

# CHAPTER 7

## FREEDOM OF INFORMATION\*

### A. Introduction

This Chapter describes laws that allow you to request copies of government documents and files. There are several reasons why these documents might be useful to you: you may want to review copies of your files and rap sheets to make sure they are accurate and complete; you may want to get copies of internal memoranda and manuals that lay out procedures prison officials must follow; and, if you are preparing to sue the government, you can use a Freedom of Information Request to gather support for your case.

All fifty states and the District of Columbia have passed some sort of state open records laws.<sup>1</sup> Many of these laws are modeled on the federal Freedom of Information Act. Only *state* freedom of information laws grant access to state and local government records; the federal Freedom of Information Act does not apply to state or municipal agencies, including state prison systems.

There are specific procedures that you must follow depending on the type of information you are requesting. Each agency has a different procedure for accessing information. It would be impossible in this Chapter to outline the procedures for every agency. Instead, this Chapter will give you an overview as to the law itself and what rights you have under the Freedom of Information Act (“FOIA”), the Privacy Act (“PA”), and the New York Freedom of Information Law (“FOIL”). Be sure to check the specific procedures for your particular request before filing an information request.

Part B of this Chapter outlines the laws that allow you to get documents from the federal government under FOIA. Part C discusses FOIL. Prisoners in other states should still read Part C to get an idea of the types of documents prisoners most often request and look carefully at the provisions of their state’s freedom of information statute. Part D contains an address for the Federal Citizen Information Center—if you need help figuring out which federal agency to contact, write or call the Federal Citizen Information Center for help. Appendix A contains a list of state freedom of information laws. Appendix B of this Chapter contains a form to use to request information from the Department of Justice (“DOJ”) and other federal agencies. Appendix C contains sample letters for filing a FOIA or PA request and/or appeal. Appendix D lists addresses of organizations and federal government agencies that can provide more help.

### B. The Federal Freedom of Information Act

#### 1. Overview & History

Your right to access the files of the United States government is established by two federal laws: the Freedom of Information Act<sup>2</sup> and the Privacy Act.<sup>3</sup> These laws have been tremendously successful in enabling public access to government files. The Freedom of Information Act (“FOIA”) allows you to request all public documents, including records that relate to you. The Privacy Act (“PA”) deals only with personal files. It gives you the right not only to look at your own records, but to correct, change, or remove records that contain incorrect, irrelevant, or incomplete information about you. If your request is incorrectly denied or ignored, you can sue under both laws in federal court.

FOIA and the PA implement one of the basic principles of democracy—the public’s right to know what its government is doing. As written, FOIA gives access to all government records unless they fall into one of nine categories of materials that agencies are allowed, but not required, to withhold.<sup>4</sup> In practice, however, there are often bureaucratic roadblocks to getting records, and you will probably not get immediate access to everything you think you are entitled to.

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1. See Appendix A.

2. 5 U.S.C. § 552 (2006 & Supp. 2009).

3. 5 U.S.C. § 552(a) (2006 & Supp. 2010).

4. 5 U.S.C. § 552(b) (2006 & Supp. 2007). These exemptions are discussed in Part B(3) of this Chapter.

## 2. What Agencies Are Covered & What Records Are Available

FOIA applies to documents held by agencies in the executive branch of the *federal* government. These agencies include:

- Military departments;
- Cabinet departments, including the Department of Justice (which controls both the Federal Bureau of Investigation (“FBI”) and federal prisons);
- Departments of the Executive Branch (such as the Department of Defense);
- Independent federal agencies (such as the Environmental Protection Agency (“EPA”));
- Government-controlled corporations (such as the United States Postal Service (“USPS”)).

FOIA does not apply to documents held by federal courts or by Congress.<sup>5</sup> FOIA also does not apply to documents held by “the President’s immediate personal staff or units within the Executive Office whose sole function is to advise and assist the President.”<sup>6</sup> FOIA does not apply to state or local governments, including state prison systems; these are usually covered by separate laws.<sup>7</sup>

FOIA allows you to look at almost all records under a federal agency’s control.<sup>8</sup> The Supreme Court has defined an “agency record” as a document that is (1) either created or obtained by the agency, and (2) under control of the agency at the time of the FOIA request.<sup>9</sup> Agency records may include many different types of information, such as papers, reports, letters, films, computer tapes, photographs, and sound recordings in the possession, custody, or control of an agency. In 1996, Congress made clear that electronically stored information meets the definition of a “record” under FOIA.<sup>10</sup> In addition, the agency must provide you records in any form or format you request, as long as the document is “readily reproducible” by it in that form or format, and the agency must make reasonable efforts to meet your request.<sup>11</sup>

FOIA does not allow you to demand answers to questions. The information must already be contained in an existing agency record. An agency is not obligated to create a new record, collect information it does not have, or research or analyze data to meet your request. Your requests for records must “reasonably describe” the material you want.<sup>12</sup> This does not mean you need to know a specific document or file number, but your request should be specific enough that a government agency employee familiar with the subject area of your

5. 5 U.S.C. §§ 551(1)(A)–(B) (2006).

6. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156, 100 S. Ct. 960, 971, 63 L.Ed.2d 267, 285 (1980), *quoting* H.R. Rep. No. 93-1380, at 15 (1974) (Conf. Rep.) (finding that telephone notes taken by Secretary of State Kissinger in his capacity as presidential advisor did not constitute “agency records” under FOIA); *see also* *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993) (holding that the determination of whether an entity is an “agency” depends on how close operationally the group is to the President, the nature of its delegation from the President, and whether it has a self-contained structure); *Sweetland v. Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995) (holding that the Executive Residence is not an agency under FOIA as it does not exercise independent authority).

7. State government records can be obtained using state freedom of information laws. The New York Freedom of Information Law is discussed in Part C of this Chapter. *See* Appendix A of this Chapter for a list of the freedom of information laws of all 50 states and the District of Columbia.

8. 5 U.S.C. § 552(a)(3)(A) (2006).

9. *U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 144–45, 109 S. Ct. 2841, 2848, 106 L.Ed.2d 112, 125 (1989) (holding that court opinions in agency files are “agency records”).

10. 5 U.S.C. § 552(f) (2006) reads: “For purposes of this section, the term . . . ‘record’ and any other term used in this section in reference to information includes . . . any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.” This language includes computer disks, CD-ROMs, microfiche, microfilm, and all other digital or electronic media.

11. *See* *Miller v. U.S. Dept. of State*, 779 F.2d 1378, 1383 (8th Cir. 1985) (noting that a department must only make reasonable, but not exhaustive, efforts to respond to a FOIA request); *Maynard v. CIA*, 986 F.2d 547, 559 (1st Cir. 1993) (holding that when the diligence of an agency’s attempt to respond to a FOIA request is at issue the agency should issue an affidavit which should describe how the search was conducted and how the agency’s filing system would make further search difficult). The new statute rejects *Dismukes v. Dept. of the Interior*, where the court held that an agency “has no obligation under the FOIA to accommodate the plaintiff’s preference.” *Dismukes v. Dept. of the Interior*, 603 F. Supp. 760, 763 (D.D.C. 1984).

12. 5 U.S.C. § 552(a)(3)(A) (2006).

request can locate the records with a reasonable amount of effort. Also, a records request under FOIA and the PA must be in writing and must include proper identification.

The PA grants you the power to look at any record within an agency's files that pertains to you.<sup>13</sup> Under the PA, as long as you are either a U.S. citizen or an alien lawfully admitted for permanent residence ("LPR"), you may apply to look at any records about yourself that are kept in the executive branch of the federal government.<sup>14</sup> In other words, a U.S. citizen or LPR can look at any records that are filed according to his or her name, social security number, or some other personal identifier. Detailed information about how to access agency records can be found in Part B(4) of this Chapter, "How to Make Your Request."

### 3. Exemptions to Record Availability Under FOIA and the PA

FOIA exempts nine categories of materials; in other words, the government does not need to disclose material fitting into any one of these nine categories. However, an agency may not withhold an entire file or document just because part of it is exempt. The agency can only withhold those parts of the record falling within the exemption.<sup>15</sup> In addition, FOIA exemptions are not mandatory. Agency officials can choose to waive the exemptions and release the materials even if they fall within one of the nine categories, unless another statute specifically limits or prohibits disclosure of that kind of information.

The seven most common of the nine FOIA exemptions are:<sup>16</sup>

Exemption 1: Records that are "properly classified" in the interests of national defense or foreign policy;

Exemption 2: Documents "related solely to the internal personnel rules and practices of an agency." In practice, this is a very limited exemption because if a person outside the agency can show a legitimate interest in the records, the material cannot be of "solely" agency interest;<sup>17</sup>

Exemption 3: Matters "specifically exempted from disclosure" by other federal statutes. In order for this claim of exemption to stand up in court, the agency must point to a statute that either (a) requires that the category of information be withheld, or (b) establishes particular criteria for withholding information. The agency must also show that the material it is withholding falls under the statute.<sup>18</sup> This exemption is complicated by the fact that there is no complete list of statutes that meet these criteria, and some statutes have their own provisions governing disclosure, disclosure procedures, and exemptions. However, you should always make your request for records under FOIA;

Exemption 4: "Trade secrets and commercial or financial information" given to the government with the expectation that they would be kept secret;

Exemption 5: "Inter-agency or intra-agency memorandum or letters." This exemption protects communications that are meant to be distributed only within the government and that contain advice, opinions, and recommendations that officials offer to each other. This exemption may not be used to withhold facts, agency decisions, or policies;

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13. For exemptions, see 5 U.S.C. §§ 552a(j)–(k) (2006).

14. 5 U.S.C. § 552a(a)(2) (2006). This is different from FOIA, which gives access rights to "any person" regardless of citizenship status. 5 U.S.C. § 552(a)(3) (2006).

15. 5 U.S.C. § 552(b) (2006 & Supp. 2007).

16. 5 U.S.C. §§ 552(b)(1)–(7) (2006). The other two rarely used exceptions to FOIA concern government regulation of financial institutions and geological/geophysical information. Please refer to the statute, 5 U.S.C. §§ 552(b)(8)–(9) (2006 & Supp. 2007), for more information.

17. *See* *Dept. of Air Force v. Rose*, 425 U.S. 352, 369–70, 96 S.Ct. 1592, 1603, 48 L.Ed.2d 11, 26 (1976) (holding that Exemption 2 does not apply to matters of "genuine and significant public interest" and observing that Congress' purpose in enacting Exemption 2 was "to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest.").

18. *See* *McDonnell v. United States*, 4 F.3d 1227, 1249 (3d Cir. 1993) (noting that burden of showing a document falls within scope of statute rests on the government); *see generally*, *Church of Scientology of California v. U.S. Dept. of Army*, 611 F.2d 738, 742 (9th Cir. 1979) (observing that the burden of showing a document is exempt from disclosure falls on the agency resisting disclosure).

Exemption 6: “Personnel and medical files and similar files” which could not be released to someone other than the subject of the file without resulting in an “unwarranted invasion of personal privacy.” The files must contain information about someone so intimate that the person could claim an invasion of privacy. Such information includes marital status, legitimacy of children, welfare payments, family fights and reputation,<sup>19</sup> medical details and conditions,<sup>20</sup> “rap sheets,”<sup>21</sup> and the incarceration of United States citizens in foreign prisons.<sup>22</sup>

Exemption 7: All “records or information compiled for law enforcement purposes.” In addition to federal law enforcement, this exemption may also apply to records compiled to enforce state law.

Exemption 7 covers many records.<sup>23</sup> For example, law enforcement manuals satisfy the requirements of Exemption 7 and may not be subject to disclosure. Other materials will fall under Exemption 7 if they:

- (a) Might “interfere with [law] enforcement proceedings.” This includes federal and state court proceedings. If release of records could, for example, reveal the government’s evidence or strategy in a criminal case, then that release can be properly excluded;<sup>24</sup>
- (b) “Would deprive a person a right to a fair trial”;
- (c) Might “constitute an unwarranted invasion of personal privacy.” The majority of courts have held the identities of law enforcement personnel are exempt unless you can show proven, significant misconduct on the part of the investigators.<sup>25</sup> In other words, the names of law enforcement personnel will usually not be revealed;
- (d) Might “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.”

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19. *See Rural Hous. Alliance v. U.S. Dept. of Agric.*, 498 F.2d 73, 76–77 (D.C. Cir. 1974) (holding that an investigation report containing detailed personal and medical information of persons allegedly discriminated against by the Department of Agriculture were “within the class of similar files” and its disclosure depended on whether it would result in a “clearly unwarranted invasion of personal privacy”).

20. *See McDonnell v. United States*, 4 F.3d 1227, 1254 (3d Cir. 1993) (noting that a “living individual” may have a “strong privacy interest in withholding his medical records” that outweighs a public request); *Rural Hous. Alliance v. U.S. Dept. of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974) (holding that Exemption 6 of FOIA covered a USDA report that included, among other things, individual’s medical condition and history); *Brown v. FBI*, 658 F.2d 71, 74–75 (2d Cir. 1981) (upholding denial of plaintiff’s request for FBI files that included an individual’s possible involvement with illegal drugs as information that falls within Exemption 6).

21. *See U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780, 109 S. Ct. 1468, 1485, 103 L.Ed.2d 774, 800 (1989) (holding that a third-party request for an individual’s rap sheet when the request does not seek “official information” about a government agency is an “unwarranted invasion of privacy”).

22. *See Harbolt v. Dept. of State*, 616 F.2d 772, 774 (5th Cir. 1980) (holding disclosure of names and addresses of U.S. citizens imprisoned in foreign countries on narcotics offenses would be an unwarranted invasion of their privacy).

23. 5 U.S.C. § 552(b)(7) (2000); *see U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 n.9, 109 S. Ct. 1468, 1473 n.9, 103 L.Ed.2d 774, 785 n.9 (1989) (explaining that the shift from “the would constitute” standard to “the could reasonably be expected to constitute” standard “represents a considered congressional effort ‘to ease considerably a federal law enforcement agency’s burden in invoking [Exemption 7]’”).

24. *See Lynch v. Dept. of the Treasury*, 2000 U.S. App. LEXIS 1392, at \*9–13 (9th Cir. 2000) (stating that even though the agency that was party to the trial had closed its investigation, an ongoing interagency task force was sufficient reason for the Department of the Treasury to deny access to the information); *Manna v. U.S. Dept. of Justice*, 51 F.3d 1158, 1164–65 (3d Cir. 1995) (affirming a district court’s finding that government records were properly denied under Exemptions (b)(7)(A) and (D) because disclosure of such information would interfere with future prosecutions and deny sources confidentiality that they were assured).

25. *See, e.g., Sutton v. IRS*, 2007 U.S. Dist. LEXIS 299, at \*18, 99 A.F.T.R.2d (RIA) 387 (N.D. Ill. 2007) (holding that the court should balance the public’s interest in disclosure against the interest in non-disclosure of personal information); *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993) (holding that government employees have a privacy interest in concealing their identities but that that interest must be balanced against the public interest in disclosure); *Anderson v. US Dept. of Justice*, 1999 U.S. Dist. LEXIS 4731, at \*8–9 (D.D.C. Mar. 31, 1999) (finding that the names of government witnesses clearly constitute information compiled for law enforcement purposes.)

Confidential sources may include persons with a close relationship to you or the victim, or persons who have a reasonable fear of retribution.<sup>26</sup> If the information is confidential, given to the agency by one source only, and collected in the course of a criminal investigation, agencies are permitted to withhold all of the information provided by that source;

- (e) Would disclose investigative techniques, procedures, or guidelines for law enforcement investigations or prosecution that would create a risk of people circumventing the law. This exemption is limited to techniques, procedures, or guidelines not generally known to the public, or not generally known by the public to be useful, and applies even when the government only expects that disclosure would create a risk of people evading the law.<sup>27</sup>
- (f) Might “endanger the life or physical safety of any individual.” This is the most frequently claimed exemption,<sup>28</sup> because while it is similar to (7)(c), it does not require the court to consider the public interest in its decision.<sup>29</sup>

While FOIA requesters are generally sent copies of the information they have requested, there may be instances when the agency may only allow you to *see* the documents. In *Tax Analysts v. United States Department of Justice*, one court noted that an agency does not need to respond to a FOIA request for copies of documents when the agency has provided an alternative way of accessing the same information.<sup>30</sup> For example, if an agency makes the requested information available in a public reading room, this is enough to satisfy that agency’s obligation under FOIA.<sup>31</sup> Therefore, if an agency declines to send you copies of the requested information, it must provide you with an alternative form of access.<sup>32</sup>

The Privacy Act (PA) also has exemptions to disclosure. These exemptions are much broader than the FOIA exemptions. The nine PA exemptions are:<sup>33</sup>

- (1) Material maintained by the Central Intelligence Agency (“CIA”);<sup>34</sup>
- (2) Material maintained by a law enforcement agency. This includes police, corrections, and prosecutors’ offices;<sup>35</sup>

26. See *Hale v. US Dept. of Justice*, 226 F.3d 1200 (10th Cir. 2000).

27. *Mayer Brown LLP v. IRS*, 562 F.3d 1190 (D.C. Cir. 2009) 2009 U.S. App. LEXIS 8104, 2009-1 U.S. Tax Cas. (CCH) P50,338; 103 A.F.T.R.2d (RIA) 1799 (affirming that the IRS did not have to disclose documents if revealing them could reasonably be expected to risk helping or training a person to break the law, especially because tax crimes involve a cost-benefit analysis).

28. [unknown]

29. See, e.g., *Anderson v. US Dept. of Justice*, U.S. Dist. LEXIS 4731 (D.D.C. Mar. 31, 1999) (finding the prisoner could not obtain witness names from a police lineup because they were protected by FOIA and privacy act exemptions covering information compiled for law enforcement purposes and protecting witness safety and privacy); *Ferreira v. Drug Enforcement Admin.*, 874 F. Supp. 15, 17 (D.C. Cir. 1995) (holding that the DEA properly withheld the names and identities of agents when the disclosure could reasonably be expected to endanger their life or physical safety).

30. *Tax Analysts v. U.S. Dept. of Justice*, 845 F.2d 1060, 1067; 269 U.S. App. D.C. 315 (D.C. Cir. 1988) (holding an agency may not avoid producing its records in response to a FOIA request by directing the requester to a public source *outside* the agency that has the same information—the agency itself must provide access), *aff’d*, 492 U.S. 136, 109 S. Ct. 2841, 106 L.Ed.2d 112 (1989).

31. *Tax Analysts v. U.S. Dept. of Justice*, 845 F.2d 1060, 1067 (D.C. Cir. 1988) (holding an agency may not avoid producing its records in response to a FOIA request by directing the requester to a public source outside the agency that has the same information), *aff’d*, 492 U.S. 136, 109 S. Ct. 2841, 106 L.Ed.2d 112 (1989); see also *Oglesby v. U.S. Dept. of the Army*, 920 F.2d 57, 70 (D.C. Cir. 1990) (finding an agency is not required to mail information in response to a FOIA request when that information has been made available to the public in another format); *Grunfeld & Harrick v. U.S. Customs Serv.*, 709 F.2d 41, 42–43 (11th Cir. 1983) (holding an agency was not required to mail documents in response to a FOIA request when the documents were available for viewing and copying at the custom house in Puerto Rico).

32. *Tax Analysts v. U.S. Dept. of Justice*, 845 F.2d 1060, 1067 (D.C. Cir. 1988) (holding an agency may not avoid producing its records in response to a FOIA request by directing the requester to a public source outside the agency that has the same information).

33. 5 U.S.C. §§ 552a(j)–(k) (2000). See, e.g., *Bassiouni v. FBI*, 436 F.3d 712 (7th Cir. 2006) (where the FBI refused to amend a person’s file, which contained 25 to 30-year-old memoranda pertaining to his activities concerning the Middle East, the district court properly granted the FBI summary judgment on the person’s action under the Privacy Act because the memos were pertinent to the FBI’s law enforcement activity.)

34. 5 U.S.C. § 552a(j)(1) (2000).

- (3) Material that is “properly” secret in the interests of national defense or foreign policy;<sup>36</sup>
- (4) Material compiled for criminal investigative law enforcement purposes by agencies whose principal function is not law enforcement;<sup>37</sup>
- (5) Material contained in Secret Service record systems, relating to protection of the President and others whom the Secret Service protects;<sup>38</sup>
- (6) Material required by statute to be maintained and used solely as statistical records;<sup>39</sup>
- (7) Material that identifies individuals who were promised that their identity would be kept secret when they provided information to the government, who provided the information in order to obtain a job used in conducting background checks of job applicants to and employees of the federal government;<sup>40</sup>
- (8) Material related to testing or examination used only to determine individual qualifications for appointment or promotion in the federal service;<sup>41</sup> or
- (9) Material that would identify individuals who were promised that their identity would be kept secret when they provided information used in promotion decisions for members of the armed forces.<sup>42</sup>

You should always request information under both FOIA and the PA. Agencies may not withhold information when it is exempt under one statute but not exempt under the other.<sup>43</sup> In other words, “[i]f a FOIA exemption covers the documents, but a Privacy Act exemption does not, the documents must be released under the Privacy Act; if a Privacy Act exemption but not a FOIA exemption applies, the documents must be released under FOIA.”<sup>44</sup>

Do not let the exemptions stop you from making requests, as the records may be available under an agency or court interpretation. In addition, agencies are not required to withhold information just because a particular exemption *could* be applied. Agency officials can choose to waive the exemptions and release the materials you requested. If information is withheld, you can challenge that decision by writing an administrative appeal letter or filing a lawsuit.

#### 4. How to Make Your Request for Information from the Department of Justice

As noted above, every agency has a very specific procedure that you must follow in order for your FOIA or PA request to be granted. This Subsection will only describe the procedure that you must follow if you are seeking to request information from the Department of Justice (“DOJ”). To get information from other agencies, or if you do not know which agency holds the information you want, you can consult any government directory or the “United States Government Manual.”

To order a \$33 copy of the “United States Government Manual,” send requests to:

Superintendent of Documents  
P.O. Box 371954  
Pittsburgh, PA 15250-7954,

Your mail order must include a check, money order, GPO Deposit Account, VISA, Master Card, or Discover payment. Cash is not accepted.

You can also call (202) 512-1800 or access <http://www.gpoaccess.gov/gmanual> on the Internet to buy or download the manual.

35. 5 U.S.C. § 552a(j)(2) (2000) To be exempt, the record by an agency under this section must consist of information compiled to identify individual criminal offenders and alleged offenders; information compiled for criminal investigation, including reports of informants and investigators; or reports identifiable to an individual that were compiled at any stage of the process of enforcement of the criminal laws.

36. 5 U.S.C. § 552a(k)(1) (2008).

37. 5 U.S.C. § 552a(k)(2) (2008).

38. 5 U.S.C. § 552a(k)(3) (2008).

39. 5 U.S.C. § 552(a)(k)(4) (2008).

40. 5 U.S.C. § 552(a)(k)(5) (2008).

41. 5 U.S.C. § 552(a)(k)(6) (2008).

42. 5 U.S.C. § 552(a)(k)(7) (2008).

43. 5 U.S.C. §§ 552(a)(t)(1)–(2) (2008).

44. *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184–89 260 U.S. App. D.C. 382 (D.C. Cir. 1987) (denying disclosure of information requested by Appellee as such disclosure was exempted by both the PA and the FOIA).

In general, if you request information from the DOJ, you should try to send your request to the specific division that has the records you want.<sup>45</sup> If you are uncertain about which division to write, you can send your request to the DOJ's FOIA/PA Mail Referral Unit, and someone in that division will forward your letter to the division they think most likely to have the information you want. All requests should be in writing.

Send requests to:

FOIA/PA Mail Referral Unit, Justice Management Division  
Attn: FOIA Request  
Department of Justice  
Room 115  
LOC Building  
Washington, DC 20530-0001  
(301) 583-7354  
Fax (301) 341-0772

The rest of this section addresses how to make a request for information from two divisions of the DOJ: the Federal Bureau of Prisons ("BOP") and the FBI. It discusses the fees that you will be charged for making such requests, the types of responses you may receive from either the FBI or the BOP, and the appeals process, which may be useful if your request is denied.

#### (a) Requesting Information from the Federal Bureau of Prisons

The BOP maintains records on current and former prisoners of the federal penal and correctional institutions as well as records relating to the administration of the agency. Part (i) of this Subsection describes how to request information from your institution and Part (ii) describes how to request information from the BOP under FOIA and the PA.

##### (i) Requesting Information from Your Institution<sup>46</sup>

If you would like access to your Inmate Central File, the BOP encourages you to request this information from your institution. Many records within the Inmate Central File can be disclosed without your filing a FOIA request. These include records relating to your sentence, detainer, participation in programs, classification data, parole information, mail, visits, property, conduct, work, release processing, and general correspondence. You can also request access to some medical records from your institution.

The Warden of your institution should have designated a staff member to receive requests for access to these records. In order to request access to your Inmate Central File or medical records, you should submit a request to this person, who must promptly schedule a time for you to review your file.

Staff members must tell you if there are documents in your Inmate Central File or medical records withheld from you. If you would like access to these withheld documents, you will need to make a FOIA and PA request.

##### (ii) Requesting information from the BOP under the FOIA and the PA

To file a request for information from the BOP under FOIA, including any information withheld from your review of your Inmate Central File or your medical records, or any other records, your request should:<sup>47</sup>

- (1) Be in writing;

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45. See <http://www.justice.gov/agencies/> for more information about each division. Also see [http://www.justice.gov/oip/04\\_3.html](http://www.justice.gov/oip/04_3.html) (listing each division of the DOJ with links to how to send FOIA requests to those divisions).

46. All of the information regarding making requests from your institution can be found in Bureau of Prisons Program Statement 1351.05, issued on September 19, 2002, available at <http://www.bop.gov/DataSource/execute/dsPolicyLoc> by clicking on "General Administration and Management" and then by clicking on "Document Name: "Release of Information.""

47. Bureau of Prisons Program Statement 1351.05, issued on Sept. 19, 2002, available at <http://www.bop.gov/DataSource/execute/dsPolicyLoc> (click on General Administration and Management; then click on Document Name: "Release of Information"); U.S. Dept. of Justice, "Freedom of Information Act Reference Guide, Revised January 2010" [http://www.usdoj.gov/oip/04\\_3.html](http://www.usdoj.gov/oip/04_3.html) (last visited Mar. 14, 2012) (click "How to make a FOIA request").

- (2) Be clearly marked "Freedom of Information Act/Privacy Act Request" on the front of the letter *and* the envelope;
- (3) Clearly describe the records you seek, including the approximate dates covered by the records; you do not need to know the name of the records, but being as specific as possible helps the DOJ to locate your records.
- (4) Include your full name, current address, date of birth, place of birth, and social security number (if you have one); and
- (5) Include your federal register number and institution where last housed.

You must also verify your identity in one of the following ways:

- (1) Complete and sign Form DOJ-361 (See Appendix B);
- (2) Have the signature on the request witnessed by a notary; or
- (3) Include the following statement before the signature on the requested letter: "I declare under penalty of perjury that the foregoing is true and correct. Executed on [date]."

The DOJ has stated that "if you request information about yourself and do not follow one of the procedures [described above], your request cannot be processed."<sup>48</sup> If you are seeking personal information, make sure that you provide the necessary identification information.

If you are requesting information about someone other than yourself, the information will not be disclosed unless:

- (1) You provide a statement by the other person specifically authorizing the release of information; the statement must be signed by that person and either witnessed by a notary or include a declaration made under penalty of perjury; or
- (2) You provide evidence that the subject of the request is deceased, such as a death certificate, or some comparable proof of death such as a newspaper obituary.

Having completed these steps, you may mail your request to<sup>49</sup>:

Chief, FOIA/PA Section  
Office of General Counsel  
Federal Bureau of Prisons  
Department of Justice  
Room 841, HOLC Building  
Washington, D.C. 20534

If you have access to the internet, you may also submit a request online through the BOP website. The website can be accessed at <http://www.bop.gov/foia/submit.jsp>. The FOIA Requester Service Center can be reached by telephone at (202) 616-7750, and the FOIA Public Liaison can be reached at (202) 514-6655.

#### (b) Requesting Information from the FBI

The FBI collects evidence in legal cases in which the United States is or may be an interested party and investigates violations of certain federal statutes.<sup>50</sup> Requests for information under FOIA and/or under the PA from the FBI should be addressed to:

Record/Information Dissemination Section  
Federal Bureau of Investigation  
Department of Justice  
170 Marcel Drive  
Winchester, VA 22602-4843

To request any information from the FBI, under either FOIA or the PA, your request must:

48. U.S. Dept. of Justice, "Freedom of Information Act Reference Guide," updated Jan. 2010, <http://www.justice.gov/oip/referenceguide.htm#how> (last visited Mar. 14, 2012).

49. U.S. Dept. of Justice, "Freedom of Information Act Reference Guide," updated Jan. 2010 <http://www.justice.gov/oip/attachmentb.htm> (last visited Mar. 14, 2012).

50. See 28 U.S.C. § 531-540(C) (2000) (describing various crimes that the FBI is authorized to investigate, for example, crimes involving government officers and employees and killing of state or local law enforcement officers).

- (1) Be in writing;
- (2) Provide your full name;
- (3) Provide your date and place of birth; and
- (4) Either be notarized by a notary public, or include the following statement before the signature on the letter: "I declare under penalty of perjury that the foregoing is true and correct. Executed on [date]."

Call FOIA Requester Service Center at (540) 868-4591 to access recorded information on how to submit a new FOIA/PA request to the FBI. Call (540) 868-4593 about the status of an existing FOIA/PA request to the FBI.

If you are requesting information about someone else and that person is alive, your request must include a waiver signed by that person and verified by a notary public. You must also include the person's full name as well as his or her date and place of birth. If you are requesting information about someone who is deceased, you must provide that person's name and proof of death, either in the form of an obituary, death certificate, or published record that indicates the person is actually dead.<sup>51</sup>

### (c) Fees

Within a reasonable amount of time after your request, staff should provide you with copies of the disclosable documents from your Inmate Central File and/or medical records. Copies cost ten cents per page. In addition, you will be charged a fee for the search time required to process your request. The cost of search time is \$2.25 per fifteen minutes for clerical staff, \$4.50 per fifteen minutes for professional staff, and \$7.50 per fifteen minutes for managerial staff. You will not be charged for the first 100 pages of duplication or the first two hours of search time, and you will only be charged for fees that total above \$8.00.<sup>52</sup>

When you file either a FOIA or PA request with the DOJ, the Department assumes that you are willing to pay fees up to \$25. Most of the time, no fees are ever charged.<sup>53</sup> However, if you cannot, or do not want, to pay \$25, you should state how much you can pay in your request letter. If the DOJ estimates that your fees will be more than \$25, they will let you make a cheaper request or ask you to agree to pay the estimated amount before they process your request. According to the DOJ website, "[y]ou ordinarily will not be required to actually pay the fees until the records have been processed and are ready to be sent to you."<sup>54</sup>

The DOJ charges for copies (ten cents per page), the cost of computer print-outs and tapes, and labor. The cost of labor is \$4.00 per fifteen minutes for clerical staff, \$7.00 per fifteen minutes for professional staff, and \$10.25 per fifteen minutes for managerial staff. The DOJ will not charge you for the first two hours of search time or the first 100 pages of copies. If the total fee is less than \$14, the DOJ will not charge any fee.<sup>55</sup>

You can also request a fee waiver. To get a fee waiver, you must show you are requesting the information to benefit the public, not your own interests. Because you are requesting records about yourself, you will probably not meet this standard.<sup>56</sup> Inability to pay is not a basis for a fee waiver.<sup>57</sup> If you are entirely

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51. Telephone Interview with staff member of the Federal Bureau of Investigations (Nov. 13, 2006).

52. See U.S. Dept. of Justice Fed. Bureau of Prisons, Program Statement 1351.05, (Sept. 19, 2002), available at <http://www.bop.gov/DataSource/execute/dsPolicyLoc> (click on "General Administration and Management" and then on Document Name: "Release of Information,") (last visited Mar. 14, 2012).

53. U.S. Dept. of Justice, Freedom of Information Act Reference Guide, Revised January 2010 <http://www.justice.gov/oip/referenceguide.htm#how> (last visited Mar. 14, 2012).

54. U.S. Dept. of Justice, Freedom of Information Act Reference Guide, Revised January 2010 <http://www.justice.gov/oip/referenceguide.htm#how> (last visited Mar. 14, 2012).

55. U.S. Dept. of Justice, Freedom of Information Act Fees and Waivers, [http://www.justice.gov/oip/04\\_1\\_2.html](http://www.justice.gov/oip/04_1_2.html) (last visited Mar. 14, 2012).

56. U.S. Dept. of Justice, Freedom of Information Act Reference Guide, Revised January 2010 <http://www.justice.gov/oip/referenceguide.htm#how> (last visited Mar. 14, 2012) (Requests for fee waivers from individuals who are seeking records pertaining to themselves usually do not meet this standard).

57. U.S. Dept. of Justice, Freedom of Information Act Reference Guide, Revised January 2010 <http://www.justice.gov/oip/referenceguide.htm#how> (last visited Mar. 14, 2012).

without a way to pay, you can attempt to request a fee waiver for that reason, but the DOJ usually denies such requests.

#### (d) Initial Response to Requests

Once a division of the DOJ has processed your request and any fee issues have been resolved, the division will send you a response. This response may either be (1) the information you requested, (2) some of the information you requested and a letter explaining why part of your request was denied, or (3) a letter explaining why your entire request was denied. If information is being withheld, the letter will tell you whether the information is being withheld because of one of the exemptions to the PA or FOIA. Also, note that in some cases you may receive the documents a short time after you receive this response.

The BOP should respond to your request within twenty business days, not counting Saturdays, Sundays, and legal holidays. The twenty-day period begins when the BOP's FOIA office receives your request. The BOP may extend the initial response time an additional ten business days when one of the following applies:

- (1) Records must be collected from field offices;
- (2) A "voluminous" (large) quantity of records must be located, compiled, and reviewed in response to the request; or
- (3) The request requires that the BOP consult with another agency that has a substantial interest in the information, or among two or more other DOJ Divisions.

When the BOP needs more time to process your request, they will inform you in writing and give you the opportunity to modify your request.<sup>58</sup>

### 5. What to Do if Your Request is Denied

If your initial request is denied, you should first file an administrative appeal with the agency from which you are requesting information. If your administrative appeal is also denied, you can file a lawsuit.

#### (a) Filing an Appeal

You should file an appeal if you are not satisfied with the response you have received to your FOIA request. Your appeal should be:

- (1) In writing;
- (2) Marked "Freedom of Information Act Appeal"—both on the front of the envelope and on the appeal itself;
- (3) Received within sixty days of the date on the DOJ's initial letter; and
- (4) Addressed to:

Office of Information Policy  
United States Department of Justice  
Attn: Freedom of Information Act Appeal  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, DC 20530-0001

Your appeal should include the name of the Component (office within the agency) that denied your request, the initial request number the Component assigned to the request, and the date of the BOP's action.<sup>59</sup> If no request number has been assigned, you should try to enclose a copy of the BOP's determination letter with your appeal. You should also explain your reasons for disagreeing with the BOP's denial of your request. Do not attach specific documents unless they are directly related to a point you are making in the appeal. Once your appeal has been received, it will be reviewed by an attorney in the Office of Information Policy ("OIP"). At that point, the OIP will either (1) affirm the BOP's decision, (2) affirm part of the BOP's decision and release other information requested, or (3) reverse or modify the original decision and send the request to the BOP to reprocess the request.<sup>60</sup>

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58. U.S. Dept. of Justice, Freedom of Information Act Reference Guide, <http://www.usdoj.gov/oip/referenceguidemay99.htm> (last visited Sept. 15, 2009).

59. U.S. Dept. of Justice, Freedom of Information Act Reference Guide, Revised Jan. 2010 <http://www.justice.gov/oip/referenceguide.htm#how> (last visited Mar. 14, 2012).

60. 28 C.F.R. § 16.9 (2009).

### (b) Filing a Lawsuit

If the appeal does not get you the information you requested, you can file a lawsuit to force the agency to release the documents. You have up to six years after the date on which your administrative appeal was denied to file a lawsuit,<sup>61</sup> but you should try to file as soon as possible to demonstrate to the court that you need the information.

Filing a FOIA complaint should be relatively inexpensive and simple.<sup>62</sup> Sometimes, as soon as the complaint is filed, the government will release the documents without further litigation. If you are denied documents that you think are clearly covered by FOIA, you may wish to draft and file your own short-form complaint. In addition, you should consider filing a “Motion for a *Vaughn* Index” using the sample *Vaughn* motion reproduced in Appendix C-5 at the end of this Chapter.<sup>63</sup> This is a routine motion under which the government agency will be required to give you an itemized index describing the documents it is withholding and the justification it claims for withholding each.

After you file your complaint, the burden is on the government to come forward and justify why it is withholding the information.

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61. 28 U.S.C. § 2401(a) (2006).

62. Various resources are available to help jailhouse lawyers filing FOIA lawsuits. The names of several organizations that will advise, though usually not represent, FOIA litigants can be found in Appendix D of this Chapter.

63. This procedure was adopted in *Vaughn v. Rosen*, 484 F.2d 820, 157 U.S. App. D.C. 340 (D.C. Cir. 1973).