

Privacy and Civil Liberties Oversight Board
(Interim) Freedom of Information Act Reference Guide

Effective Date: March 22, 2017

I. Introduction

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, generally provides that any person has the right to request access to federal agency records or information and to obtain access to federal agency records except to the extent that those records are protected from disclosure by the FOIA. Federal agencies are required to disclose records upon receiving a written request for them, except for records that are protected from disclosure by the nine exemptions and three exclusions of the FOIA. This right of access is enforceable in court.

This reference guide is designed to help the public understand how the FOIA process works so that the public can be better informed about the operations and activities of the federal Government. The goal of the PCLOB's FOIA practice is to keep the public better informed about the PCLOB's role to provide advice on and oversee federal government counterterrorism activities and appropriately balance those activities with national security and privacy and civil liberties interests. Because of PCLOB's need to comply with the national security laws of the United States, some information, including documents, or portions thereof, cannot be released to the public. Nonetheless, it is the goal of the PCLOB to release, when possible, a substantial amount of information following review.

The Board increasingly provides information on its website. Before making a request, you are encouraged to review the materials posted on the website. Additionally, please note that each federal department or agency responds to requests for its own records. Therefore, before sending a request to the Board, you should determine whether PCLOB is likely to have the records you are seeking. If you are interested in information about the FOIA itself, FOIA.gov provides important information and resources. It also provides a listing of FOIA contacts at all federal agencies.

Please note that the Board does not maintain records or collect information about specific individuals. The only such information the Board may possess would be the result of receiving such information directly from you.

The formal rules for making FOIA requests to PCLOB are set forth in the Board's regulations. These regulations are available on PCLOB's website, <https://www.pclob.gov>, under "Library."

II. Access to certain records without a FOIA request

PCLOB's website, located at www.pclob.gov, should be the starting point for anyone interested in the Board. The Board's website includes information about the Board and its Members, oversight reports, Board policies, budget requests, strategic plans, transcripts and photos from public events, and news releases, among other information. Further, the PCLOB, like all federal agencies subject to FOIA, makes certain types of records available without a FOIA request through its electronic library on its website <https://www.pclob.gov/library>. This is where the Board posts a variety of records of interest to the public. Such records include the PCLOB's annual FOIA reports and Chief FOIA Officer Reports – which include such information as the number of FOIA requests received by the agency, the amount of time taken to process requests, the total amount of fees collected by the agency, information regarding the backlog of pending requests, and other information about the agency's handling of FOIA requests.

For both classified and unclassified information systems, the Board's data is primarily stored within employee-assigned user folders, shared drives, and email, as well as the maintenance of some hard copy records.

III. Where to make a FOIA request

All requests should be submitted to the attention of PCLOB's FOIA Officer. Requests can be submitted via email to foia@pclob.gov or mail. As of 2016, the Board's mailing address is MS2, Room 2C104, Washington, DC 20511; however, the Board is scheduled to move out of this interim space, so requestors should check the Board's website at <https://www.pclob.gov> for the Board's current mailing address prior to submitting a request via mail. Requests also may be sent via fax to (301) 699-6447.

IV. How to make a FOIA request

Your FOIA request must be in writing and should be sent to the email address or physical mailing address provided above. Please include your name and contact information, including an email address or physical mailing address to where you would like any responsive records to be sent. You should include the notation "Freedom of Information Act Request" in your email or on the front of your request envelope and at the beginning of your request letter.

There is no special form or wording for making requests. You should simply state that you are requesting records under the FOIA and describe the records you are requesting. In making your request, you should be as specific as possible regarding names, dates, places, events, subjects, etc. The more specific you are about the records or types of records that you want, the more likely it will be that the Board will be able to locate those records and that any search charges will be minimized. You also may specify the format in which you wish to receive the records.

In your request, you should be as clear as you can about what you would like to obtain. The Board's FOIA Officer will give the words you use their ordinary meaning, read in the

context of your request as a whole. If we cannot determine what you are seeking, the Board's FOIA Officer may ask you for clarification.

A FOIA request can be made for any agency record; however, this does not mean that the Board will disclose any record sought. There are statutory exemptions that authorize the withholding of certain information. The Board will assess the applicability of these exceptions in accordance with existing law and policy.

When the Board withholds information, it ordinarily will specify which FOIA exemption permits withholding. Please note that the FOIA does not require agencies to perform research, analyze data, answer written questions, or create records to respond to a request.

V. Response Times

The PCLOB is required to respond to your FOIA request within 20 business days (excluding Saturdays, Sundays, and legal holidays). This time period begins when your request is received by the Board. Under the FOIA, an agency is not required to send releasable documents to you by the 20th business day; it may send you a letter informing you of its decision and then send you the documents within a reasonable time afterward.

The Board may toll (i.e. suspend) the time for response once to seek additional information from you about your request and as many times as necessary to clarify fee assessments. In addition, the Board may extend its response time by an additional 10 business days when:

- A. Responsive records need to be collected from offices that are separate from the Board's headquarters;
- B. The request involves a "voluminous" amount of records which must be located, compiled, and reviewed; or
- C. The PCLOB must consult with another agency which has a substantial interest in the responsive information.

When such a time extension is needed, the Board will notify you of this in writing and offer you the opportunity to modify or limit the scope of your request. Alternatively, you may agree to a different timetable for the processing of your request. The Board's FOIA Public Liaison can assist you with this.

VI. Expedited Processing

Under certain circumstances, you may be entitled to have your request or administrative appeal processed on an expedited basis. The Board may grant your request for expedited processing upon your written request and demonstration of compelling need. Compelling need means that the failure to obtain the records you request on an expedited basis could pose an imminent threat to life or physical safety of an individual, or that the requester is primarily engaged in the dissemination of

information to the public and the information is urgently needed to inform the public concerning actual or alleged federal government activity.

Your request for expedited processing must include a statement setting forth the reasons why your request or administrative appeal should be expedited. You must certify the reasons given for seeking expedited processing of this request are true and correct to the best of your knowledge and belief. The Board will notify you of its decision whether to grant or deny your request for expedited processing within 10 calendar days after receiving your request. If the Board denies your request for expedited processing, you will be advised of your right to submit an administrative appeal of that denial, which will be handled expeditiously. (For information about filing administrative appeals, see Section X of this Reference Guide.)

VII. Fees

There is no initial fee to file a FOIA request; in fact, in most cases, no fees are ever charged. By law, however, an agency is entitled to charge certain fees depending on the category of FOIA requester that you fall into. For the purposes of fees only, the FOIA divides requesters into three categories.

1. In the first category, *commercial requesters* may be charged fees for searching for records, "processing" the records (i.e., reviewing them to determine the possible applicability of FOIA exemptions), and duplicating them to respond to a request.
2. In the second category, *educational or noncommercial scientific institutions and representatives of the news media* are charged only for duplication expenses, after the first one hundred pages of copies. The first one hundred pages are provided free of charge.
3. In the third category, *all other requesters* are charged for record searches and duplication. There is no charge for the first two hours of search time or for the first one hundred pages of duplication or their cost equivalent.

The Board currently charges ten cents per page for duplication. In all cases, if the total fee does not exceed \$25.00 we will not charge any fee at all.

Your request may include a specific statement limiting the amount that you are willing to pay in fees. If you do not do so, the Board assumes you are willing to pay fees of up to \$25. If the Board estimates the total for processing your request will exceed \$25, it will notify you in writing of the estimate and offer you an opportunity to narrow the scope of your request to reduce the fees. If you continue to seek all records involved, you will be asked to express your commitment to pay the estimated fees and the processing of your request will be suspended until you agree to do so.

You ordinarily will not be required to pay the fees until the records have been processed and are ready to be sent to you. If, however, you have failed to pay fees within thirty days of billing in the past, or if the estimated fees exceed \$250, you may be required to pay the estimated fees in advance – that is, before the records

are processed. If you agree to pay fees and then fail to do so within 30 days of billing, you may be charged interest on your overdue balance and the Board will not proceed with any further requests until you pay your balance in full. If you agree to pay fees for searching for records, you may be required to pay such fees even if the search does not locate any responsive records of, if records are located, even if they are withheld as entirely exempt from disclosure.

If you have any questions about a fee estimate or assessment, contact the Board's FOIA Officer or FOIA Public Liaison.

VIII. Fee waivers

If you expect or are advised that a fee will be charged, you may request a waiver of those fees. Fee waivers, however, are limited to situations in which a requester can show that the disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester. A requester's inability to pay fees is not a legal basis for granting a fee waiver.

IX. Initial determinations

Once the Board has processed your request and any fee issues have been resolved, the FOIA Officer will send you a written initial determination. The FOIA Officer will include any documents that can be disclosed along with the determination letter; though, on occasion, the documents may be sent to you separately within a reasonable time following the determination letter.

As noted earlier, the FOIA provides access to all federal agency records (or portions of those records), except for records that are protected by any of nine exemptions or three law enforcement exclusions. The Board's initial determination letter will advise you of whether any information is being withheld pursuant to one or more of the exemptions. When a page of a record is being withheld in its entirety, the FOIA Officer ordinarily will specify the number of pages being withheld or make a reasonable effort to estimate the volume of the withheld information. Where a page of a record is being withheld in part, the withheld portions of the page will ordinarily be specifically marked with the applicable exemption(s).

The FOIA's nine exemptions authorize federal agencies to withhold information covering:

- (1) classified national defense and foreign relations information;
- (2) internal agency rules and practices;
- (3) information that is prohibited from disclosure by another federal law;
- (4) trade secrets and other confidential commercial or financial information;
- (5) inter-agency or intra-agency communications that are protected by legal privileges;
- (6) information involving matters of personal privacy;

- (7) records or information compiled for law enforcement purposes, to the extent that the production of those records
 - (A) could reasonably be expected to interfere with enforcement proceedings;
 - (B) would deprive a person of a right to a fair trial or an impartial adjudication;
 - (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;
 - (D) could reasonably be expected to disclose the identity of and/or information provided by a confidential source;
 - (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions; or
 - (F) could reasonably be expected to endanger the life or physical safety of any individual;
- (8) information relating to the supervision of financial institutions; and
- (9) geological information on wells.

Congress also enacted three narrow categories of law enforcement and national security records that are protected under the FOIA (referred to as FOIA “exclusions”). The first exclusion protects the existence of an ongoing criminal law enforcement investigation when the subject of the investigation is unaware that it is pending and disclosure could reasonably be expected to interfere with enforcement proceedings. The second exclusion is limited to criminal law enforcement agencies and protects the existence of informant records when the informant’s status has not been officially confirmed. The third exclusion is limited to the Federal Bureau of Investigation and protects the existence of foreign intelligence, counterintelligence, or international terrorism records when the existence of such records is classified. Records falling within an exclusion are not subject to the requirements of the FOIA.

X. Administrative Appeals

If you are not satisfied with the Board’s initial determination, or you believe that there are additional records responsive to your request that its search did not uncover, you may file an administrative appeal. You also may appeal the denial of a request for expedited processing or a fee waiver. The Board will advise you of your right to file an administrative appeal in the Board’s response containing the adverse determination.

All appeals must be made in writing and addressed to the PCLOB Chief FOIA Officer. As of 2016, the Board’s mailing address is MS2, Room 2C104, Washington, DC 20511; however, the Board is scheduled to move from this interim space, so requesters should check the Board’s website at <https://www.pclob.gov> for the Board’s current mailing address. Appeals also may be transmitted electronically to foia@pclob.gov. The Board also accepts appeals by facsimile if sent to (301) 699-6447. Your appeal letter and envelope, or subject line of electronic transmission, should be marked “Freedom of Information Act appeal.” Your appeal must be postmarked, or in the case of electronic

submissions, transmitted, within 90 calendar days after the date of the Board's initial determination letter. Please include the initial request number assigned to your request and the date of the Board's action in your appeal letter.

There is no specific form or language needed to file an administrative appeal. You may explain the reasons for your disagreement with the action, but a simple statement that you are appealing the Board's decision is sufficient. If you are appealing because you believe there are additional records that may be responsive to your request, you should specify that you think such records exist and, if possible, where you believe they might be located.

The Chief FOIA Officer will review your administrative appeal, and will make an independent determination as to whether your request was properly processed.

Under the FOIA, the Board ordinarily must decide on your administrative appeal within 20 business days. The Chief FOIA Officer may take one of several actions on your appeal: affirm the decision in full and identify which exemptions have been appropriately claimed; affirm part of the decision (identifying the applicable exemptions), but order the release of other information previously withheld; order the release of all withheld information. Finally, under some circumstances, the Chief FOIA Officer may return or "remand" the request for reprocessing. When a case is remanded, you will have another opportunity to appeal the FOIA Officer's determination to the Chief FOIA Officer if you remain dissatisfied with the FOIA Officer's action.

XI. Resolving disputes

As noted throughout this Reference Guide, the Board has a FOIA Public Liaison to whom you may turn if you are dissatisfied with the services received from its FOIA Office. The FOIA Public Liaison can assist you throughout the request process, from working with you and the FOIA Officer to arrange an alternative time-frame for processing your request, to increasing understanding regarding the status of your request, to assisting you in resolving disputes.

In addition, the Office of Government Information Services, an office created within the National Archives and Records Administration, offers mediation services to FOIA requesters. They may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
Email: ogis@nara.gov
Phone: (301) 837-1996
Fax: (301) 837-0348
Toll-free: 1-877-684-6448

Finally, the FOIA provides requesters with the right to challenge an agency's action in federal court. Before doing so, you ordinarily will be required to have first filed an administrative appeal with the Board.