

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 explain 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.¹ Many of these laws are modeled on the federal Freedom of Information Act, but this Act does not apply to state or municipal agencies, including state prison systems. Only *state* freedom of information laws grant access to state and local government records.

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. Incarcerated people in other states should still read Part C to get an idea of the types of documents incarcerated people 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 Act² and the Privacy Act.³ 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

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1. See Appendix A.
2. 5 U.S.C. § 552.
3. 5 U.S.C. § 552a.

into one of nine categories of materials that agencies are allowed, but not required, to withhold.⁴ In practice, however, there are often administrative obstacles to getting records, and you will probably not get immediate access to everything you think you are entitled to.

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:

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

FOIA does not apply to documents held by federal courts or by Congress.⁵ 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.”⁶ FOIA does not apply to state or local governments, including state prison systems; these are usually covered by separate laws.⁷

FOIA allows you to look at almost all records under a federal agency’s control.⁸ 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.⁹ 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.¹⁰ 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.¹¹

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

5. 5 U.S.C. §§ 551(1)(A)–(B).

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* *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208, 228–229, 406 U.S. App. D.C. 440, 460–461 (D.C. Cir. 2013) (holding that logs of visitors to the Office of the President are not agency records covered by FOIA); *Sweetland v. Walters*, 60 F.3d 852, 855 (D.C. Cir. 1995) (holding that the Executive Residence is not an agency under FOIA as it does not exercise independent authority); *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 closely it operates with the President, the nature of its delegation from the President, and whether it has a self-contained structure).

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).

9. *U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 144–145, 109 S. Ct. 2841, 2848, 106 L. Ed. 2d 112, 125 (1989) (holding that court opinions that were a part of the agency files are “agency records”) and should be made available under FOIA); *see also* *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208, 216–217, 406 U.S. App. D.C. 440, 448–449 (D.C. Cir. 2013) (explaining when files in control of an agency become “agency records”).

10. 5 U.S.C. § 552(f) 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* *Ancient Coin Collectors Guild v. U.S. Dept. of State*, 641 F.3d 504, 514, 395 U.S. App. D.C. 138, 148 (D.C. Cir. 2011) (holding that an agency “fulfills its obligations under FOIA ‘if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents’”); *Miller v. U.S. Dept. of State*,

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.¹² 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 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 as listed.

The PA grants you the power to look at any record within an agency’s files that applies to you.¹³ 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.¹⁴ 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.¹⁵ 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.

Relevant FOIA exemptions include:¹⁶

- (1) Records that should be kept confidential in the interests of national defense or foreign policy;
- (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;¹⁷

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 the agency should issue an affidavit that describes how the search was conducted and how the agency’s filing system would make further search difficult when the adequacy of an agency’s attempt to respond to a FOIA request is at issue.). The new statute rejects *Dismukes v. Dept. of the Interior*, where the court held that an agency has no obligation under FOIA to accommodate the plaintiff’s preference for a specific form or format of the records. *Dismukes v. Dept. of the Interior*, 603 F. Supp. 760, 763 (D.D.C. 1984).

12. 5 U.S.C. § 552(a)(3)(A).

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

14. 5 U.S.C. § 552a(a)(2); 5 U.S.C. § 552a(d)(1). This is different from FOIA, which gives access rights to “any person” regardless of citizenship status. 5 U.S.C. § 552(a)(3).

15. 5 U.S.C. § 552(b).

16. 5 U.S.C. §§ 552(b)(1)–(7). 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), for more information.

17. *See Milner v. Dept. of Navy*, 562 U.S. 562, 581, 131 S. Ct. 1259, 1271, 179 L. Ed. 2d 268, 284–285 (2011) (holding that Exemption 2 “encompasses only records relating to issues of employee relations and human resources”); *Dept. of Air Force v. Rose*, 425 U.S. 352, 369–370, 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”).

- (3) Matters “specifically exempted from disclosure” by other federal statutes. There are two ways that an agency can claim this exemption. First, they can say that a federal statute requires that the agency withholds this type of information. Second, the agency could also argue that a federal statute created requirements for withholding information, and that the agency has met those requirements. The agency must also show that the statute applies the material they are trying to withhold.¹⁸ Unfortunately, there is not a list of every statute that lets agencies withhold certain information. Additionally, some of these statutes have separate requirements for agencies’ disclosure of information. But, even if the statute has different procedures for disclosing documents, you should always make your request for records under FOIA.
- (4) “Trade secrets and commercial or financial information” given to the government with the expectation that they would be kept secret;
- (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;
- (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,¹⁹ medical details and conditions,²⁰ “rap sheets,”²¹ and the incarceration of United States citizens in foreign prisons.²²
- (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.

18. See *McDonnell v. United States*, 4 F.3d 1227, 1249 (3d Cir. 1993) (noting that the burden of showing that a document falls within the scope of a statute and is exempt rests on the government); see generally *ACLU of New Jersey v. F.B.I.*, 733 F.3d 526, 531 (3d Cir. 2013) (noting that the agency bears the burden of justifying the withholding of information under a FOIA exemption); *Church of Scientology of California v. U.S. Dept. of Army*, 611 F.2d 738, 742 (9th Cir. 1979) (explaining that the burden of showing a document is exempt from disclosure falls on the agency that is refusing to disclose).

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”); *but see Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 194 (2d Cir. 2012) (holding that “[w]here public interest favoring disclosure is no more than minimal, a lesser privacy interest suffices to outweigh it”).

20. See *Yonemoto v. Dept. of Veterans Affairs*, 686 F.3d 681, 696 (9th Cir. 2012) (finding that excluding information about the type of medical illness causing an employee to be absent from work was proper under Exemption 6); *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, 74–76 (2d Cir. 1981) (upholding denial of plaintiff’s request for FBI files that included an individual’s possible involvement with illegal drugs because that information 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).

Exemption 7 covers many records.²³ For example, law enforcement manuals satisfy the requirements of Exemption 7 and may not be subject to disclosure. Other materials will fall under Exemption 7²⁴ if they:

- (1) 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;²⁵
- (2) “Would deprive a person [other than yourself] a right to a fair trial”;
- (3) 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.²⁶ In other words, the names of law enforcement personnel will usually not be revealed;
- (1) 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.” Confidential sources may include persons with a close relationship to you or the victim, or persons who have a reasonable fear of retribution.²⁷ 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;
- (2) 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;²⁸

23. See 5 U.S.C. § 552(b)(7); see also *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) (noting 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]’”) (citation omitted) (alterations in original).

24. See 5 U.S.C. §552(b)(7) (listing instances where production of law enforcement records would be exempt).

25. See *Lynch v. Dept. of the Treasury*, No. 98-56358, 2000 U.S. App. LEXIS 1392, at *9–13 (9th Cir. Jan. 8, 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, 1164–1165 (3d Cir. 1995) (affirming a district court’s finding that government records were properly denied under Exemption (b)(7)(A) because disclosure of such information would interfere with future prosecutions and deny sources confidentiality that they were assured).

26. See, e.g., *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 194 (2d Cir. 2012) (holding that “[w]here public interest favoring disclosure is no more than minimal, a lesser privacy interest suffices to outweigh it,” such as when the identities of federal employees may invade personal privacy); *Sutton v. IRS*, No. 05 C 7177, 2007 U.S. Dist. LEXIS 299, at *18, 99 A.F.T.R.2d (RIA) 387 (N.D. Ill. Jan. 4, 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*, No. 95-1888 (TFH), 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.)

27. See *Hale v. U.S. Dept. of Justice*, 226 F.3d 1200, 1202, 1204–1205 (10th Cir. 2000) (reaffirming test for confidentiality required case by case analysis, and holding that identity of witnesses properly withheld because they otherwise wouldn’t have spoken to the FBI); see also *Hodge v. F.B.I.*, 703 F.3d 575, 581–582, 403 U.S. App. (D.C. 255, 261–262 (D.C. Cir. 2013) (holding that names of witnesses were properly withheld where they had been assured that they would remain confidential).

28. See *Blackwell v. F.B.I.*, 646 F.3d 37, 42, 396 U.S. App. D.C. 164, 169 (D.C. Cir. 2011) (noting Exemption 7(E) sets a relatively low bar, and holding that documents containing information on FBI forensic examination procedures were properly excluded from FOIA request); see also *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193–1194, 385 U.S. App. D.C. 250, 254, 103 A.F.T.R.2d (RIA) 1799 (D.C. Cir. 2009) (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).

- (3) Might “endanger the life or physical safety of any individual.” This is a frequently claimed exemption, because while it is similar to (7)(c), it does not require the court to consider the public interest in its decision.²⁹

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 another way of accessing the same information.³⁰ 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.³¹ Therefore, if an agency itself declines to send you copies of the requested information, it must provide you with another form of access.³²

The Privacy Act (PA) also has exemptions to releasing documents. These exemptions are much broader than the FOIA exemptions. The nine PA exemptions are:³³

- (1) Material maintained by the Central Intelligence Agency (“CIA”);³⁴
- (2) Material maintained by a law enforcement agency. This includes police, corrections, and prosecutors’ offices;³⁵
- (3) Material that is “properly” secret in the interests of national defense or foreign policy;³⁶
- (4) Material gathered for criminal investigative law enforcement purposes by agencies whose principal function is not law enforcement;³⁷
- (5) Material contained in Secret Service record systems, relating to protection of the President and others whom the Secret Service protects;³⁸
- (6) Material required by statute to be maintained and used only as statistical records;³⁹

28. *Anderson v. U.S. Dept. of Justice*, No. 95-1888 (TFH), 1999 U.S. Dist. LEXIS 4731, at *10–11 (D.D.C. Mar. 31, 1999) (finding the incarcerated person could not obtain witness names from a police lineup because it could have subjected them to harassment and threats); *Ferreira v. Drug Enf’t 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, 322 (D.C. Cir. 1988), *aff’d*, 492 U.S. 136, 109 S. Ct. 2841, 106 L.Ed.2d 112 (1989) (holding an agency may satisfy its FOIA obligations by simply making extra copies of documents available in its public reading room; it does not have to mail copies of records).

31. *Tax Analysts v. U.S. Dept. of Justice*, 845 F.2d 1060, 1067, 269 U.S. App. D.C. 315, 322 (D.C. Cir. 1988) (holding an agency may satisfy its FOIA obligations by simply making extra copies of documents available in its public reading room; it does not have to mail copies of records), *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, 287 U.S. App. D.C. 126, 139 (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 customhouse in Puerto Rico).

32. *Tax Analysts v. U.S. Dept. of Justice*, 845 F.2d 1060, 1067, 269 U.S. App. D.C. 315, 322 (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). *See, e.g.*, *Bassiouni v. FBI*, 436 F.3d 712, 724–725 (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).

35. 5 U.S.C. § 552a(j)(2). 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).

36. 5 U.S.C. § 552a(k)(2).

37. 5 U.S.C. § 552a(k)(3).

38. 5 U.S.C. § 552a(k)(4).

- (7) Material that identifies individuals who were promised that their identity would be kept secret when they provided information to the government as part of a background check for a job application;⁴⁰
- (8) Material related to testing or examination used only to determine individual qualifications for appointment or promotion in the federal service;⁴¹ 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.⁴²

You should always request information under both FOIA and the PA. Agencies may not hide the information from you when it is exempt under one statute, but not exempt under the other.⁴³ 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.”⁴⁴

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 keep the information from you just because a particular exemption *could* be applied. Agency officials can choose to not follow the exemptions and give you 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 procedures that you must follow if you are seeking to request information from the DOJ. To get information from other agencies, or if you do not know which agency holds the information you want, you can check up on 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 the Government Publishing Office at (202) 512-1800 or access <http://www.usgovernmentmanual.gov/> on the Internet to buy or download the manual.

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.⁴⁵ If you are uncertain about which division to write to, 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

39. 5 U.S.C. § 552a(k)(5).

40. 5 U.S.C. § 552a(k)(6).

41. 5 U.S.C. § 552a(k)(7).

43. 5 U.S.C. § 552a(t)(1)–(2).

44. *Martin v. Office of Special Counsel, Merit Sys. Prot. Bd.*, 819 F.2d 1181, 1184 (D.C. Cir. 1987) (denying disclosure of information requested by Appellee as such disclosure was exempted by both the PA and the FOIA).

45. See *Organizational Chart*, U.S. DEPT. OF JUSTICE, available at <https://www.justice.gov/agencies/chart> (last visited Jan. 27, 2019), for more information about each division. For a list of FOIA contacts at the DOJ, see *Find A FOIA Contact at DOJ*, U.S. DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/find-foia-contact-doj/list> (last visited Jan. 27, 2019).

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(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 Institution⁴⁶

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 you having to file 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 selected 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:⁴⁷

- (1) Be in writing;
- (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.

46. Information regarding making requests from your institution can be found in BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT NO. 1351.05, RELEASE OF INFORMATION (Sept. 19, 2002, revised Mar. 9, 2016), *available at* https://www.bop.gov/policy/progstat/1351_005_CN-2.pdf (last visited Jan. 27, 2019).

47. *See* BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT NO. 1351.05, RELEASE OF INFORMATION (Sept. 19, 2002, revised Mar. 9, 2016), *available at* https://www.bop.gov/policy/progstat/1351_005_CN-2.pdf (last visited Jan. 27, 2019); *IV. How to Make a FOIA Request*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, *available at* <https://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

- (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 "[i]f you request information about yourself and do not follow one of the procedures [described above], your request cannot be processed."⁴⁸ 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 given to you 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 to⁴⁹:

FOIA/PA Section
Office of General Counsel, Room 924
Federal Bureau of Prisons
320 First Street, N.W.
Washington, DC 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 <https://www.bop.gov/foia/#tabs-5> The FOIA Requester Service Center can be reached by telephone at (202) 616-7750, and the FOIA Public Liaison can be reached at (202) 616-7750.

(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.⁵⁰ 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:

- (1) Be in writing;

48. *IV. How to Make a FOIA Request*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/departments-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

49. *Freedom of Information Act*, BUREAU OF PRISONS, available at <https://www.bop.gov/foia/#tabs-5> (last visited Jan. 27, 2019).

50. *See* 28 U.S.C. §§ 535, 540–540b (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).

- (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) 868-1535 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.⁵¹

(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 copies or the first two hours of search time, and you will only be charged for fees that total above \$8.00.⁵²

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.⁵³ 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."⁵⁴

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.⁵⁵ You cannot get a fee waiver just because you cannot pay for it.⁵⁶ If you are entirely without a way to pay, you can ask for a fee waiver for that reason, but the DOJ usually denies such requests.

51. *Requesting FBI Records*, FBI, available at <https://www.fbi.gov/services/information-management/foipa/requesting-fbi-records> (last visited Jan. 27, 2019).

52. See BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, PROGRAM STATEMENT NO. 1351.05, RELEASE OF INFORMATION 21-22 (Sept. 19, 2002, revised Mar. 9, 2016), available at https://www.bop.gov/policy/progstat/1351_005_CN-2.pdf (last visited Jan. 27, 2019).

53. VII. *Fees*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

54. VII. *Fees*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

55. VIII. *Fee Waivers*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019) (stating that requests for fee waivers from individuals who are seeking records pertaining to themselves usually do not meet this standard).

56. VIII. *Fee Waivers*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

(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.⁵⁷

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. 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

57. *IV. How to Make a FOIA Request*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019)

point you are making in the appeal.⁵⁸ 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.⁵⁹

(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,⁶⁰ but you should try to file as soon as possible to show the court that you need the information.

Filing a FOIA complaint should be relatively cheap and simple.⁶¹ 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.⁶² This is a routine motion under which the government agency will be required to give you an detailed list describing the documents it is withholding and the reason 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.

C. Conclusion

While FOIA can be a great tool to get documents related to your case or your life, it is important to follow the procedural rules. Of note, many states have passed their own Freedom of Information laws, with their own procedures for requesting documents. If you are considering filing a Freedom of Information request to a state agency under a state law, make sure you read the relevant state laws—some states do not have a fee waiver provision like the federal Freedom of Information Act. Also, know that it can take many months to receive a final response to your FOIA request. However, if you believe that FOIA information will be helpful for you or your case, it never hurts to file one just in case.

58. *X. Administrative Appeals*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

59. See 28 C.F.R. § 16.8(c) (2018); *X. Administrative Appeals*, in *Dept. of Justice Freedom of Information Act Reference Guide*, DEPT. OF JUSTICE, available at <https://www.justice.gov/oip/department-justice-freedom-information-act-reference-guide> (last updated Dec. 13, 2018) (last visited Jan. 27, 2019).

60. 28 U.S.C. § 2401(a).

61. 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-1 of this Chapter.

62. This procedure was adopted in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (instructing trial court to provide itemized index of disclosable and exempt documents, with justifications for exemptions).