributing FOIA Program custodians and transfer these records to the Lead FOIA Program POC through an agreed-upon method of transfer.

## SEARCH INSTRUCTIONS

You have been identified as a potential custodian of responsive records to a Freedom of Information Act (FOIA) request. The request **[FOIA Request Number]** concerns **[describe the request and any modification agreed upon with the requestor]**. A copy of the request and any relevant communication with the requester is attached for your reference

*Reminder:* In accordance with EPA's FOIA Procedures, you should track and record the time spent searching for responsive records.

### STEP 1: CONDUCT THE SEARCH

Please search the following locations for responsive records: **[The Lead FOIA Program should select the appropriate locations from the list below. {**

- Enterprise Content Management System (ECMS)
- Superfund Enterprise Management System (SEMS)
- Local or shared computer drives (C:, F:, G:, etc.);
- SharePoint sites (including any associated with Microsoft Teams)
- OneDrive
- Mobile devices (e.g., text messages and photographs)
- Voicemail
- External drives and discs
- Hard-copy files (including any Federal Record Centers, if appropriate)
- Other}]

Please use the following key words in your search:

- **[The Lead FOIA Program should provide search terms here.]**

Attached for your reference are step-by-step instructions for conducting a search of the source locations identified above. **[The Lead FOIA Program should select and attach applicable instructions.]**

### STEP 2: CONFIRM THE SEARCH IS COMPLETE

When you have completed your search, please send an email, with the subject line: “Search Response for [FOIA Request Number]” to the [Lead FOIA Program Point of Contact’s email address]. In your email, include the following information:

- The number of records located within each search location [If you did not locate any records, please note this in your email]; and
- The time spent searching for responsive records.

### STEP 3: TRANSFER SEARCH RESULTS FOR REVIEW

**[Select one of these:**

**Option 1: For Lead FOIA Program Custodians:** {Once you have completed your search in accordance with Step 1, above, and confirmed that your search is complete (Step 2), please transfer the records in accordance with the instructions below. You may also be asked to review the responsive records for responsiveness and potential FOIA exemptions, once all potentially responsive records are collected.}

**OR, Option 2: For Contributing FOIA Program Custodians:** {Once you have completed your search in accordance with Step 1, above, and confirmed that your search is complete (Step 2), please transfer the records in accordance with the instructions below. Your Contributing FOIA Program POC will review the records for responsiveness and potential redactions. Your Contributing FOIA Program POC may seek your input before providing the records to the Lead FOIA Program.}}

**[The Lead FOIA Program Point of Contact (POC) should provide specific instructions; the information below is an example of such instructions and should be revised, as necessary, by the Lead FOIA Program.]**

{For collection via email: Consolidate all responsive records in a folder on your computer, labelled as “Your Name, FOIA Request Number, Folder # of #\_Responsive” and all non-responsive records in a folder labeled “Your Name, FOIA Request Number, Folder # of #\_Nonresponsive.” You will send these folders via email to [For Lead FOIA Program custodians: Lead FOIA Program POC@epa.gov] or [For Contributing FOIA Program custodians: Contributing FOIA Program POC@epa.gov]. Due to limitations on file size, you may need to compress the folder(s) and/or send multiple emails. For each email, use the folder label as the subject line.}

{For collection via OneDrive: Lead FOIA Program POC and/or Contributing FOIA Program POCs will need to create “responsive” and “unresponsive” folders for each custodian on OneDrive. Using the following link: [link to OneDrive folder], upload all responsive and unresponsive records into the corresponding folders.}

{For collection via thumb drive: Create a folder on the thumb drive titled “Your Name, FOIA Request Number” and separate subfolders for responsive and nonresponsive records. Upload all responsive records and nonresponsive records to corresponding subfolders and save on a thumb

drive. Please deliver this drive to the Lead FOIA Program POC or your Contributing FOIA Program POC.}

Note: All hardcopy documents should be scanned into an electronic document and transferred to the Lead FOIA Program POC or Contributing FOIA Program POC in accordance with the instructions above.

This memorandum provides an example of how the Lead FOIA Program may document the search plan and track the search process.

Lead FOIA Program

Point of Contact:

Office:

Contributing FOIA Programs

Point(s) of Contact:

Office:

Request Information

Requester:

FOIA Number(s):

Subject of Request:

Date Range:

Custodians:

Name	Office (Separated=NA)	Date Tasked	Date Completed

Repositories Searched

- |  |  |
|--|--|
| <input type="checkbox"/> Outlook                         | <input type="checkbox"/> SharePoint Sites          |
| <input type="checkbox"/> Lotus Notes                     | <input type="checkbox"/> OneDrive                  |
| <input type="checkbox"/> Microsoft Teams                 | <input type="checkbox"/> SEMS                      |
| <input type="checkbox"/> ECMS                            | <input type="checkbox"/> Mobile Devices            |
| <input type="checkbox"/> CMS                             | <input type="checkbox"/> Voicemail                 |
| <input type="checkbox"/> Local or Shared Computer Drives | <input type="checkbox"/> External Drives and Discs |
| <input type="checkbox"/> Other:                          | <input type="checkbox"/> Hard-Copy Files           |

Other: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Search Terms Used

Total Number Responsive Records

These instructions are for custodians who may be searching and collecting electronic files from network drives or source locations that were not included in an EDD centralized search. If applicable, please include this as an attachment to your Search Instructions for custodians.

Using the search terms provided in the Search Instructions, search for responsive records located in the other computer drives to which you have access. This includes, but is not limited to, your C: drive and your F: drive on your EPA computer. Unless you are designated by the Lead FOIA Program/ Contributing FOIA Program Point of Contact to search a shared drive, such as the G: drive, you should limit your search to those drives to which you have sole access.

Note: Computer drives cannot be collectively searched. For each search term, you will need to conduct a separate search within each drive that you have identified as containing potentially responsive records.

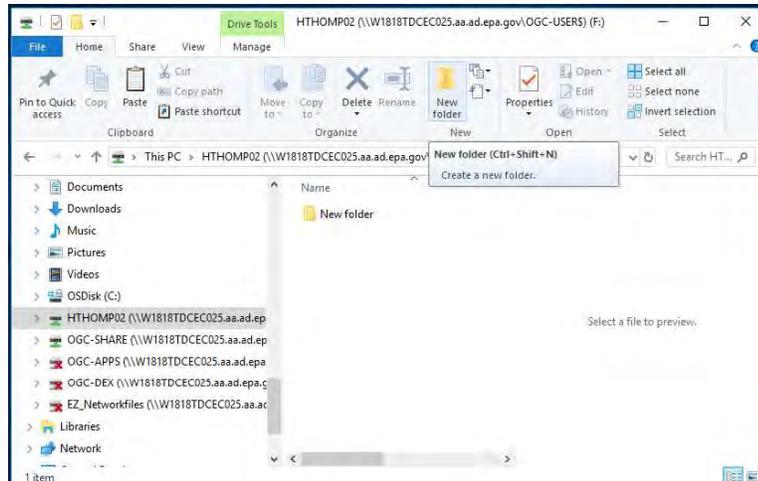
Below are detailed instructions that will guide you through the following steps:

- (1) Create search folders to collect search results and final collection folders for responsive and nonresponsive records
- (2) Conduct term-specific searches of a single drive, and repeat for each drive
- (3) Copy search results into a search folder
- (4) Consolidate all search results into the final collection folders and search for duplicates
- (5) Review files for responsiveness and sort into subfolders
- (6) Transfer the files to the Lead FOIA Program or your Contributing FOIA Program POC.

### Step 1. Create Search Folders

Before you begin your search for records, you will need to create folders to store the records from each search. You will then consolidate these folders into “Final Collection” folders for responsive and nonresponsive records. You should follow the instructions provided by the Lead FOIA Program or your Contributing FOIA Program POC regarding the creation of folders. As an example, the Lead FOIA Program or Contributing FOIA Program may provide instructions like the following:

- ✓ Select the “**File Explorer**” located on your desktop or on the task bar at the bottom of your screen.
- ✓ Create a folder either by selecting *Home > New Folder* or *File > New > Folder* as shown below. [How to create the folder may vary depending on the computer system]



- ✓ Name the folder using a simple convention, such as “Search Results [insert # of search].” **Do NOT use the case name or any search term in the folder name.**
- ✓ Repeat this process for each search, and to create a “Final Collection” folder where you will copy all the records from the search folders.
- ✓ In the “Final Collection” folder, create two subfolders, one for “responsive” records and the other for “nonresponsive” records.

## Step 2. Conduct the Search

Below are some tips to assist with your electronic document search. These tips would apply to searches for files located, for example, in Word, Excel, PowerPoint, WordPerfect, Adobe, and .tif documents, saved in your C:drive, F:drive, and G:drive (if applicable).

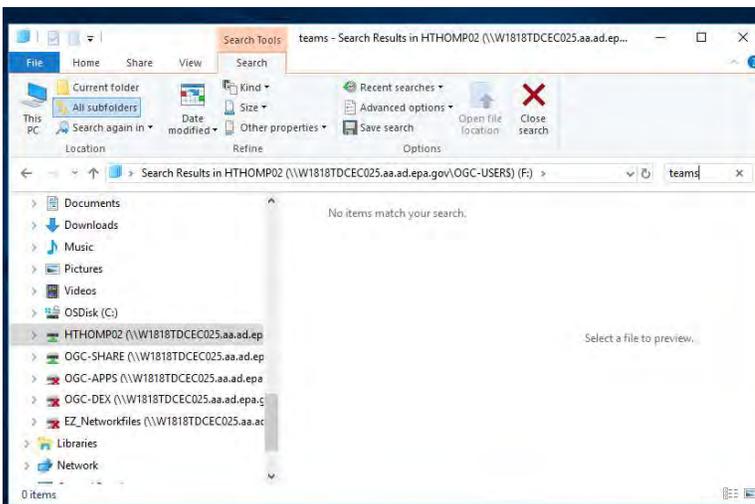
One place to start is with a Windows Search of an entire drive, such as the C:Drive. To perform such a search, follow the steps below.

### Windows Explorer Search for Entire Drive

- ✓ Select the “**File Explorer**” located on your desktop or on the task bar at the bottom of your screen.



- ✓ Identify the drive that you want to search (C:, F:, etc.).
- ✓ Type the search term in the search box **in the upper right corner of the file explorer screen.**



- ✓ Click on the Search Tools tab.
- ✓ Under “Location” click “All subfolders.”
- ✓ The search will automatically start.

Depending upon the number of files, the search may take anywhere from 5 minutes to 40 minutes. If the search completes successfully, the search companion will indicate that the search is done and that the search has found a specific number of documents.

- ✓ Record this number for later reference.

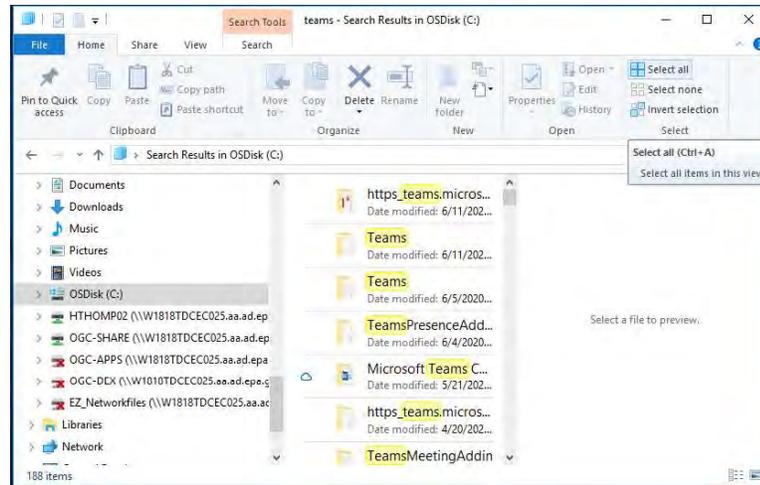
Note: If when searching, the search unexpectedly stops running, the green “progress” bar stops moving, or the search gets stuck in one folder, consider searching each subfolder within a drive separately per the instructions below.

## Manual Search

In conducting a manual search, review those locations in the drive that are reasonably likely to contain responsive records.

### Step 3. Copy Records to Search Folders

- ✓ As you complete each search, go to the “Home tab,” and click **Select All**. Right click and drop down to **Copy**.



- ✓ Go to the Search folder created to hold documents pulled from that specific search, open it, right click, and select “**Paste**” from the drop-down menu. The documents will appear in that folder.  
Repeat Steps 1 through 3 for each of the drives to which you have sole access.

### Step 4. Copy Records from the Search Results Folders to the “Final Collection” Folder

- ✓ Once you have completed your search, you should consolidate all documents collected in your Search Results folders into a Final Collection Folder. Open one Search Folder so that you can see all the files inside the folder. Go to the “Home” tab, click **Select All**. Right click and drop down to **Copy**.
- ✓ Go to the Final Collection folder created to hold all documents. Open the folder, right click, and select “**Paste**” from the drop-down menu.
- ✓ Repeat for all Search Folders until all files are in the Final Collection Folder.

Because you will need to search each drive for every search term, it is likely that a file will respond to more than one search and that you will have the same file saved in more than one Search Folder. To eliminate duplicates in your Final Collection Folder, do the following:

- ✓ When you open the Final Collection folder and paste the highlighted documents into that folder, if the document is a duplicate of a document already in the folder you will get a dialog box “**Confirm File Replace.**” Click “**No**” for each document for which

such a box appears because it is a duplicate.

### **Step 5. Sort Responsive Records from Nonresponsive Records**

Review documents in the Final Collection folder for each drive to make sure that they are actually responsive to the FOIA request and were not captured because of the presence of a search term used in another context. All responsive records should be separated into a “Responsive” Subfolder; all nonresponsive records should be separated into a “Nonresponsive” Subfolder.

### **{Optional: Step 6. Transfer Records to the Lead FOIA Program or your Contributing FOIA Program Point of Contact**

Please refer to the [Resource C](#), Sample Search Instructions for Potential Custodians, for advice on how to transmit your files to the Lead FOIA Program/Contributing FOIA Program Point of Contact.}

Refer to these instructions to search and collect Lotus Notes emails. If applicable, please include this as an attachment to your Search Instructions for custodians. Note that any FOIA request seeking emails sent or received prior to February 2013 requires a Lotus Notes search.

To fulfill your responsibility under the FOIA, you may need to search Lotus Notes email for any potentially responsive emails and collect these records. Note that you will need access to the IBM Notes application to search Lotus Notes mailboxes.

Below are detailed instructions to guide you through the following steps:

- If needed, request a Lotus Notes license and have IBM Notes installed and configured on your computer.
- Request access to the Lotus Notes mailbox.
- Open the mailbox and verify that it is indexed.
- Perform the search.
- Save each responsive email as a PDF to your collection folder.
- Send the responsive emails to your point of contact or upload the emails into FOIAonline.

### Requesting a Lotus Notes License

1. Contact your local Information Resources Management (IRM) Branch Chief or Information Management Official (IMO) to request a Lotus Notes license.

#### **Example of email to your IRM Branch Chief or IMO requesting a Lotus Notes license:**

From: [auto-populated with your email address]  
Sent: 6/2/2014 12:59:40 PM  
To: [insert email address of your IRM Branch Chief or IMO]  
Cc: [insert email address of your supervisor]  
Subject: Request for a Lotus Notes license

Hello –

I am writing to request a Lotus Notes license to search and collect Lotus Notes emails responsive to a FOIA request. I am requesting a Lotus Notes license until [insert date].

My supervisor, [insert supervisor's name], is copied on this request in case supervisor approval is required.

Thank you.

[insert your name or signature block]

2. Your IRM Branch Chief or IMO will submit a Lotus Notes license request to the Enterprise IT Service Desk (EISD).
3. EISD will issue a ticket to the EUS Notes Administrators group to license the account.

4. The EUS Notes Administrator will license the account and then notify your local IT service desk to install and configure the IBM Notes application.
5. The local IT service desk will contact you to set up a time to configure the IBM Notes application.
6. The IT service desk will notify the EUS Notes Administrators group when the IBM Notes application is configured and ready to use.

### Requesting Access to Your Lotus Notes Mailbox

If you are seeking access to your own Lotus Notes mailbox, include this request in the same communication you send to request a Lotus Notes license. Please follow the instructions in the next section if you are requesting access to the Lotus Notes mailbox for another custodian.

#### **Example of email to your IRM Branch Chief or IMO requesting a Lotus Notes license and access to your Lotus Notes mailbox:**

From: [auto-populated with your email address]  
Sent: 6/2/2014 12:59:40 PM  
To: [insert email address of your IRM Branch Chief or IMO]  
Cc: [insert email address of your supervisor]  
Subject: Request for a Lotus Notes license and access to my Lotus Notes mailbox

Hello –

I am writing to request a Lotus Notes license and access to my Lotus Notes mailbox. I am requesting a license and access to my Lotus Notes mailbox to search and collect Lotus Notes emails responsive to a FOIA request. I am requesting a license and access to my Lotus Notes mailbox until [insert date].

My supervisor, [insert supervisor's name], is copied on this request in case supervisor approval is required.

Thank you.

[insert your name or signature block]

Once the account is licensed and the IBM Notes application is installed, the EUS Notes Administrator will start the file index for your active and archive mailboxes, and email you hyperlinks to your mailbox and archive mailbox.

#### **Example of email to requester from the EUS Notes Administrator:**

**From:** Longenberger, Randall  
**Sent:** Thursday, February 18, 2021 10:32 AM  
**To:** Doe, Jane <Doe.Jane@epa.gov>  
**Subject:** The location of the requested Notes mail files have been found

Good Morning,

The requested access for the Notes mail has been granted. We implemented indexing to assist in searching. Use the below links to access the mail files inside of the IBM Notes application.

[Notes://epamail/12345a6789bc123de](mailto://epamail/12345a6789bc123de) → John Smith Mail  
[Notes://epamail/12345a6789bc123de](mailto://epamail/12345a6789bc123de) → John Smith Archive

Regards,

Randall Longenberger  
EUS Administrator  
O:919-541-2347  
[Longenberger.Randall@epa.gov](mailto:Longenberger.Randall@epa.gov)  
Team SAIC Redefining Ingenuity™  
NCC Bldg, N191J, RTP, NC

### Requesting Access to Another Custodian's Lotus Notes Mailbox

Follow these instructions to request access to the Lotus Notes mailbox of another active employee or a separated employee.

1. Send an email to the custodian's supervisor (or former supervisor, in the case of separated personnel) requesting access to the custodian's Lotus Notes mailbox. Ask the supervisor to send written approval to their IRM Branch Chief or IMO.

### **Example of email to custodian's manager requesting access to another custodian's Lotus Notes mailbox:**

From: [auto-populated with your email address]  
Sent: 6/2/2014 12:59:40 PM  
To: [insert email address of the custodian's manager]  
Cc: [insert email address of your supervisor]  
Subject: Request for access to [insert custodian's name] Lotus Notes mailbox

Hello –

I am writing to request access to [insert custodian's name] Lotus Notes mailbox. I am requesting access to this Lotus Notes mailbox to search and collect Lotus Notes emails responsive to a FOIA request. I am requesting access to this Lotus Notes mailbox until [insert date].

My supervisor, [insert supervisor's name], is copied on this request in case supervisor approval is required.

Please email your written approval of this request to the IRM Branch Chief or IMO for your office.

Thank you.

[insert your name or signature block]

2. To approve the request, the custodian's manager should forward the request email to the IRM Branch Chief or IMO for their office and indicate that the request is approved.
3. If the IRM Branch Chief or IMO approves the request, they will forward the request to [OBI\\_FILE\\_ACCESS\\_REQUEST@epa.gov](mailto:OBI_FILE_ACCESS_REQUEST@epa.gov). The IRM Branch Chief or IMO's email should include the following information:

Request for Access to Records of Employees Who are on Leave or Separated	
Role	Name
Approver	John Doe (IMO, IRM Branch Chiefs or their designee whose name has been provided as authorized approvers)
Mailbox Name	Doe.Jane@epa.gov
Employee's full name	Jane Any Doe
Employee's LAN ID	Jdoe
Telephone number	111-222-3333
Person Receiving Access (Include email address)	Steven Jones (Jones.StevenT@epa.gov)
Access Needed for the Following Applications (as applicable):	Lotus Notes
The email Subject must include the nature of the request (i.e., requesting access to a Lotus Notes mailbox).	

4. The ticket will be assigned to an EUS Notes Administrator. The EUS Notes Administrator will add the requester to the mail file ACL, start the file index, and email the requester links to the custodian's Lotus Notes mailbox.

**NOTE: Indexing a large mail file will take several hours (most email files are large).** Example of email to requester from the EUS Notes Administrator:

**From:** Longenberger, Randall  
**Sent:** Thursday, February 18, 2021 10:32 AM  
**To:** Doe, Jane <Doe.Jane@epa.gov>  
**Subject:** The location of the requested Notes mail files have been found

Good Morning,

The requested access for the Notes mail has been granted. We implemented indexing to assist in searching. Use the below links to access the mail files inside of the IBM Notes application.

[Notes://epamail/12345a6789bc123de](mailto://epamail/12345a6789bc123de) ← John Smith Mail

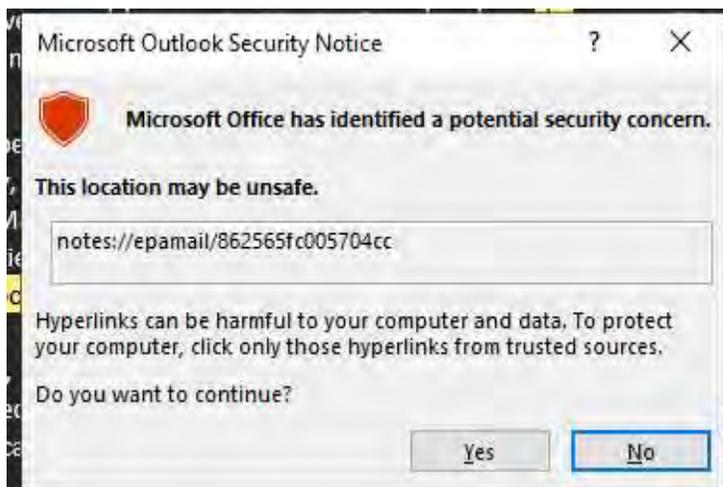
[Notes://epamail/12345a6789bc123de](mailto:Notes://epamail/12345a6789bc123de) ←John Smith Archive

Regards,

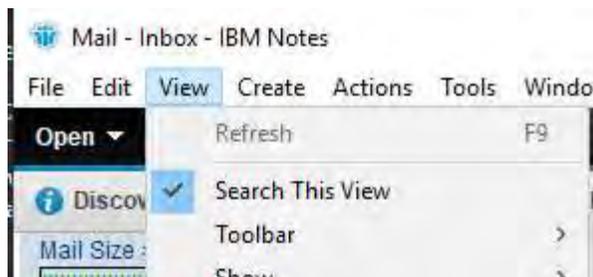
Randall Longenberger  
EUS Administrator  
O:919-541-2347  
[Longenberger.Randall@epa.gov](mailto:Longenberger.Randall@epa.gov)  
Team SAIC Redefining Ingenuity™  
NCC Bldg, N191J, RTP, NC

### Accessing the Lotus Notes mailbox, turning on the search function, and verifying the Index is Completed

1. Click the link in the email from the Notes Administrator and select yes on the Outlook security notice



2. Once the mailbox opens in IBM Notes, go to View in the top left and ensure “Search this View” is checked



This will add a search bar to the top of the mail window. The index status will be located to the right of Show results.

3. If the index status reads “not indexed,” close the file and wait up to 24 hours before checking the status again. If the file is still not indexed, email [EUS\\_Notes\\_Administrators@epa.gov](mailto:EUS_Notes_Administrators@epa.gov) to request that they check the indexing status.



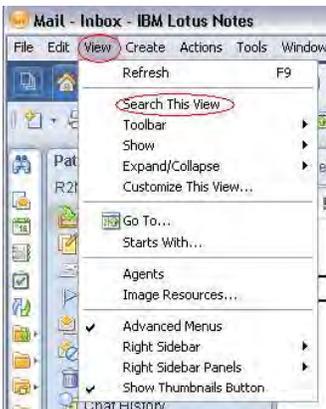
## Search for Emails

1. Make sure that your email is indexed prior to conducting the search. When indexing has completed, you should see a green ball and "Indexed" to the right of the search function.



If you do not see the search box:

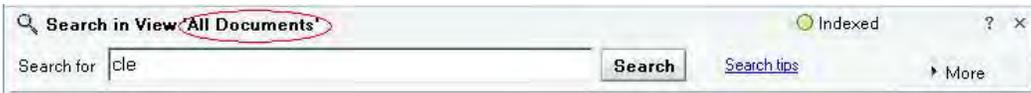
- ✓ Click **View > Search this View** from the menu bar at the top of your Notes screen.



2. On the listings at the left side of your Inbox select **All Documents**. This will capture all potentially responsive documents, even if emails are stored in folders.



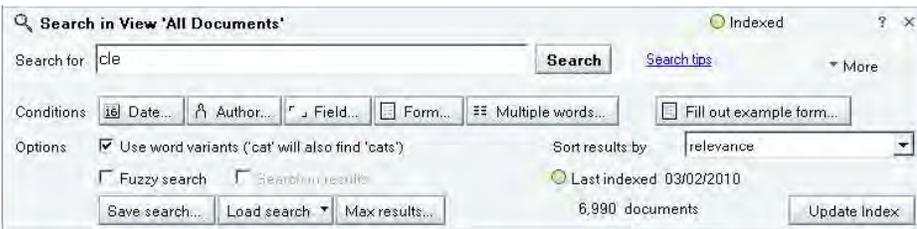
The “Search in View” will now indicate that the search will consider “All Documents.”



3. Click on **the double arrow icon** at the right side of the screen to reveal additional search options.

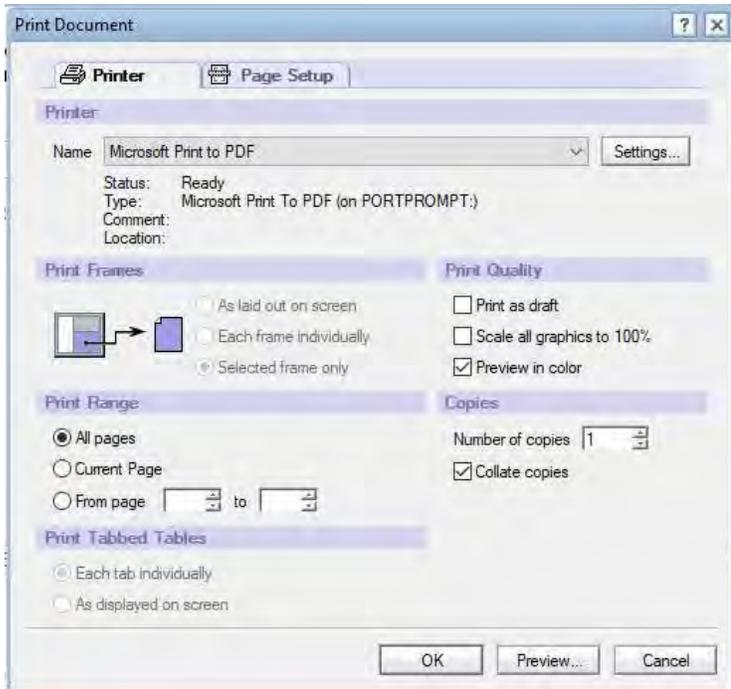


The screen should now look like the snapshot below:

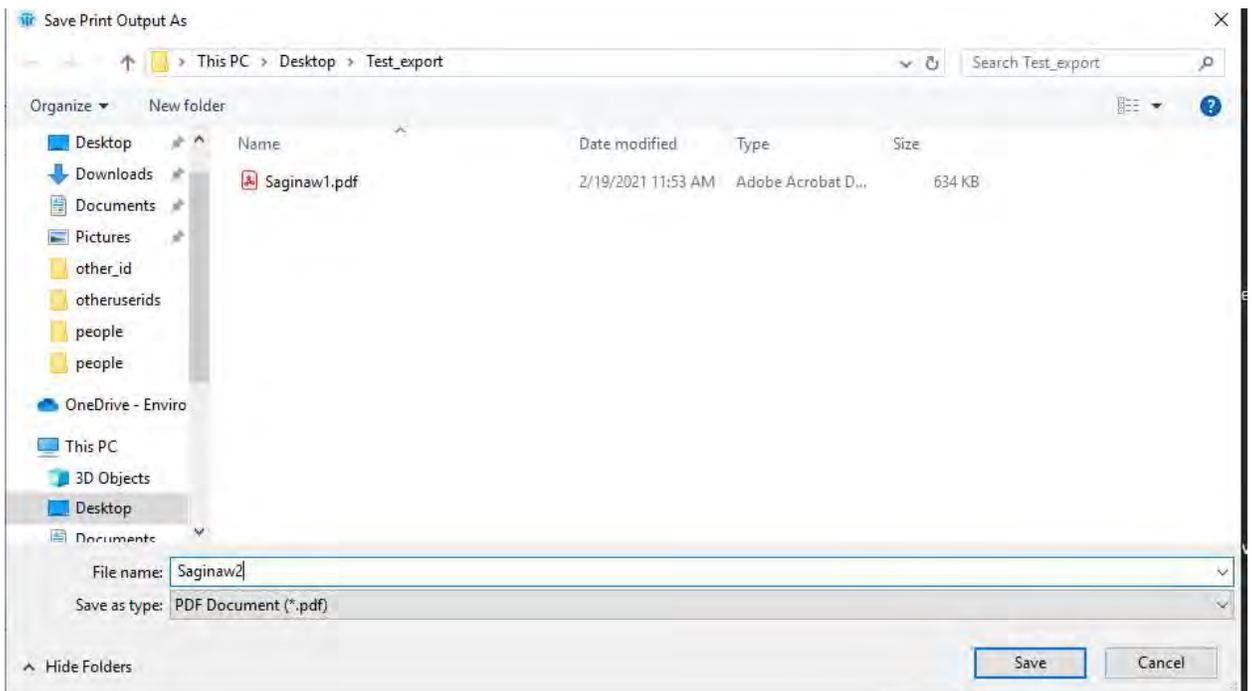


**NOTE: Clicking on the **Multiple words** box will allow you to choose up to eight words for your search.**

4. Enter the search terms provided in the Search Instructions and click **Search**. Your search results will appear below the Search window.
5. Save each email as a pdf to the collection folder on your OneDrive or network drive.
  - ✓ Select the first email (click to the left of the email to add a check mark next to the email)
  - ✓ Go to File and choose Print (Ctrl+P)
  - ✓ Select “Microsoft Print to PDF” as the printer and click “OK”



- ✓ Navigate to the collection folder you created for this search, name the file, and click “Save”



6. Repeat step 5 above until you have saved each of the returned results as a pdf to your collection folder.

**Note: Lotus Notes has a search limit of 5,000 documents. If your search returns “5,000” documents, there are probably more potentially responsive emails that were not captured. You will need to do one of the following to address this issue:**

- Refine your search terms (talk with your POC prior to doing this); or
  - Conduct multiple searches using fewer terms.
7. Repeat steps 4 through 6 above until you have completed the search.

### Review Search Results for Responsiveness

1. Review the emails and attachments in your collection folder to make sure that they are responsive to the FOIA request. It is possible for a search to return documents that use one of the search terms in a context that is outside the scope of the request. Organize the records into responsive and non-responsive folders in accordance with the instructions provided by your point of contact.
2. Organize your responsive records into three sub-folders: release in full; release with redactions; and withhold in full. Refer to the instructions provided by your point of contact to redact any exempt material.

### Upload Responsive Search Results into FOIA Online

Refer to the instructions provided by your point of contact for next steps (e.g., save responsive records to a folder on a shared network drive or SharePoint site; upload the responsive records to the FOIA request case file in FOIAonline).

The versioning feature in SharePoint allows you to store, track, and restore files in a library by listing new “versions” whenever the file is changed. If you are required to collect prior versions of a document, here are instructions for identifying and restoring prior versions:

1. Navigate to your SharePoint Site. Choose “view online” option if you are navigating to your OneDrive through file explorer.
2. Right click on a document and choose “version history.” This will identify all the available versions of the document.
3. Open each version and save a copy to the folder created to collect documents for the request.

This document offers direction on how to forward text messages from a mobile device to the EPA email system. These instructions are located at:

<https://intranet.epa.gov/mobiledevices/pdf/Instructions-Saving-Text-Messages.pdf>.

EPA discourages the use of text messages for transmitting substantive (or non-transitory) federal records. See EPA, EPA National Records Management Program <https://www2.epa.gov/records> (last visited Aug. 31, 2020). If a substantive (or non-transitory) text message is sent or received on your government-issued mobile device, it must be saved into an EPA-approved records management system. If you follow the steps below, you can forward the text message into the EPA email system and then later save it as a record using EZ Email Records or another approved recordkeeping system. When forwarding the text message from the mobile device to the EPA email system, you must include contextual information such as the time, date, subject, and sender/recipient of the message. Please follow the instructions below to manage text messages that are substantive (or non-transitory) records.

### How to Forward Text Messages to Email from an iPhone

Tap the “*Messages*” icon  on the device.

1. Find the text message conversation that you need to save as a record.
2. Tap and hold one of the text messages in the conversation.
3. Tap the “*More*” option that appears above the text message.
4. Put a check mark in the circle beside any or all the text messages that you want to save as records.
5. Tap the blue arrow icon in the lower right corner of the screen.
6. Type your EPA email address in the “*To*” field.
7. After the text message, enter contextual information about the message—including to, from, date, time, and a relevant subject—and then tap “Send.” For example, add “(To: Susan Employee, From John Worker, Date: 01.01.15, Time: 6:35 PM, Subject: Project Y).” Press “*Send*”.
8. After receiving the email containing the text message, follow the EZ Email Records process in Outlook to save the email as a record. After following these instructions, you may also notice that a copy of the message containing the contextual information created in step 8, appears in your list of messages in the Messages app on your phone.

**Note:** If you have problems forwarding text messages to email using the above instructions, please try the below options, starting with Option 1, below.

#### Option 1:

1. Tap the Settings App > Messages > Send & Receive
  2. If your email address is listed with a checkmark next to it, tap on it to uncheck.
  3. Exit out of Settings and try to forward a text message to your email. If you do not have an email listed or it still does not work, try Option 2.
- \*Be sure to check your Junk Email folder to ensure it did not route there.

## Option 2:

1. Tap the Settings App > iTunes & App Store > Apple ID > Sign Out
2. Re-enter your Apple ID (work email address) and Apple ID password.
3. Exit out of Settings and try to forward a text message to your email.

## How to Forward Text Messages to Email from a Windows Phone

1. On *Start* , tap “*Messaging*” , then tap the thread that contains the text message you want to save as a record.
2. Open the text message, press and hold the message to be forwarded, and then click “*Forward*”.
3. Type your EPA email address in the “*To*” field.
4. After the text message, enter contextual information about the message—including to, from, date, time, and a relevant subject—and then tap . For example, add “(To: Susan Employee, From John Worker, Date: 01.01.15, Time: 6:35 PM, Subject: Project Y).”
5. After receiving the email containing the text message, follow the EZ Email Records process in Outlook to save the email as a record.

**Note:** This approach for saving text messages on a Windows phone can only be used for forwarding individual text messages. If multiple messages need to be stored as records, forward each message and the related contextual information to EPA’s email system individually.

## Technical Assistance

If you have questions about managing records on your mobile or portable devices, contact the [Records Help Desk](#), and refer to the [Frequent Questions about Mobile and Portable Devices, and Records](#) for more information.

This document offers simple tips for conducting a search.

As you oversee the search for records responsive to a FOIA request, keep in mind the following recommended best practices:

- ✓ Do NOT conduct a search for an improper request.
  - Before you plan your search, make sure that the request “reasonably describes the records sought.” If the request is overly broad, poses questions, or seeks records not yet in existence, contact the requester to modify the request.
- ✓ Document the process from start to finish.
  - Any external communications that you have with the requester, as well as any notable intra-agency communication pertaining to the request, should be memorialized in writing. Documented changes to the request and any correspondence that you have with the requester should be uploaded to FOIAonline.
- ✓ Keep an eye on the clock.
  - Unless you can identify “unusual circumstances,” you will have 20 working-days to conduct a reasonable search and provide the requester with responsive records. Remember, you can stop the clock *once* to seek clarification from the requester but remember to re-start the clock once the request is clarified and keep track of the amended due date in FOIAonline.
- ✓ Planning your search is essential.
  - Before you begin your search, you should compile a search plan that identifies the relevant offices, repositories, and custodians.
  - Remember to search absent or former employees.
- ✓ Maximize the Centralized Search.
  - You may submit a search request to the eDiscovery Division (EDD) for Outlook emails, Skye Chats, and records on OneDrive, SharePoint, network drives, and workstations. EPA organizations should submit search requests to collect electronic documents from the identified electronic record source locations covered by the eDiscovery Division’s centralized search, unless a more targeted collection is more likely to locate all responsive documents, such as where all responsive records are located in a specific folder within an email account.
  - As soon as you distribute the Search Instructions, remind custodians to transfer any potentially responsive records from, for example, mobile devices (e.g. text messages and photos) to Outlook Email so that they will be captured in the centralized search.
- ✓ Conducting a Search
  - Remember to conduct a defensible search.
  - Remind custodians to search all locations where they are reasonably likely to find responsive records. This may include lesser-used locations, including CMS and external drives.

- ✓ Prepare for Collection.
  - Once custodians complete their search, you will need to collect and review records. Consider using a cloud-based collection option, such as OneDrive, or a shared network drive for the collection of documents not captured in EDD's centralized search.
- ✓ When in Doubt, Ask.
  - The General Law Office's Information Law Practice Group, the Office of Regional Counsel (if the matter concerns a Regional FOIA), and the National FOIA Office are available to assist you.

The FOIA provides for nine exemptions that agencies may use to protect specific types of information.

**Exemption 1, Classified Information:** Exemption 1 applies only to information that has been properly classified according to criteria established by an Executive Order. This exemption is rarely asserted by the EPA.

**Exemption 2, Personnel Rules and Practices:** Exemption 2 of FOIA exempts from mandatory disclosure records that are “related solely to the internal personnel rules and practices of an agency.” The Supreme Court has held that Exemption 2 covers only records “relating to issues of employee relations and human resources” and that such records must be internal and relate solely to those personnel rules and practices. Exemption 2 is narrow in scope and, thus, is rarely used.

**Exemption 3, Federal Statute Prohibits Disclosure:** Exemption 3 protects from disclosure information that is prohibited from disclosure by another federal statute, provided that the other federal statute explicitly requires matters to be withheld from the public. Statutes found to qualify under Exemption 3 include, for example, FIFRA, the Internal Revenue Code, and the Patent Act. Note that if you withhold information under Exemption 3, you must identify the statute under which you are withholding information in your response letter.

**Exemption 4, Trade Secrets and Confidential Business Information (CBI)** (also referred to as Proprietary Business Information (PBI)): Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." Based on this wording, the exemption covers two distinct categories of information in federal agency records, (1) trade secrets, and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. For purposes of Exemption 4, “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.” See [Part 5.D.ii](#), CBI Review, for further information about reviewing documents that may contain CBI.

**Exemption 5, Privileged Communications:** Exemption 5 protects “inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.” In simpler terms, Exemption 5 protects those documents that are normally privileged in the civil discovery context. There are two threshold steps in determining if Exemption 5 applies:

1. Is the record an intra-agency or inter-agency communication?
2. Does a discovery privilege apply?

If your record meets both requirements, you must then analyze which discovery privilege applies. The three most used Exemption 5 privileges are:

- Deliberative Process Privilege;

- Attorney-Client Privilege; and
- Attorney Work Product Privilege.

### **Deliberative Process Privilege (DPP)**

- To apply DPP, the record must be:
  - Predecisional: The information must have been created before the adoption of an agency policy/decision.
  - Deliberative: Material is deliberative if it "reflects the give-and-take of the consultative process."
- DPP exists to: (1) encourage open, frank discussions; (2) protect against premature disclosure of proposed policies; and (3) protect against public confusion.
- DPP should only be used "if the agency reasonably foresees that disclosure would harm an interest protected by an exemption."
- Additionally, DPP cannot be used on records that were created 25 years prior to the date they were requested.
- Some common examples include:
  - Draft documents
  - Staff analysis
  - Comments on draft rule-making documents
  - Emails or memos discussing Agency opinions or options

### **Attorney-Client Privilege (ACP)**

- Protects internal communications:
  - Between an attorney(s) and client(s);
  - Made in confidence;
  - For the purpose of seeking or providing legal advice.
- Confidential communications between agency attorneys can be covered, as can communications between attorneys and staff, that discuss legal issues or ask for legal advice.
- May have to show that disclosure is restricted to those who need to know within the Agency/Executive branch.

### **Attorney-Work Product Privilege (AWP)**

- To apply AWP, the record must be:
  - Prepared by, or at the direction of, an attorney
  - In reasonable anticipation of litigation
- Extends to documents prepared by or for a representative of a party, including an agent.

**Exemption 6, Personal Privacy:** 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." When considering whether to assert Exemption 6, balance the privacy interest of the individual against the public interest in disclosure. Common examples of content to withhold include private home addresses, personal phone numbers, personal email addresses, and medical information.

**Exemption 7, Law Enforcement:** Exemption 7 protects from disclosure certain types of “records or information compiled for law enforcement purposes.” This exemption is comprised of six subsections, as described below. When asserting Exemption 7, remember to specify which subsection you are using.

- Exemption 7(A) protects records that “could reasonably be expected to interfere with enforcement proceedings.” This includes information that would hinder the government’s ability to control or shape the investigation, enable targets of the investigation to elude enforcement or suppress or fabricate evidence, or prematurely reveal the government’s evidence or strategy. Note that this exemption is “temporary” because it is applicable only for the duration of the investigation.
- Exemption 7(B) is aimed at preventing prejudicial pretrial publicity that could impair a court proceeding, protects “records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication.”
- Exemption 7(C) protects information that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption is like Exemption 6 except that it requires EPA to meet a lower standard (“reasonably expected to” under exemption 7(C) vs “clearly unwarranted” for Exemption 6) and is applicable only in the law enforcement context. For example, Exemption 7(C) is sometimes used to protect identities of employees working on sensitive cases.
- Exemption 7(D) provides protection for “records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.”
- Exemption 7(E) affords protection to law enforcement information that “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.”
- Exemption 7(F) protects law enforcement information that “could reasonably be expected to endanger the life or physical safety of any individual.” Courts have routinely upheld the use of Exemption 7(F) to protect the identities of law enforcement agents. EPA has also used this exemption to protect the identities of members of security details and to withhold schematics detailing drinking water sources.

**Exemption 8, Financial Institutions:** Exemption 8 protects certain information related to financial institutions but is only applicable for agencies responsible for regulating or supervising financial institutions. Accordingly, EPA does not assert Exemption 8.

**Exemption 9, Wells:** Exemption 9 exempts from disclosure “geological and geophysical information and data, including maps, concerning wells.” This exemption can be applied to any type of well, including gas or water. An example of information withheld under Exemption 9 would be maps showing the exact locations of wells.

**PROPRIETARY BUSINESS INFORMATION CASE TRACKING**

- A. Purpose: Explain how to track FOIA requests in FOIAonline when information is withheld pursuant to FOIA Exemption 4 pending a confidentiality determination by the appropriate legal office.
- B. Process:
1. Include the initial denial language, included in a final determination in which information is withheld under FOIA Exemption 4:

The information withheld under Exemption 4 will be sent to the appropriate legal office to issue a final confidentiality determination. The appropriate legal office will contact you to confirm your continued interest in receiving a final confidentiality determination and provide you with a fee estimate, where appropriate. Therefore, you do not need to appeal the information withheld pursuant to Exemption 4. To the extent you would like to appeal any other issue, including any non-Exemption 4 withholding, you may appeal this response... [FOLLOWED BY APPEAL LANGUAGE]

2. The program or region is responsible for creating a PBI case in FOIAonline after issuing an initial denial in which information was withheld under Exemption 4:
  - a. Select “New Request.”
  - b. Agency, Sub-Agency, and Submitted Date are pre-populated.
  - c. Do not select a Perfected Date.
  - d. Select “PBI” as Request Type.
  - e. Fill in contact information as provided by the FOIA requester. Do not include an email address.
  - f. Processing Fees information pre-populated.
  - g. Fill in the following for Description:

[**OGC or ORC**] to provide confidentiality determination for [**TSCA or FIFRA**] information initially withheld under FOIA Exemption 4 in response to FOIA request no. EPA-HQ-20XX-XXXXXX. Do not perfect the request. Please assign to [**OGC or ORC in Region X**] without correspondence to the requester.
  - h. Do not select Expedited Processing or Fee Waiver.

- i. Under Additional Information – Records Location select Headquarters or Region as appropriate.
      - j. Attach a copy of the PBI Final Response Letter to the underlying FOIA request as a Supporting File.
      - k. Select “Preview.”
      - l. After confirming the information is correct, select “Submit.”
3. The new PBI case is automatically routed to NFO. The NFO standard centralized intake process does not apply to PBI cases, specifically NFO will not issue any correspondence to the requester as part of the intake process. NFO assigns PBI case to OGC or Regional ORC, as indicated in the Request Description:
  - a. The NFO opens the PBI case.
  - b. Then selects “Make Assignment.”
  - c. Under Assign to Organization:
    - i. For HQ PBI determinations: Search for and select “EPA/HQ/OGC/PBI – PBI Determination”; or
    - ii. For Regional PBI determinations: Search for and select the appropriate Regional Sub-agency, “EPA/RX – Region X”.
  - d. Select “Save.”
4. The OGC or ORC individual assigned the PBI request is responsible for:
  - a. Contacting the FOIA requester to confirm continued interest in receiving a final confidentiality determination;
  - b. Closing out PBI request if requester fails to confirm interest or is not interested in receiving a final confidentiality determination;
  - c. Providing an estimate of fees where appropriate, with the input of the HQ or Regional FOIA program;
  - d. Closing out PBI request if requester fails to assure payment of fees, or provide advanced payment if applicable;
  - e. Notifying HQ or Regional FOIA program of need to request substantiation from affected business(es) and provide program recommendation where appropriate;

- f. Issuing final confidentiality determination to the affected business(es);
- g. Closing out PBI request in FOIAonline.
- h. The HQ or Regional FOIA program is responsible for reopening the FOIA request and providing an updated response/records to requester where appropriate.

The eDiscovery Division (EDD) maintains a Relativity Resource Center SharePoint site<sup>5</sup> that provides access to Relativity user guides and recorded trainings. The SharePoint site includes comprehensive user guides as well as tip sheets on discreet Relativity topics, such as how to create a saved search and how to apply text redactions to a document.

#### GETTING DOCUMENTS OUT OF RELATIVITY

- There are two options for exporting documents out of your Relativity workspace.
- Informal Export – An informal export may be used to export records for review within the Agency (*e.g.*, manager review; equity reviews), and if you need to consult with another federal agency regarding the application of exemptions on records or portions of records where the other federal agency has equity.
- Formal Production – A formal production is used to export records from Relativity when:
  - a. You have a set of records ready to release to the requester; or
  - b. You are referring records to another federal agency for direct response to the requester.
- To request an informal export, fill out an “Informal PDF Export Request” form. To request a formal production, fill out a “Formal Production Request” form. You should describe which documents need to be produced, if you would like them to be produced as images or in native format, and how you would like the documents to be stamped. Submit the completed form to [relativitysupport@epa.gov](mailto:relativitysupport@epa.gov). EDD’s Relativity Support may follow up to clarify those and other details. If you know that you are going to request a large production, it can be helpful to reach out in advance. You may access these forms and instructions for filling out the formal production request form on EDD’s [Relativity Resource Center SharePoint site](#).
- **NOTE:** All informal exports will include a “Not for Public Distribution” watermark. The informal export should only be used to manage reviews within the Agency and solely for consultations with other federal agencies. If you are referring records to another federal agency, you should request a formal production for those records.
- You may also use the “export to file” option in Relativity to export out an index of designated documents. This tool is useful if you need to create a log of withheld records, or if you would like to have a list of documents in the workspace to assist in clarification discussions with the requester. While such a list of the records in the workspace is useful to the EPA FOIA processing team, this spreadsheet should not be shared with the requester. In addition, the FOIA processing team should review and redact any sensitive or exempt information from the log of withheld records before releasing the log to the requester.

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<sup>5</sup> <https://usepa.sharepoint.com/sites/EDD/RRC/Documents/Forms/AllItems.aspx>

To review any records that are not collected by an eDiscovery Division centralized search, it is recommended that EPA staff use EPA-approved document review and redaction software, such as Adobe Acrobat Pro DC.

- (1) Choose **Tools > Redact**. The Redact toolset is displayed in the secondary toolbar.
- (2) In the secondary toolbar, choose **Mark for Redaction > Text & Images**.
- (3) (Optional) To set the appearance of redaction marks, click **Properties** in the secondary toolbar. (See Change the look of redaction markers.)

**Note:** The FOIA requires that the Agency provide an estimate of the volume of redacted information to the requester. This includes redaction marks within documents. Therefore, you must always use redaction marks or borders that are visible. In other words, never place a white redaction mark on a white background.

- (4) Mark items you want to remove by doing any of the following:

- Double-click to select a word or image.
- Drag to select a line, block of text, object, or area.
- Press Ctrl as you drag to select areas of a page in a scanned document.

**Note:** To preview how your redaction marks appear, hold the pointer over the marked area.

- (5) To apply multiple code entries to a single redaction, right-click a redaction mark and select an option. For more information, see Apply multiple code entries to a redaction.

**Tip:** Use the **Find Text** tool to find and remove words or phrases in one or more PDFs that contain searchable text. (see below)

- (6) (Optional) To repeat a redaction mark, right-click it and choose **Repeat Mark Across Pages**. This feature is convenient if a particular header, footer, or watermark appears in the same location on many pages.

- (7) When you have finished marking the items you want to redact, click **Apply** in the secondary toolbar to remove the items, then click **OK**. The items aren't permanently removed from the document until you save it.

- (8) If you want to search for and remove hidden information in the document by using the **Remove Hidden Information** feature, click **Yes** in the dialog box. Otherwise, click **No**.

- (9) Choose **File > Save**, and specify a filename and location. The suffix “**\_Redacted**” is appended to the filename. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.

**Tip:** Use the **Find Text** tool to find and remove words or phrases in one or more PDFs that contain searchable text. (see below)

### **Search and Remove Text**

**Note:** The **Find Text** tool doesn't search secured (encrypted) PDFs.

(1) Choose **Tools > Redact**. The Redact toolset is displayed in the secondary toolbar.

(2) In the secondary toolbar, choose **Mark For Redaction > Find Text**.

(3) In the **Search** dialog box, specify if you want to search the current PDF or all PDFs in another location.

(4) Do one of the following:

- To search for only one word or phrase, choose **Single Word or Phrase** and type the word or phrase in the text field.
- To search for multiple words, select **Multiple Words or Phrase**, and then click **Select Words**. Type each word in the **New Word or Phrase** text field and click **Add**. You can also import a text file with the list of words or phrases to search for.
- To search for a pattern (for example, phone numbers, credit card numbers, email addresses, social security numbers, or dates), click **Patterns**. Choose one of the available patterns. You can change the language version of the patterns. (See Select a different language version for patterns.)

(5) Click **Search & Remove Text**.

(6) In the search results, click the plus sign (+) next to the document name to see all occurrences of the word or phrase. Then, select the occurrences you want to mark for redaction:

- To select all occurrences in the list, click **Check All**.
- To select individual occurrences, click the check box for each one you want to redact. Click the text next to a check box to view the occurrence on the page.
- To mark none of the occurrences, close the **Search** dialog box or click **New Search** to start over.
- To mark whole words or partial words (characters) for redaction, select the option under **Redaction Mark Options**. For partial words, select **Mark Partial Word(s) for Redaction** and the **Settings** dialog box appears. In the **Settings** dialog box, specify the number and location of the characters for redaction. Character redaction is useful if you're searching for a pattern, like credit card numbers, and want to leave part of the number visible for identification purposes.

(7) If you selected occurrences that you want to mark for redaction, click **Mark Checked Results for Redaction**. The items you selected in the list are shown marked for redaction.

**Note:** If you haven't saved the file, you can select redaction marks in the document and press **Delete** to remove the redaction mark. The redaction marks become permanent after you save the file.

(8) To remove the marked items, click **Apply** in the secondary toolbar, and then click **OK**. The items aren't permanently removed from the document until you save it.

(9) If you want to search for and remove hidden information in the document by using the Remove Hidden Information feature, click Yes. Otherwise, click No.

(10) Choose **File > Save**, and specify a filename and location. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both.

### **Find and remove hidden content**

**Tip:** Use the **Remove Hidden Information** feature to find and remove content from a document that you don't want, such as hidden text, metadata, comments, and attachments. When you remove items, additional items are automatically removed from the document. Items that are removed include digital signatures, document information added by third-party plug-ins and applications, and special features that enable Adobe Reader users to review, sign, and fill PDF documents.

**Note:** To examine every PDF for hidden content before you close it or send it in email, specify that option in the **Documents** preferences using the **Preferences** dialog box.

(1) Choose **Tools > Redact**. The Redact toolset is displayed in the secondary toolbar.

(2) In the secondary toolbar, click **Remove Hidden Information**.

If items are found, they are listed in the **Remove Hidden Information** panel with a selected check box beside each item.

(3) Make sure that the check boxes are selected only for the items that you want to remove from the document. (See Remove Hidden Information options.)

(4) Click **Remove** to delete selected items from the file, and click **OK**.

(5) Choose **File > Save**, and specify a filename and location. If you don't want to overwrite the original file, save the file with a different name, at a different location, or both. The selected content is permanently removed when you save the file. If you close the file without saving it, repeat this process, making sure to save the file.

**Tip:** Use this function to take file attachments you intend to withhold based on a FOIA exemption out of Adobe documents.

**Note:** When marking documents for redactions in Adobe, always save two versions of the document:

- One version with the redaction marks unapplied
  - This version will be the “review” version. The redaction marks will be visible along with the content you intend to apply the redaction mark to.
  - This version will also be uploaded to FOIAonline but not released to the requester.
- One version with the redaction marks applied
  - This will be your production version that will be released to the requester

# Freedom of Information Act Community Mtg

## Negotiating with Requesters – May 12, 2022

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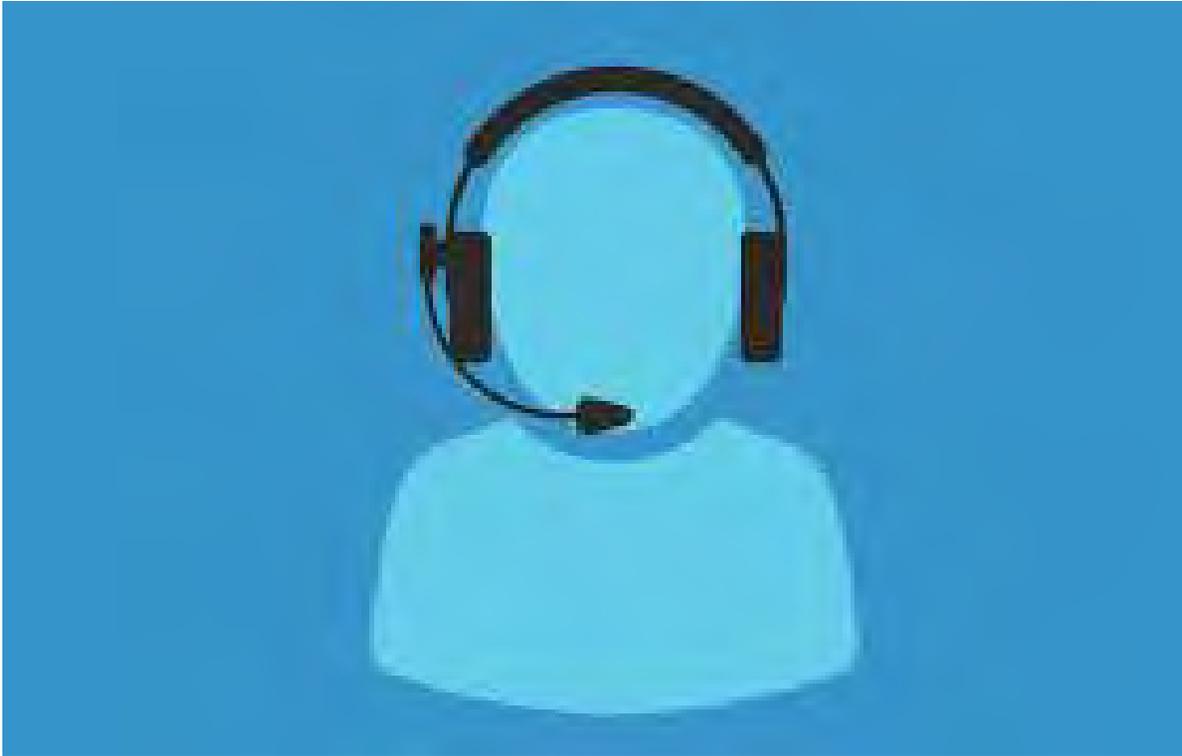
National FOIA Office  
EPA Office of General Counsel

Denise A. Walker  
National FOIA Office  
Office of General Counsel

# Why is this training important?

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- ❖ To help you comply with the FOIA
- ❖ Good customer service
- ❖ To support the Agency's 2022-2026 [Strategic Plan](#)
- ❖ To meet EPA's FOIA commitments in the [Administrator's FOIA memo](#)
  - ❖ transparency
  - ❖ disclosure
  - ❖ cooperation
  - ❖ innovation and improvement
- ❖ To create a clear record & avoid excessive FOIA litigation and attorneys' fees
- ❖ To help decrease your FOIA program's backlog



When is it a Good  
Idea to Contact a  
Requester?

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# Communication is key

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**Below are common communications that may occur:**

Clarify Scope of  
the request

Increase Fee  
Limit / Assurance  
of Payment

Extend Due Date

Discuss Search  
Terms

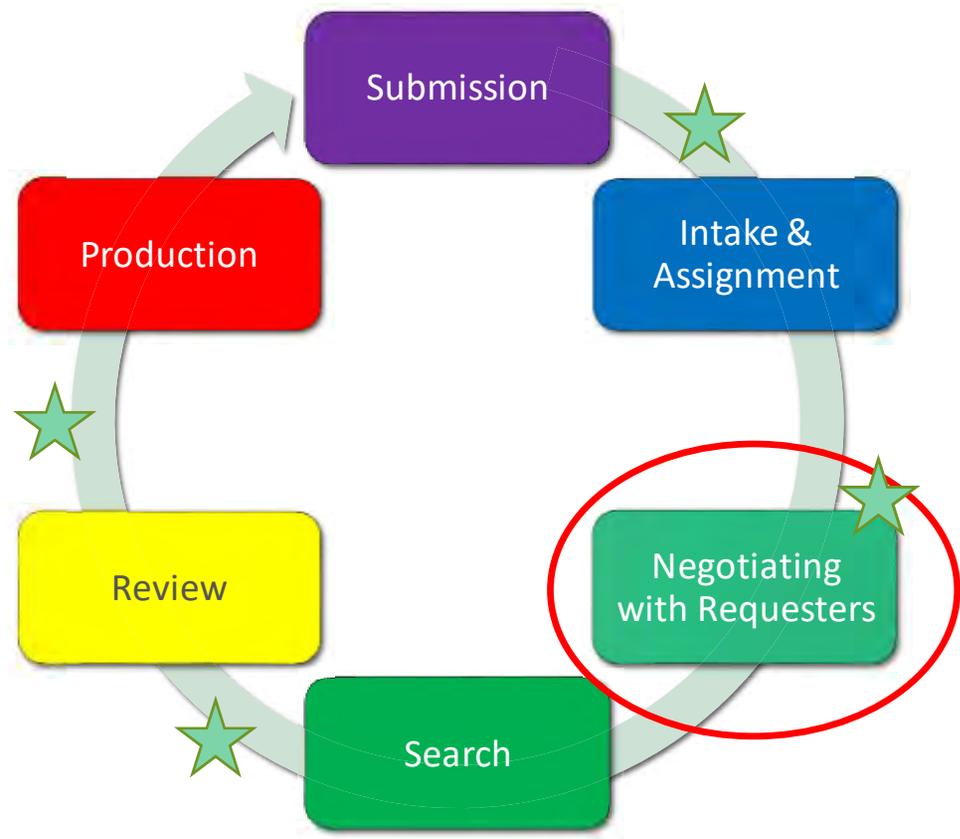
Discuss  
Preliminary  
Search Results

Status Updates

Interim release  
of records

Final release and  
close out letter

# Lifecycle of a FOIA Request at EPA



OGC NATIONAL FOIA OFFICE



National FOIA Office  
EPA Office of General Counsel



## Why Don't We Call Requesters?

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It is scary! What if I say the wrong thing?? I don't want to get into trouble!

I don't know what to say. It's easier to just interpret the request myself!

What if they start asking questions??

# The 'Why' behind the request

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FOIA requesters generally do not have to justify or explain their reasons for making requests.

## **Exceptions:**

- When expedited processing is requested
- When a fee waiver is requested

However, understanding what a requester is looking for can really help!

# Negotiating and Documenting a Clarification: Before the Call

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- Make sure you're prepared!
- Have a call with your subject matter experts.
- Agree who will lead the call and who will take notes.
- Talk through the information you already have and that you need to find out to conduct a search:
  - Custodians?
  - Search Terms?
  - Record Types and Locations?
  - Time Frame?



# What is Active Listening?



# Negotiating and Documenting a Clarification: During the Call

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Relax. You're prepared.



## **1. Be attentive:**

Make sure everyone is on the call. Introduce yourself and your team with confidence and kindness.

Wait for everyone to join. It's OK to engage in a little innocuous small talk while you wait.

Once everyone arrives: Begin by thanking the requester to take time to talk to you about the request.

# Negotiating and Documenting a Clarification: During the call

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## 2. Ask Open Ended Questions and Listen:

*“I have your request in front of me, but I’d like to start by letting you explain in your own words what you’re looking for.”*

Don’t interrupt until the requester is finished. Encourage the speaker to continue with small verbal comments like yes, and uh huh.



## 3. Ask Probing Questions:

*“Is there a specific document you have in mind?”*

*“If we were able to provide the perfect document or set of records to you, what would it look like?” “Do you need records by a particular date?”*

-Ask any follow-up questions that will help you or the SMEs locate the right records

# Negotiating and Documenting a Clarification: During the call

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## 4. Request Clarification:



“Could you clarify what you meant by “related to V-AWESOME?””

## 5. Paraphrase:



*“So let me see if I understand: You’re looking for email records that reflect EPA conversations with outside stakeholders while the agency was developing the V-AWESOME Policy. Is that correct?”*

# Negotiating and Documenting a Clarification: During the call

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## 6. Be Attuned to and Reflect Feelings:

*“It sounds like you’re concerned that we might clarify or put limits on your request in a way that won’t meet your needs. After this call, I’ll send you a letter that will document our conversation today. You will have the opportunity to review it and let us know if we misunderstood something. And, of course, you can always submit more FOIA requests.”*

*“It sounds like you might be feeling frustrated about the timeline that I proposed, would it help to set up a bi-weekly check in call to update you on our progress?”*



## 7. Summarize:

“You’re looking for the email records and attachments that were sent to and from non-EPA email addresses by the key employees in this office between March 1 and March 31 and we’ll use the search term: “V-AWESOME”.

# Negotiating and Documenting a Clarification: During the call

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## 8. Be attentive as you end the call:

Again thank the requester for speaking with you. Let them know they can reach you by phone or email if they have additional questions. Let them know the next steps as applicable:

*“Thank you for speaking with us today. I think we have what we need to move forward with the search and collection for your request. We will restart the clock as of today’s date. We’ll send you a letter this afternoon/ Monday/in the next few days that will capture what we talked about today. The letter will also include your (revised fee estimate/ information for a follow-up call/ the estimated date of completion... Etc.)*

*Is there anything else you need from us at this point?*

*Again, thank you for your time. We will be in touch soon.*

# Negotiating and Documenting a Clarification: After the Call

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Debrief with anyone else who was on the call with you.

As soon as possible, draft the follow-up letter/ email to the requester.

If the clock was stopped for clarification or fees restart it in FOIAonline.

Let's look at a few example follow-up letters.



# The importance of a good administrative record

- ❖ A **good administrative record** tells the story of the request – from cradle to grave.
- ❖ Use **Comments and Correspondence features** in FOIAonline to maintain your administrative record.
- ❖ **Include:**
  - ❖ All communications (phone calls, email, and letters) with requester;
  - ❖ Summary of internal discussions about request, especially decisions regarding interpretation of request, search strategy, withholdings, productions;
  - ❖ Procedural actions and reasoning (e.g., clock stoppage, office reassignment);
  - ❖ Search instructions;
  - ❖ Applied and unapplied versions of redacted and withheld records; and
  - ❖ Any information you think would be helpful to GLO on appeal/litigation.

# What if things go sideways??

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## **1. The requester calls you out of the blue and you aren't prepared to talk to them.**

→ Tell them you are not available to talk right now but will be happy to schedule a time with them.

## **2. The requester is hostile, angry, or abusive.**

→ Breathe. Be polite and helpful to a point. Please do not tolerate abusive behavior. Do your best to acknowledge their feelings or fears and attempt to resolve the situation. "It sounds like you are upset and frustrated about the possibility of contamination in your community. Can you tell me which records would best assist your community group...?"

If the requester persists with being abusive or hostile, politely let them know you cannot continue the conversation if the behavior continues and you will arrange to speak with them at another time.

"Mr. Angry, if you continue to swear at me, I will be unable to help you. Are you willing to continue the conversation calmly or shall I reschedule/refer you to the FOIA Public Liaison?"

## **3. The requester asks for something you aren't sure about.**

→ It's ok to say that you need to confer with your supervisor/ the NFO /SME and get back to them.

## **4. The requester asks questions about the work of the agency.**

→ In general, refer these questions to the Office of Public Affairs. [press@epa.gov](mailto:press@epa.gov)

# Clarification Call Checklist



1. **Be attentive**



2. **Ask open ended questions and listen**



3. **Ask probing questions**



4. **Ask for clarification**



5. **Summarize**



6. **Be attuned to and respond to feelings**



7. **Summarize**



8. **Be attentive as you wrap up the call with next steps.**