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Department of Agriculture
Departmental FOIA Officer
1400 Independence Avenue, SW
Room 4039-A
Washington, DC 20250-0706
[USDA Public Access Link \(PAL\)](#)
Email: USDAFOIA@usda.gov

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United States
Department of
Agriculture

Office of the General Counsel
1400 Independence Ave. SW
Washington, DC 20250-1400

April 14, 2023

Delivered via Electronic Mail

**Re: Final Response to Freedom of Information Act (FOIA) Request
FOIA Case No. 2023-OGC-03128-F**

This is the Office of Information Affairs' (OIA) final response to the above-referenced FOIA request, which sought records regarding best practices for the submission of administrative appeals requiring legal sufficiency review under Section 1.9(e) of the U.S. Department of Agriculture's FOIA Regulations.

Your request has been processed under the FOIA, 5 U.S.C. § 552.

A search for responsive records was conducted by the OIA. The OIA is under the purview of the Office of the General Counsel (OGC) and serves as the focal point for USDA's FOIA program. It provides coordination and ensures agency-wide compliance with the FOIA. Additionally, the OIA processes requests and appeals on behalf of the Office of the Secretary (OSEC), the Under Secretaries, USDA's staff offices, and the Research, Education and Economics and Trade and Foreign Agricultural Affairs mission areas. The OIA search identified a twenty-one (21) page responsive record.

Following a review of the responsive record, the OIA has determined that certain information contained therein should be withheld pursuant to 5 U.S.C. § 552(b)(5) (FOIA Exemption 5). Below is an explanation of the information that has been withheld.

FOIA Exemption 5 – Deliberative Process

FOIA Exemption 5 protects from disclosure those "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." One of the frequently invoked FOIA Exemption 5 privileges is the deliberative process privilege. To fall within FOIA's deliberative process privilege, the records must be both pre-decisional and deliberative; the records must precede the adoption of an agency policy and include the opinions, recommendations, or deliberations on a legal or policy matter.

In this instance, the OIA is withholding, under the deliberative process privilege, pre-decisional intra-agency sample, draft language contained in the responsive record. This information is pre-decisional in that it is antecedent to any final agency decision. It is also deliberative in that it reflects the evolving, back-and-forth process between agency employees that is so integral to the

Executive Branch decision-making process; more specifically, the development of potential recommendations made by agency advisors for use in making determinations and policy decisions.

If this pre-decisional, deliberative information was released to the public, USDA and other Executive Branch employees would be much more cautious in their discussions with each other, and in candidly discussing and providing all pertinent information and viewpoints in a timely manner to agency decision-makers. This lack of candor would also seriously impair the Department's ability to engage in forthright, internal discussions necessary for efficient and proper agency decision-making.

FOIA Exemption 5 – Attorney-Client

The OIA is also withholding information under the attorney-client privilege. This privilege protects confidential communications between an attorney and his/her client relating to a legal matter for which the client has sought professional advice. Although this privilege fundamentally applies to facts divulged by a client to his/her attorney, this privilege also encompasses any opinion given by an attorney to his/her client based upon those facts, as well as communications between attorneys that reflect client supplied information. In this instance, the OIA is withholding draft appeal packet language that contains information shared internally whereby legal advice is being sought from and provided by the Department's counsel.

These confidential communications are shielded from disclosure in order to encourage open and frank discussions between the Department and its legal advisors. Ensuring the Department receives sound legal advice promotes public policy, and this advice depends on counsel being fully informed. The release of these confidential communications would inhibit the Department's ability to provide pertinent information and would impair the Department's counsel from making well-informed legal decisions.

You may appeal this response by email at USDAFOIA@usda.gov. Your appeal must be in writing, and it must be received electronically no later than 90 calendar days from the date of this letter. The OGC 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, a copy of the original request, the OIA's response to your original request, and a statement explaining the basis of your appeal. For quickest possible handling, the subject line of your email and the appeal letter should be marked "Freedom of Information Act Appeal" and reference FOIA No. 2023-OGC-03128-F.

You may seek dispute resolution services from the OIA's FOIA Public Liaison, Ms. Melanie Enciso. Ms. Enciso may be contacted by telephone at (202) 720-9462, or electronically at Melanie.Enciso@usda.gov or USDAFOIA@usda.gov.

You also have the option to seek assistance from the Office of Government Information Services (OGIS). Please visit <https://www.archives.gov/ogis/mediation-program/request-assistance> for information about how to request OGIS assistance in relation to a FOIA request.

Provisions of the FOIA allow us to recover part of the cost of processing your request. In this instance, no fees will be charged.

If you have any questions regarding the processing of this request, please contact Mr. Kyle Kemper electronically at Kyle.Kemper@usda.gov or USDAFOIA@usda.gov.

For additional information regarding USDA FOIA regulations and processes, please refer to the information available online at [Freedom of Information Act Division | USDA](#).

The OIA appreciates the opportunity to assist you with this matter.

Sincerely,

A handwritten signature in black ink that reads "Alexis R. Graves". The signature is written in a cursive, flowing style.

Alexis R. Graves
Director
Office of Information Affairs

Enclosure: Responsive Record (21 pages)



THE UGLY APPEAL

10 Steps for Preparing a Successful Appeal Package

Presented by the FOIA Service Center

Agenda

- **Getting Started**
 - **The Ugly Appeal**
 - **Freedom of Information Act (FOIA)**
 - **Defining an Adverse Determination**
 - **Basis of a FOIA Appeal**
 - **USDA's FOIA Regulations**
- **10 Steps for Preparing a Success Appeal Package**
- **Contact Information**

Getting Started

THE UGLY APPEAL

Just when you thought that you were safe and you could breathe a tremendous sigh of relief

You come across an envelope or subject header in your inbox marked “**APPEAL.**”



Getting Started

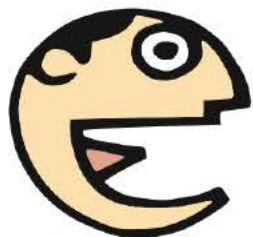
Freedom of Information Act

5 U.S.C. § 552(a)(6)(A)

“Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall— (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency **ANY ADVERSE DETERMINATION.**”

Getting Started

Defining an **ADVERSE DETERMINATION**



What is an **ADVERSE DETERMINATION**?

An **ADVERSE DETERMINATION** would be any decision, on the part of an agency responding to a FOIA request, to deny a request made by a FOIA requester.



Is telling a requester that he or she cannot obtain unredacted copies of all the records that we find in response to the request, or is telling a requester that he or she cannot have a fee waiver or expedited processing all that is encompassed by the term **ADVERSE DETERMINATION**?

No. An **ADVERSE DETERMINATION**, in the appeals context, ends up becoming practically any decision made by an agency relating to the processing of a FOIA request that is *perceived by the requester to be a denial of any sort*.

Getting Started -- Basis of a FOIA Appeal

Denial of Records.



Decision by an agency not to conduct a file search:

- Because the agency decides that it is not reasonable to believe that it has records responsive to the request.
- Because the requester seeks records maintained by another agency.
- Because the request is not reasonably described, and the requester fails to clarify it, when given an opportunity.
- Because the requester fails to agree to pay applicable FOIA fees, when given an opportunity.
- Because the requester fails to pay outstanding, overdue FOIA fees.

Decision by an agency not to release records responsive to a FOIA request:

- Because no responsive records are located in the file search.
- Because the FOIA file search is perceived to be less than reasonable.
- Because the agency issues a Glomar response to the request, and does not acknowledge the existence or non-existence of responsive records.
- Because portions of the responsive records are protected by one or more of the 9 FOIA exemptions (or one or more of 3 FOIA exclusions, for law enforcement agencies).
- Because responsive records located in the file search are referred to other agencies for a release decision.
- Because responsive records are not deemed to be subject to the FOIA, if they are classified as personal or Congressional records.
- Because records are not issued in the format requested by the requester.

Decision of an agency to not constructively respond to a FOIA request within 20 working days of its receipt.

Getting Started -- Basis of a FOIA Appeal Continued

Denial of Requests for Expedited Processing.

Denial of Requests for More Favorable Treatment, with Respect to FOIA Fees.

Decision by an agency not to grant a fee waiver.

Decision by an agency to classify a requester in a less favorable fee category.

Decision by an agency to assess certain FOIA fees, if they are deemed to be too high or inappropriate, or unnecessary by the requester.



Preparing Your Appeal Package

10 Steps for Success



Tip 1: Complete a Thorough but Prompt Review of the Appeal

After a thorough review, you should be able to address the following:

- Whether the appeal was received within 45 days of the date of the denial letter.
- Whether the appeal includes contact information for the requester beyond a mailing address.
- Whether the requester outlined the basis for the appeal.
- Whether there is more than one basis for the appeal.
- Whether each basis was articulated in a manner whereby you would reasonably be able to determine next steps.
- Whether the basis for each claim is factual or speculative.
- Whether the appeal expands the scope of the underlying FOIA requests. If so, be sure to split off any new requests for records included in them as a new initial FOIA request.

A solid appeal package requires solid responses to the items above!



Tip 2: Promptly Issue Acknowledgment and Follow Up with Teleconference



United States Department of Agriculture

United States
Department of
Agriculture

Office of the Chief
Information Officer

1400 Independence
Avenue SW
Washington, DC
20250

July 10, 2015

Delivered via Electronic Mail

Jake Cox
Research Analyst
America Rising LLC
1555 Wilson Boulevard
Arlington, Virginia 22209
Email: jake@americarisingllc.com

Re: Fee Assessment Reconsideration Letter
FOIA Case No. 2015-OSEC-00202-A
(FOIA Case No. 2015-OSEC-04171-F)

Dear Mr. Cox:

This letter responds to your July 7, 2015 FOIA appeal sent to the U.S. Department of Agriculture (USDA). Your appeal was received in the FOIA Service Center (FSC) on July 7, 2015 and was assigned FOIA Case No. 2015-OSEC-00202-A (hereinafter "the Appeal"). You are appealing the FSC's determination that America Rising is properly classified as a commercial requester in FOIA Case No. 2015-OSEC-04171-F (hereinafter "the Request").

Background Information

The Request was received by the FSC via email on June 10, 2015. The Request is dated June 10, 2011, but it is assumed that the year is a typographical error based on subsequent communications with you. The Request sought "access to all records of communications between Senator Michael Bennet (D-CO) and the Department of Agriculture's Office of the Secretary from January 21, 2009 to January 21, 2011," and further requested that OCIO "include any communications sent to or received from Senator Bennet during the same period by the Department's offices of public affairs, legislative/congressional affairs, and executive secretariat."

You included a provision addressing fees in the Request. The fee language used in the Request reads as follows:

Absolutely! I'm so glad you called....Let me walk through why I believe I was placed in the wrong requester category? Let me provide you with some additional details

I am hoping you received our acknowledgement ...

I am also hoping you have a few minutes to review the basis of your appeal with me so I am clear on next steps!

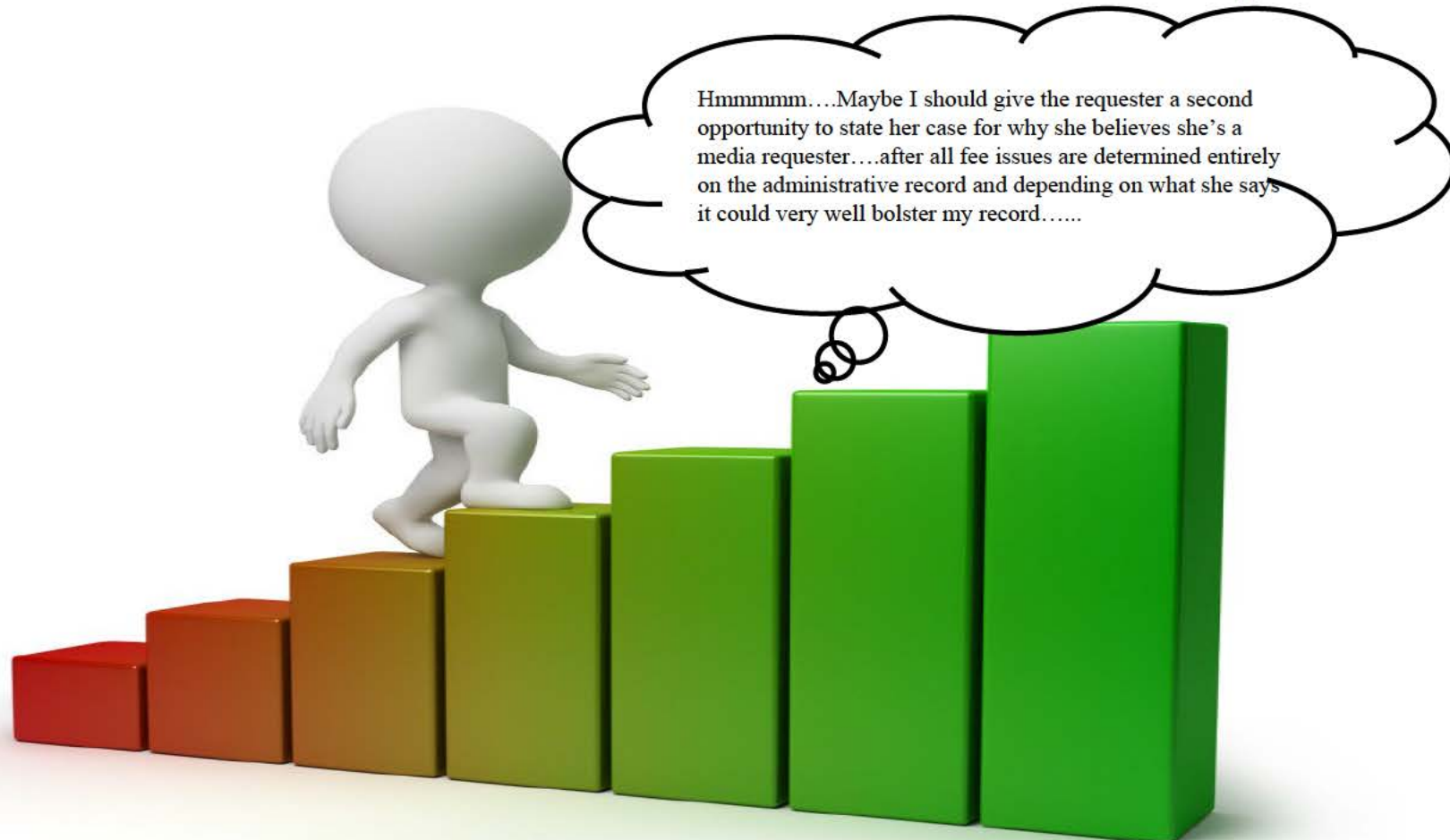


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Tip 3: Promptly Retrieve the **ENTIRE** Administrative Record and Identify the Portions Pertinent to the Appeal



Tip 4: Review in Detail the Pertinent Portions of the Administrative Record to Determine Next Steps



Tip 5: Map Your Plan and Share with the Requester



Tip 6: Execute the Plan



Tip 7: Draft an HONEST Roadmap

Why do we have the appeal?

The first page of your appeal package, should include a memorandum that details the events leading up to the requester's appeal.

Note: There may be instances where some of the events leading up to the appeal are not favorable ---- it's OK! It's important that we draft an HONEST roadmap so OGC can make an informed decision.

Now that we have the appeal --- what do you propose?

The memorandum should also clearly articulate your proposed action(s).





Tip 7: Draft an HONEST Roadmap Cont.



United States Department of Agriculture

United States
Department of
Agriculture

Office of the Chief
Information Officer
1400 Independence
Avenue SW
Washington, DC
20250

TO: Shawn McGruder, Esq.
Assistant General Counsel
Office of General Counsel

From: Alexis Graves
Departmental FOIA Officer
Office of the Chief Information Officer
The FOIA Service Center

(b) (5) Deliberative Process, (b) (5) Attorney Client

(b) (5) Deliberative Process, (b) (5) Attorney Client



Tip 7: Draft an HONEST Roadmap Cont.

USDA
United States Department of Agriculture

United States
Department of
Agriculture

Office of the Chief
Information Officer

1400 Independence
Avenue SW
Washington, DC
20250

TO: Shawn McGruder, Esq.
Assistant General Counsel
Office of General Counsel

From: Alexis R. Graves
Departmental FOIA Officer
Office of the Chief Information Officer
The FOIA Service Center

(b) (5) Deliberative Process, (b) (5) Attorney Client

(b) (5) Deliberative Process, (b) (5) Attorney Client

Tip 8: Include in Your Package ANY Supporting Documentation Needed for OGC-GLRD to Make an Informed Legal Decision

How Does Treatment of this Requester Compare with Similarly Situated FOIA Requesters?

How Does the Requester Support their Claim?



Tip 9: Presentation is Everything! Avoid the Data Dump!

Package Concise?

Placed in a Logical Order?

Does the Memorandum Serve as a Sufficient Roadmap?

Exhibits Labeled?

Redactions Translucent?

If Using Exemption 3, Did You Identify the Statute?

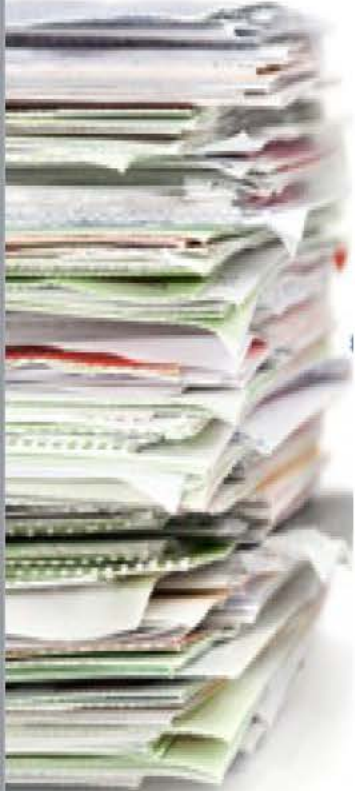
If Using Exemption 5, Did You Identify the Privilege?

Records Numbered?

Authority to Address the Basis of the Appeal?

Draft Final Response Included?

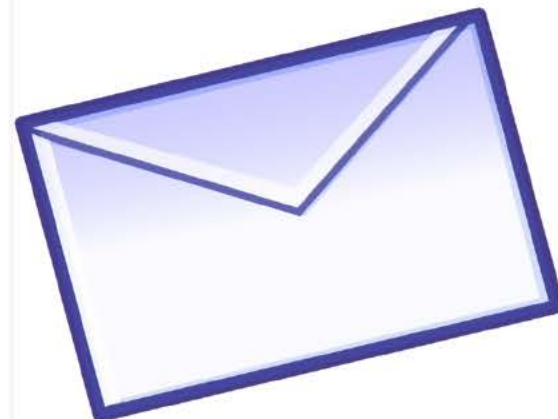
All Items Free of Spelling and Grammatical Errors?



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Tip 10: Follow Up with OGC-GLRD



Contact Information

Alexis Graves

Department FOIA Officer

(202) 690.3318

Alexis.Graves@ocio.usda.gov

