

Best Practices for Agency Freedom of Information Act Regulations



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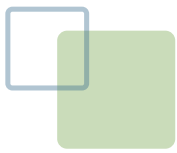
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EXECUTIVE SUMMARY

Of the 100 agencies in the federal government subject to the Freedom of Information Act (FOIA), dozens of agencies have not yet updated their FOIA regulations to reflect requirements in the OPEN Government Act of 2007. The OPEN Government Act required federal agencies to better assist people who make requests for public information under FOIA – for instance, by providing individualized tracking numbers in order to check the status of a request. Despite additional direction from President Obama and Attorney General Eric Holder to improve FOIA processing, six years later, most agency regulations include few of the best practices described below.

FOIA regulations should be easy for both requesters and agency staff to understand and should promote transparency by highlighting existing practices in federal agencies. The Obama administration has committed to developing common FOIA regulations and practices applicable to all agencies. This report is designed to be a practical guide for the administration and agency staff engaged in improving FOIA regulations and practices.

The report recommends agencies adopt the following eight best practices for agency FOIA regulations:

- I. **Expand proactive online disclosures:** Agencies should proactively post information online to make it easily accessible, avoiding the need for FOIA requests. The Department of the Interior proactively identifies records of interest to the public and posts such records online, which increases transparency.
- II. **Use the Internet to process requests more efficiently:** Agencies should allow requesters to submit requests and appeals online, provide online tracking, and use e-mail as a default way of communicating. The U.S. Environmental Protection Agency allows people to submit requests by e-mail or through the agency website, which is faster than by regular mail. Agencies should use existing technology to provide more efficient service to requesters.
- III. **Acknowledge and track FOIA requests promptly:** Agencies should promptly acknowledge that they have received requests and make it easy to track the progress of a request.

The Consumer Financial Protection Bureau provides all requesters with a tracking number in order to more easily track their requests.

- IV. **Clearly and proactively communicate with requesters:** Agencies should proactively communicate with requesters and be certain that agency staff understand what information is being requested if there is any confusion. The National Labor Relations Board contacts requesters before denying access. The Departments of Justice and Homeland Security notify requesters if processing will be delayed.
- V. **Apply a presumption of disclosure and prevent the destruction of records:** Agencies should adopt a foreseeable harm standard for withholding information. The National Archives and Records Administration requires agency reviewers to foresee specific harm from the disclosure of records, to ensure that the agency does not withhold information unnecessarily.
- VI. **Limit and streamline confidential business information claims:** Confidential business information claims should be narrowly interpreted to ensure that claims of confidentiality are reasonably limited. The Department of Health and Human Services requires companies with trade secrets concerns to promptly object to disclosure of claimed confidential information.
- VII. **Clarify fees and waiver procedures:** Agencies should adopt clear procedures for fees and fee waivers. The Department of the Interior has adopted a reasonable threshold for minimum fee charges in order to prevent delays and disputes over small amounts of money.
- VIII. **Improve administrative appeals and dispute resolution:** Agencies should also provide adequate procedures for appealing agency decisions and resolving disputes with requesters. The Office of the U.S. Trade Representative provides 60 days for appeals to be submitted to ensure that those who wish to dispute decisions are not prevented from doing so because of unreasonably short deadlines.

The report also suggests that agencies seek feedback from the requester community on proposed regulations so that requesters can identify concerns and agencies can improve their FOIA policies before finalizing them.

The report concludes with a discussion of the challenges in FOIA administration that require additional study and consultation.

Adopting effective, modern FOIA rules is a necessary and important step toward reinvigorating FOIA and ensuring American citizens have access to public information in a more timely fashion.

INTRODUCTION

The Freedom of Information Act (FOIA),¹ passed in 1966, is only the foundation for FOIA policy. The actual implementation of FOIA is guided by government-wide policies and guidance, such as executive orders and Office of Management and Budget (OMB) guidelines, as well as agency-specific regulations and handbooks. To be most effective, each of these layers of policy should support transparency, and the various layers should align and reinforce each other. If they don't, confusion, noncompliance, and unnecessary withholding will result.

Agency regulations provide the most direct guidance in the day-to-day implementation of FOIA in many agencies. Agency staff and FOIA requesters alike look to FOIA regulations to guide decision making and expectations. Unfortunately, most agencies have not yet incorporated the latest revisions to the statute and government-wide policy into their own agency regulations.²

FOIA regulations also offer agencies the opportunity to adopt leading transparency practices, beyond the minimum requirements. In many aspects of FOIA administration, agencies have the discretion to adopt practices that are more supportive of openness than those mandated by law or policy guidelines. Some agencies have already used their FOIA regulations to embrace innovative approaches to increasing transparency, but all agencies can and should do more than they have.

The purpose of this document is to highlight best practices from a variety of federal agencies in implementing the latest requirements of the law and government-wide policy. In some cases, these best practices are stronger than the law requires. In almost every case, at least one agency has already adopted the practice. Our goal is to encourage the spread of these good practices and thus to improve the access to public information that the Freedom of Information Act is supposed to provide.

Additionally, the Obama administration has committed to developing common FOIA regulations and practices applicable to all agencies.³ This report offers recommendations that could guide the development of such a centralized standard or model FOIA regulations.

¹ 5 U.S.C. § 552.

² National Security Archive, "Freedom of Information Regulations: Still Outdated, Still Undermining Openness," March 13, 2013, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB417/>.

³ The White House, "The Open Government Partnership – Second Open Government National Action Plan for the United States of America: A Preview Report," Oct. 31, 2013, available at http://www.whitehouse.gov/sites/default/files/docs/preview_report_of_open_gov_national_action_plan_10_30.pdf.

Of course, regulatory reforms are not the only changes needed to strengthen FOIA. At each layer of policymaking – legislative reform, updates to government-wide policy and guidance, and updates in agency-specific policies and handbooks – improvements could be made. Agencies could also improve their FOIA practices through training, software,⁴ and websites. However, we feel that strengthening agency FOIA regulations is crucial to improving the experience that citizens have when they request information from government agencies and to ensuring more information is available to the public in a more timely fashion.

Our Goal in Producing This Document

This document aims to:

- Raise awareness of the importance of up-to-date, easy-to-use regulations that support transparency and the effective, efficient administration of FOIA;
- Call attention to good practices that agencies should include in their FOIA regulations;
- Highlight examples of agencies implementing good practices in responding to FOIA requests;
- Recommend regulatory language and implementation practices; and
- Identify areas in FOIA administration where new best practices need to be developed.

The Basis for Our Recommendations

The recommendations here are intended to address major concerns that FOIA requesters have frequently voiced. Our recommendations are drawn from the law itself, as well as from government-wide policy and guidance from the Office of Information Policy at the Department of Justice and the Office of Government Information Services at the National Archives and Records Administration. Moreover, we have identified one or more agencies actively implementing most of the recommendations here.

⁴ See e.g. National Security Archive, “Freedom of Information Regulations: Still Outdated, Still Undermining Openness,” March 13, 2013, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB417/> (recommending that agencies should “update their FOIA processing software so that it can generate all FOIA data (including responses and documents) in a non-proprietary machine-readable format, that can be posted to any online repository”).

Some of our recommended “best practices” are directly required by the statute. We have included them here because some agencies have not yet incorporated the requirements into their regulations or because requesters have noted problems with agency implementation.

In other cases, our recommendations are compliant with the statute but build upon it by recommending best practices, consistent with agencies’ legal obligations, to improve the effectiveness and efficiency of FOIA implementation.

Our recommendations include suggested regulatory language for incorporating the best practice into FOIA regulations. Because FOIA regulations can vary widely in style and organization, the specific language should be considered demonstrative, rather than prescriptive. In addition, some recommendations suggest approaches to implementing the best practice, beyond the text of the regulation itself.

General Principles for Developing Agency FOIA Regulations

Comply with and reflect the statute

Agencies should ensure their FOIA regulations comply with and reflect the most current revision of FOIA. Requesters as well as agency staff rely on regulations to act. If the regulations are out of sync with the statute, confusion can result.

Adopt established government best practices

The Obama administration has issued several government-wide policies designed to strengthen transparency under FOIA and has directed agencies to incorporate those policies.⁵ Furthermore, agencies should ensure their FOIA regulations adopt best practices recommended by the Office of Government Information Services and guidance issued by the Department of Justice’s Office of Information Policy.

⁵ Rahm Emanuel and Bob Bauer, “Freedom of Information Act,” White House memorandum, March 16, 2010, *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/foia_memo_3-16-10.pdf (“[Y]ou should update all FOIA guidance and training materials to include the principles articulated in the President’s Memorandum”).

FOIA directs the Justice Department to “encourage agency compliance” with the statute.⁶ The law also establishes the Office of Government Information Services and directs it to “review policies and procedures” and “recommend policy changes” regarding FOIA.⁷ Both offices have used their expertise with the law to develop numerous resources for agencies, including guidance and best practices. Agencies should review and, where appropriate, adopt those practices when developing their FOIA regulations. The Office of Government Information Services is also available to consult with agencies on developing FOIA regulations.⁸

Use plain language

Agencies should write their FOIA regulations in plain language.⁹ It is important for requesters as well as agency staff to fully understand agencies’ FOIA policies. Using plain language in FOIA regulations helps avoid misunderstandings. In addition, plain language sets a tone for requesters that agencies are accessible, accountable, and concerned with providing good service.¹⁰

Enable public participation

Agencies should publish any substantive changes to their FOIA regulations in the *Federal Register* for public comment, even if notice-and-comment is not legally required. Some aspects of FOIA specifically require agencies to establish regulations by notice and comment.¹¹ However, aside from these topics, agencies sometimes publish their FOIA regulations without the opportunity for public feedback,¹² stating that the regulations relate solely to agency practice and procedure, and thus are not subject to the notice-and-comment requirements of the Administrative Procedure Act.¹³

6 5 U.S.C. § 552(e)(6).

7 5 U.S.C. § 552(h)(1),(2).

8 Office of Government Information Services, “Agency Best Practices for Agency FOIA Regulations,” available at <https://ogis.archives.gov/about-foia/best-practices/Agency-Best-Practices-for-Agency-FOIA-Regulations.htm>.

9 See Barack Obama, Executive Order 13563, “Improving Regulation and Regulatory Review,” The White House, Jan. 18, 2011 (“Our regulatory system must ... ensure that regulations are accessible, consistent, written in plain language, and easy to understand”); William J. Clinton, Presidential Memorandum, “Plain Language in Government Writing,” June 1, 1998, 63 F.R. 31885 (“I direct you to ... use plain language in all proposed and final rulemaking documents published in the Federal Register”); William J. Clinton, Executive Order 12988, “Civil Justice Reform,” Feb. 5, 1996 (directing agencies to ensure that any proposed regulation “specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified”); William J. Clinton, Executive Order 12866, “Regulatory Planning and Review,” The White House, Sept. 30, 1993 (“Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty”).

10 Office of Government Information Services, “Agency Best Practices for Agency FOIA Regulations,” available at <https://ogis.archives.gov/about-foia/best-practices/Agency-Best-Practices-for-Agency-FOIA-Regulations.htm> (“Don’t forget plain writing. ... Remember, FOIA regulations endure and are there for both agency FOIA professionals and the public.”).

11 See 5 U.S.C. § 552(a)(4)(A)(i) (specifying a schedule of fees and establishing procedures for waiving or reducing fees); 5 U.S.C. § 552(a)(6)(B)(iv) (providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert); 5 U.S.C. § 552(a)(6)(D)(i) (providing for multitrack processing); and 5 U.S.C. § 552(a)(6)(E)(i) (providing for expedited processing).

12 See e.g. Federal Trade Commission, “Freedom of Information Act,” rule, Feb. 28, 2013, 78 F.R. 13472.

13 See 5 U.S.C. § 553(b)(3)(A).

Nonetheless, FOIA regulations clearly impact requesters. Furthermore, requesters and others with an interest in FOIA often have useful ideas about how agencies might implement the law. In recognition of President Obama's commitment to expand opportunities for public participation in policymaking,¹⁴ agencies should publish any proposed FOIA regulations for public comment.

Note: Many agency regulations, in addition to addressing matters that directly affect requesters, also set policy for the management of the agency FOIA process. For instance, some agency regulations address the responsibilities of different agency staff, including the Chief FOIA Officer and the FOIA Public Liaison;¹⁵ agency cooperation on FOIA matters with the Office of Government Information Services and the Office of Special Counsel;¹⁶ responsibility for training agency staff on FOIA matters;¹⁷ and compliance with reporting requirements.¹⁸

This document does not address those topics. However, agencies should consider whether they wish to cover such topics in their FOIA regulations.

Feedback on This Document

We welcome your feedback on this document. Please submit any comments at <http://www.forefactivegov.org/contact>.

14 Barack Obama, Presidential Memorandum, "Transparency and Open Government," The White House, Jan. 21, 2009, *available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment ("Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information.").

15 See e.g. 12 C.F.R. § 1070.23; 40 C.F.R. § 1515.4; 32 C.F.R. § 2402.2.

16 See e.g. 32 C.F.R. § 2402.7(d); 32 C.F.R. § 295.6(f)(2); 32 C.F.R. § 290.6(a)(1)(vii).

17 See e.g. 32 C.F.R. § 286.36.

18 See e.g. 32 C.F.R. § 2402.10; 32 C.F.R. § 518.22.

I.EXPAND PROACTIVE ONLINE DISCLOSURES

Expanding online disclosure is an important method to efficiently maximize agencies' transparency.¹⁹ Posting information online maximizes the impact of the agencies' FOIA efforts by allowing the public to access and use the information disclosed.²⁰ For instance, millions more Americans visit government websites to seek information than file FOIA requests.²¹

FOIA contains minimum obligations for agencies to disclose information proactively, in advance of any request.²² But agencies can, and should, go far beyond the statutory minimum.²³ Whenever possible, agencies should make information available to the public without requiring requesters to navigate FOIA's administrative process.

Additionally, online disclosure can save agency resources by reducing duplicative requests. For example, after the Department of Agriculture posted online a searchable database of 50,164 animal care inspection reports for 2006-2008, the number of incoming FOIA requests dropped by nearly 35 percent.²⁴

19 Department of Justice, "Proactive Disclosures," *DOJ Guide to the Freedom of Information Act 2009 Edition*, 2009, p.11. available at http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf ("Proactive disclosures are an efficient means to make record publicly available that otherwise might be sought through less efficient FOIA requests.").

20 U.S. Department of Justice Office of Information Policy, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines," April 17, 2009, available at <http://www.justice.gov/oip/foiapost/2009foiapost8.htm> ("[A]gencies must recognize that proactively disclosing information about the operations and activities of their agency is an integral part of achieving transparency").

21 See Center for Effective Government, "Fixes Early in FOIA Process Offer Greatest Potential for Impact," May 7, 2013, available at <http://www.foreffectivegov.org/fixes-early-foia-process-offer-greatest-potential-impact>.

22 See 5 U.S.C. § 552(a)(1)-(2); U.S. Department of Justice Office of Information Policy, "Guidance on Submitting Certification of Agency Compliance with FOIA's Reading Room Requirements," June 27, 2008, available at <http://www.justice.gov/oip/foiapost/2008foiapost21.htm> ("[T]he Reading Room provision of the FOIA imposes an affirmative disclosure requirement").

23 Department of Justice, "Proactive Disclosures," *DOJ Guide to the Freedom of Information Act 2009 Edition*, 2009, p.10, available at http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf ("Agencies should also exercise their discretion to make a broader range of records available beyond the minimum required by the statute.").

24 Office of Government Information Services, FOIA Requirements, Best Practices, and OGIS Recommendations available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf>.

President Obama’s FOIA memorandum,²⁵ Attorney General Holder’s FOIA guidelines,²⁶ and the Open Government Directive²⁷ have also emphasized the importance of posting information online. Therefore, agencies should proactively disclose information to the greatest extent possible and include provisions within their regulations outlining their responsibilities in this area.

1. Establish Categories of Records to Be Disclosed Regularly

Ideally, the public should be able to access key government-held information without the need to file a FOIA request. The Office of Government Information Services recommends that agencies establish categories of records – such as all inspection reports or all contracts issued by the agency – and regularly post all such records on the agency website.²⁸

Example: Equal Employment Opportunity Commission²⁹

Recommended language: “{Agency} will establish categories of records that can be disclosed regularly and will routinely post such records on its website.”

Implementation suggestion: Consult with stakeholders, including the open government community, to identify categories of records that would be useful to disclose – in particular, categories of records that shed light on core agency operations.³⁰

25 Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct (“[A]gencies should take affirmative steps to make information public”).

26 Eric Holder, “The Freedom of Information Act (FOIA),” Office of the Attorney General, March 19, 2009, available at <http://www.justice.gov/ag/foia-memo-march2009.pdf> (“[A]gencies should readily and systematically post information online in advance of any public request”); see also Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Best Practices,” March 19, 2009, p.2, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (noting the Holder memo’s requirements for proactive disclosure online).

27 Peter R. Orszag, “Open Government Directive,” Office of Management and Budget, Memorandum 10-06, Dec. 8, 2009, available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf (“[A]gencies should proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA.”).

28 Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Recommendations,” available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf>.

29 Equal Employment Opportunity Commission, “Availability of Records,” rule, June 19, 2013, 78 F.R. 36649 (“EEOC has established and will continue to establish categories of records and information of interest to the public that it will disclose regularly online.”).

30 The open government community has identified several types of information that agencies should regularly post online; see <http://www.foreffectivegov.org/files/info/open-gov-min-standards-final.pdf>.

2. Proactively Identify and Disclose Additional Records of Interest to the Public

Agencies have a public service obligation to promptly disclose matters that would be of public interest, without waiting for a FOIA request, as President Obama called for in his FOIA memo.³¹ Therefore, agencies should proactively identify particular records that may be of interest to the public and post those records online.³²

Examples: Department of the Interior;³³ Special Inspector General for Afghanistan Reconstruction;³⁴ Department of Justice proposed regulations³⁵

Recommended language: “{Agency} will proactively identify additional records of interest to the public and will post such records on its website.”

3. Post Records Released in Response to FOIA Requests

Many members of the public have expressed interest in having regular access to any information released under FOIA. The E-FOIA Act of 1996 mandated agencies to post online any information that has been released in response to a FOIA request and is “likely to become the subject of subsequent requests.”³⁶ Some agencies have gone beyond that and adopted the best practice of posting *all* released records.³⁷ Such an approach increases transparency by making more information

31 Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct (“[Agencies] should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government.”).

32 Department of Justice. “OIP Guidance and Suggested Practices for Improving Transparency.” Sept. 1, 2010, p.3, *available at* <http://www.justice.gov/oip/docs/best-practices-guidance-sept-2010.pdf> (“All agencies should ensure that they, including all their components, are identifying documents for proactive disclosure and have an on-going process of posting documents of interest to the public”).

33 43 C.F.R. § 2.67(a) (“Each bureau must ... [i]dentify additional records of interest to the public that are appropriate for public disclosure ... [and] [p]ost those records in FOIA libraries.”).

34 5 C.F.R. § 9301.4 (“SIGAR will also identify records of interest to the public that are appropriate for public disclosure, and then post these records.”).

35 Justice Department, “Freedom of Information Act Regulations,” proposed rule, March 21, 2011, 76 F.R. 15236 (“Each component is responsible for ... identifying additional records of interest to the public that are appropriate for public disclosure, and for posting such records.”).

36 Electronic Freedom of Information Act Amendments of 1996, Pub .L. 104-231, 110 Stat. 3049, codified as amended at 5 U.S.C. § 552(a)(2)(D).

37 Office of Government Information Services. “FOIA Requirements, Agency Best Practices, and OGIS Best Practices,” March 19, 2009, p.2, *available at* <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Post online significant documents that have been released under FOIA without waiting for a second FOIA request. If feasible post previously released documents, of whatever age, in searchable form on agency FOIA web page.”).

available to the public. Additionally, it eliminates the need for agencies to evaluate each request in order to determine whether it is likely to become the subject of subsequent requests.

Examples: Department of the Air Force policy;³⁸ Office of the Secretary of Defense and Joint Staff practices³⁹

Recommended language: “{Agency} will post, in a searchable format on its website, all records released in response to FOIA requests.”

Implementation suggestions:

- To protect privacy, exclude first-person requests for personal information.⁴⁰
- Consider joining the multi-agency portal, FOIAonline,⁴¹ which offers the functionality for agencies to post released records.
- Provide a subscription service, such as by e-mail or RSS, to allow members of the public to receive notifications when new records are posted.⁴²

4. Publish Logs of FOIA Requests Received by the Agency

FOIA logs are a useful tool for members of the public to monitor what sort of requests agencies are receiving.⁴³ Additionally, FOIA logs can provide information about agency performance on

38 Air Force Manual, “Freedom of Information Act Program,” § C2.1.2.4.3.1, Oct. 21, 2010, available at <http://www.foia.af.mil/shared/media/document/AFD-070702-060.pdf> (“The FOIA RSC will consider any requested record that has been previously partially or fully released as a frequently requested record ... and make it publicly available electronically ... FOIA managers will ensure that there is no personally identifiable information (PII) posted to the e-Reading Room even if it is fully released, i.e., first or third party request”).

39 U.S. Government Accountability Office, “Freedom of Information Act: Additional Actions Can Strengthen Agency Efforts to Improve Management,” GAO-12-828, July 31, 2012, pp. 24-25.

40 5 U.S.C. § 552(a)(2) (“To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes ... copies of records referred to in subparagraph (D)”).

41 <http://foiaonline.regulations.gov/>.

42 For instance, the Department of Agriculture’s Food Safety and Inspection Service provides requesters with the option of signing up for e-mail notifications of changes to its log of FOIA requests. See U.S. Department of Agriculture Food Safety and Inspection Service, “FSIS Electronic Reading Room,” available at <http://www.fsis.usda.gov/wps/portal/footer/policies-and-links/freedom-of-information-act/fsis-electronic-reading-room/fsis-electronic-reading-room>.

43 See e.g. Freedom of Information Center at the Missouri School of Journalism, available at <http://www.nfoic.org/foi-center> (“One of the best things you can do when starting your FOIA request is finding out what other FOIA requesters are asking the government.”).

FOIA implementation, in greater detail than is available in annual agency reports. To increase the transparency of their FOIA operations, several agencies now routinely post their FOIA logs on the agency website.

Examples: Department of Housing and Urban Development proposed regulations⁴⁴

Recommended language: “{Agency} will post, in a searchable format on its website, a log listing all FOIA requests received by the agency and their processing status.”

Implementation suggestion: Include sufficient detail about each request, including the opening and closing date of each request, the requester’s name (and, if applicable, organization), a description of the records requested, and the disposition of the request.

5. Publish Online Indexes of Disclosed Records

The E-FOIA Act required agencies to publish indexes of records that they have made available for public inspection.⁴⁵ The most effective way to publish such indexes is on the agency website.

Examples: Environmental Protection Agency;⁴⁶ National Archives and Records Administration (NARA)⁴⁷

Recommended language: “{Agency} will publish on its website current indexes of information made available for public inspection under 5 U.S.C. 552(a)(2) of the FOIA.”

⁴⁴ Department of Housing and Urban Development, “Revision of Freedom of Information Act Regulation,” proposed rule, May 31, 2013, 78 F.R. 32601 (stating that HUD posts on its FOIA website “FOIA request logs”).

⁴⁵ Electronic Freedom of Information Act Amendments of 1996, Pub .L. 104-231, 110 Stat. 3049, codified as amended at 5 U.S.C. § 552(a)(2)(E).

⁴⁶ 40 C.F.R. § 2.101(c).

⁴⁷ 36 C.F.R. § 1250.12(a)(5).

II. USE THE INTERNET TO RESPOND TO REQUESTS MORE EFFICIENTLY

Offering online options for requesters to submit requests and appeals, providing automated tracking online, and using e-mail as the default mode of communication can increase convenience and timeliness for requesters while reducing printing and mailing costs for agencies.

6. Provide a Website and/or E-mail Address for Submitting Requests

Allowing requesters to submit their requests by e-mail or on the agency website may be faster, cheaper, and more convenient for requesters and agency FOIA staff.⁴⁸

Examples: Federal Communications Commission;⁴⁹ Environmental Protection Agency;⁵⁰ Institute of Museum and Library Services proposed regulations⁵¹

Recommended language: “{Agency} will provide an e-mail address or website where the public can submit FOIA requests to the {agency}.”

Implementation suggestion: Consider accepting requests through the multi-agency portal, FOIAonline,⁵² which provides a single website where members of the public can submit and track requests to multiple agencies.

48 Department of Justice. “OIP Guidance and Suggested Practices for Improving Transparency.” Sept. 1, 2010, p.3, *available at* <http://www.justice.gov/oip/docs/best-practices-guidance-sept-2010.pdf> (“Given this wide-spread use of technology to simplify the request making process, during the next year those few agencies that do not receive requests electronically should consider doing so.”); Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Recommendations,” p. 3, *available at* <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Develop an online or e-mail system for filing FOIA requests”).

49 47 C.F.R. § 0.461 (d)(1) (“Requests shall be ... Sent by e-mail to foia@fcc.gov ... [or] [f]iled electronically through the Internet at <http://www.fcc.gov/foia/#reqform>”).

50 40 C.F.R. § 2.101 (a) (“You may request records by writing to the Records, FOIA, and Privacy Branch, Office of Environmental Information, Environmental Protection Agency, 1200 Pennsylvania Avenue (2822T), NW, Washington, DC 20460; e-mail: hq.foia@epa.gov. You may also access EPA Headquarters and Regional Freedom of Information Offices’ Web sites at <http://www.epa.gov/foia> and submit a request via an online form”).

51 Institute of Museum and Library Services, “Implementing the Freedom of Information Act,” proposed rule, April 16, 2013, 78 F.R. 22501 (“You may make a FOIA request for agency records by ... email to foia@imls.gov. You may also submit your FOIA request online through the agency FOIA Request Form located at: http://www.imls.gov/about/foia_request_form.aspx”).

52 <http://foiaonline.regulations.gov/>.

7. Provide a Website and/or E-mail Address for Submitting Appeals

Allowing requesters to submit their administrative appeals by e-mail or on the agency website may be faster, cheaper, and more convenient for requesters and agency employees processing the appeals.

Example: Special Inspector General for Afghanistan Reconstruction⁵³

Recommended language: “Requesters may submit appeals in writing, by fax, e-mail, or on {agency}’s website,” and provide appropriate addresses.

Implementation suggestions:

- Consider joining the multi-agency portal, FOIAonline, which offers the functionality for requesters to submit appeals through the website.
- Ensure that websites for submitting appeals allow requesters to include attachments, as some appeals include supporting materials.

8. Provide Automated Status Updates Online

The OPEN Government Act requires agencies to establish a service allowing requesters to inquire about the status of their requests.⁵⁴ Requesters often want to know where their request is in processing – for instance, whether the agency is searching for records, reviewing the documents, or consulting with another agency. Providing automated status updates on the agency website can reduce the time spent in communicating such basic information to requesters and allow FOIA personnel to focus on processing requests.⁵⁵

⁵³ 5 C.F.R. § 9301.6(d).

⁵⁴ OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2527, codified as amended at 5 U.S.C. § 552(a)(7)(B); *also see* Department of Justice. “OIP Guidance: Assigning Tracking Numbers and Providing Status Information Requests,” *FOIA Post*, November 18, 2008, *available at* <http://www.justice.gov/oip/foiapost/2008foiapost30.htm>.

⁵⁵ Department of Justice. “OIP Guidance and Suggested Practices for Improving Transparency,” Sept. 1, 2010, p.2, *available at* <http://www.justice.gov/oip/docs/best-practices-guidance-sept-2010.pdf> (“The FOIA itself requires agencies to provide requesters with status information about their request. There should be mechanisms in place to accomplish all these customer service functions.”); Office of Government Information Services. “FOIA Requirements, Agency Best Practices, and OGIS Best Practices,” March 19, 2009, p.5, *available at* <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Establish telephone or web service that provides information about the status of a request using the case tracking number to the requester.”).

Examples: Department of the Interior practices;⁵⁶ Federal Housing Finance Agency practices;⁵⁷ General Services Administration practices;⁵⁸ Federal Labor Relations Authority practices⁵⁹

Recommended language: “{Agency} will provide automated updates on the status of FOIA requests on the {agency}’s website,” and provide the appropriate address. “Requesters may view the status of their request and the estimated date of completion by entering the tracking number provided to them.”

Implementation suggestion: Consider joining the multi-agency portal, FOIAonline, which allows requesters to track the status of requests online.

See also: Recommendation #11, “Provide a Tracking Number in All Acknowledgement Letters” ([p. 19](#))

9. Communicate with Requesters by E-mail Where Appropriate

Digital communications are changing the way that government connects with citizens. Agencies should take advantage of information technology to deliver fast and effective communications with the public.⁶⁰ E-mail communication can also result in cost savings for agencies.⁶¹

56 Department of the Interior, “2013 Chief FOIA Officer Report,” March 2013, p.10, available at http://www.doi.gov/foia/upload/2013-DOI-CFO-Report_posted.pdf (“FOIA requesters can now retrieve personalized results, using their FOIA tracking number, in real time. The results include the request date, receipt date, processing track, request status, and fee category.”).

57 Federal Housing Finance Agency, “2013 Chief FOIA Officer Report,” March 11, 2013, p.8, available at <http://www.fhfa.gov/webfiles/25017/Final%20FHFA%202013%20Chief%20FOIA%20Officers%20Report.pdf> (“The information provided to the requester through the tracking system is as follows: Received date, Assigned, Perfected, On hold for information/clarification, Request for documents sent, Closed, Fees due.”).

58 General Services Administration, “2013 Chief FOIA Officer Report,” March 2013, p. 8, available at <http://www.gsa.gov/portal/getMediaData?mediaId=166295> (“GSA FOIA website allows users to track and obtain the status of their FOIA requests. The system in place is not currently designed with real time status information, but GSA is considering ways to improve such information.”).

59 Federal Labor Relations Authority, “2013 Chief FOIA Officer Report,” March 2013, p.5, available at http://www.flra.gov/webfm_send/687 (“Using FOIAonline, a requester can determine: (1) if the request has been submitted; (2) if the request is being evaluated to determine whether it is perfected; (3) if the request has been assigned; (4) if the request is being processed; and (5) if the request is closed.”).

60 Barack Obama, Executive Order 13571, “Streamlining Service Delivery and Improving Customer Service,” The White House, April 27, 2011 (“[B]est practices include increasingly popular lower-cost, self-service options accessed by the Internet or mobile phone and improved processes that deliver services faster and more responsively, reducing the overall need for customer inquiries and complaints.”).

61 Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Recommendations,” p. 7, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Contacting requesters need not always be by mail. Often, it may be more efficient to contact requester [sic] by e-mail or by telephone that can be memorialized in writing later.”).

Examples: United States Trade Representative practices⁶²

Recommended language: “{Agency} will generally communicate with the requester by e-mail, unless he or she specifies otherwise.”

⁶² Office of the U.S. Trade Representative, “Chief Freedom of Information Act Officer Annual Report,” March 11, 2013, *available at* <http://www.ustr.gov/sites/default/files/USTR%20CHIEF%20FOIA%20OFFICER%20Report%202012.pdf> (“USTR is likewise working toward mostly electronic communications with requesters and generally transmits FOIA responses via email”).

III. ACKNOWLEDGE AND TRACK REQUESTS PROMPTLY

Promptly and effectively acknowledging the sender when a request has been made sets a constructive tone for interactions between the agency and the requester. Because it can often take several weeks for agencies to provide a full response to a request, providing an initial acknowledgement letter can be helpful to let requesters know that their request has been received and is being processed. The acknowledgement letter can also provide useful information to requesters, such as the tracking number for the request.

10. Acknowledge Requests as Soon as Practicable

Promptly acknowledging requests assures requesters that their request has been properly received. In addition, acknowledgement letters can provide requesters with important information, such as the tracking number for their request and contact information for questions about processing.

Examples: Environmental Protection Agency;⁶³ Consumer Financial Protection Bureau⁶⁴

Recommended language: “{Agency} will provide an acknowledgment letter to each requester as soon as possible.”

Implementation suggestion: Provide an automated acknowledgment when possible (e.g., for requests received through the agency website or by e-mail). Several agencies have adopted this practice, including the Department of State,⁶⁵ General Services Administration,⁶⁶ and the Department of the Interior Office of Inspector General.⁶⁷

63 40 C.F.R. § 2.104(b) (“On receipt of a request, the FOI Office ordinarily will send a written acknowledgment advising you of the date it was received and of the processing number assigned to the request for future reference”).

64 12 C.F.R. § 1070.18.

65 Department of State, personal communication, March 3, 2011.

66 U.S. General Services Administration, “FOIA Review and Plan in Response to Executive Order 13392,” Nov. 1, 2006, p. 4, available at http://www.gsa.gov/graphics/staffoffices/GSA_FOIA_Review_and_Plan_v3.doc.

67 Department of the Interior Office of Inspector General, “Processing a FOIA Request,” March 25, 2013, available at <http://www.doi.gov/oig/foia/Processing-a-FOIA-Request.cfm>.

See also: Recommendation #31, “Provide Information about the Agency’s FOIA Public Liaison” ([p. 40](#))

11. Provide a Tracking Number in All Acknowledgement Letters

Under the OPEN Government Act, tracking numbers are required for any request that will take longer than 10 days to process.⁶⁸ More simply, some agencies provide tracking numbers in *all* acknowledgement letters, as recommended by the Office of Government Information Services.⁶⁹

Examples: Environmental Protection Agency;⁷⁰ Special Inspector General for Afghanistan Reconstruction;⁷¹ Consumer Financial Protection Bureau⁷²

Recommended language: “{Agency} will provide an individualized tracking number in its acknowledgement letter to the requester.”

See also: Recommendation #8, “Provide Automated Status Updates Online” ([p. 15](#))

12. Promptly Reroute Requests to the Appropriate Agency FOIA Office and Notify Requesters

The OPEN Government Act of 2007 required agencies to begin processing a FOIA request within 10 days of its receipt by any agency-designated FOIA office.⁷³ Accordingly, agencies with multiple FOIA offices should reroute requests to the appropriate FOIA office within 10 days, which assists

68 OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2527, codified as amended at 5 U.S.C. § 552(a)(7)(A) (“Each agency shall ...establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request”).

69 Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Recommendations,” p. 5, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Provide in writing to the requester the tracking number ... as quickly as possible”).

70 40 C.F.R. § 2.104(b).

71 5 C.F.R. § 9301.6 (c)(1) (“SIGAR will provide an individualized tracking number, and estimated date of completion, and a brief description of the subjects of the request in an acknowledgement letter to the requester.”).

72 12 C.F.R. § 1070.18 (a) (“Upon receipt of a perfected request, the CFPB will assign to the request a unique tracking number. The CFPB will send an acknowledgement letter to the requester by mail or email within ten (10) calendar days of receipt of the request. The acknowledgment letter will contain ... [t]he applicable request tracking number”).

73 OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2526, codified as amended at 5 U.S.C. § 552(a)(6)(A) (“The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency’s regulations under this section to receive requests under this section.”).

requesters and avoids undue delays. When rerouting a request, agencies should also notify the requester that they have done so, in order to avoid confusion.⁷⁴

Examples: Federal Labor Relations Authority⁷⁵

Recommended language: “Within 10 days of receiving a request, {agency} will reroute requests received by any {agency} FOIA office to the appropriate {agency} FOIA office for the records requested. {Agency} will notify the requester of the office to which it rerouted the request and provide contact information for that office. If {agency} reroutes a request, the time period for processing the request begins when the appropriate FOIA office receives the request, or 10 days after any {agency} FOIA office first received the request, whichever is earlier.”

⁷⁴ Department of Justice Office of Information Policy, “OIP Guidance: New Requirement to Route Misdirected FOIA Requests,” *FOIA Post*, November 18, 2008, available at <http://www.justice.gov/oip/foiapost/2008foiapost31.htm> (“In those instances where a receiving FOIA office has routed a misdirected request to another FOIA office within the agency for processing, the receiving FOIA office is encouraged to notify the requester of the routing.”).

⁷⁵ 5 C.F.R. § 2411.8(a).

IV. CLEARLY AND PROACTIVELY COMMUNICATE WITH REQUESTERS

Clear and open communication between requesters and agency staff is vital to an effective, user-friendly FOIA process. Agencies should strive to provide the best service to requesters by maintaining open lines of communication and providing requesters with relevant updates throughout the process.⁷⁶ Providing requesters with information to make informed decisions, as well as status updates, can generally improve the requester's experience, reduce unnecessary delays, and avoid disputes.

13. Seek Clarification as Necessary

An agency's interpretation of the particular scope of a FOIA request, and its determinations regarding exactly which information falls within it, are vitally important aspects of FOIA administration. Therefore, if the agency is unclear as to any aspect of the request, the best approach is to contact the requester to seek clarification, as recommended by the Office of Information Policy.⁷⁷ Doing so can help focus the staff's work in processing the request and avoid disputes with the requester.

Examples: Nuclear Regulatory Commission (NRC) guidance⁷⁸

Recommended language: “If {agency} has any uncertainty regarding an aspect of the request, {agency} will attempt to communicate with the requester to clarify the scope of his or her FOIA request.”

⁷⁶ Barack Obama, Executive Order 13571, “Streamlining Service Delivery and Improving Customer Service,” The White House, April 27, 2011 (“The public deserves competent, efficient, and responsive service from the Federal Government.”).

⁷⁷ U.S. Department of Justice Office of Information Policy, “OIP Guidance: The Importance of Good Communication with FOIA Requesters,” March 4, 2010, available at <http://www.justice.gov/oip/foiapost/2010foiapost5.htm> (“Good communication with requesters can also be exceedingly helpful in those instances where an agency is uncertain about the scope of what is being requested”).

⁷⁸ Nuclear Regulatory Commission FOIA/Privacy Team guidance, available at <http://pbadupws.nrc.gov/docs/ML0932/ML093230619.pdf> (“[M]ake every effort to clarify the scope of the request before forwarding the request to the office FOIA coordinators”).

14. *Contact the Requester before Denying Requests as Unreasonable*

FOIA requires agencies to process any request that “reasonably describes” the records sought by the requester.⁷⁹ Agencies can deny requests that do not reasonably describe the records sought, and in fact, agencies denied more than 6,000 requests for that reason in fiscal year 2012.⁸⁰

Some requesters have complained that, in their view, agencies are sometimes unduly stringent in enforcing this provision. One possible reason for such disputes is the potential for misunderstanding about the scope of a request. Additionally, some requests may initially be unreasonable because a novice requester doesn’t know how to construct a request, or because a requester doesn’t know where certain records are located and thus casts a wide net.

In such instances, a simple phone call or e-mail from the agency can offer a requester the opportunity to clarify the scope of his or her request. Seeking such clarification, rather than immediately denying a request, can improve customer service and avoid disputes.

Examples: National Labor Relations Board;⁸¹ Administrative Conference of the United States⁸²

Recommended language: “Requests must reasonably describe the records sought. If {agency} determines that a request does not reasonably describe the records sought, {agency} will contact the requester to seek clarification. {Agency} may toll the time limits for processing in order to make one such request, in which case the time limits resume upon {agency}’s receipt of a response from the requester.

“{Agency} will provide at least 30 days for the requester to respond to a request for clarification. If the request has not been clarified after 30 days, {agency} will deny the request for not reasonably describing the records sought and will provide the requester with the opportunity to appeal under the procedures in Sec. {XX}.”

⁷⁹ 5 U.S.C. § 552(a)(3)(A).

⁸⁰ According to statistics available on FOIA.gov.

⁸¹ 29 C.F.R. § 102.117(c)(1) (“If the Agency determines that a request does not reasonably describe records, it may contact the requester to inform the requester either what additional information is needed or why the request is insufficient. Requesters may be given an opportunity to discuss their request so that requests may be modified to meet the requirements of this section”).

⁸² 1 C.F.R. § 304.3(b) (“If the agency determines that your request does not reasonably describe records, then it will tell you either what additional information is needed or why your request is otherwise insufficient. It also will give you an opportunity to discuss your request by telephone so that you may modify it to meet the requirements of this section.”).

Implementation suggestion: Provide examples of how a requester can “reasonably describe” the records that he or she seeks.⁸³

15. *Provide Estimated Time to Complete the Request and Opportunities to Reformulate*

In the OPEN Government Act, Congress directed agencies to provide requesters with an estimated date of completion for processing the request.⁸⁴ Agencies should provide a meaningful estimate to requesters as early as possible after receiving a request.⁸⁵ In addition, requesters should be given the opportunity to reduce the time necessary to complete processing by narrowing the scope of their request.⁸⁶

Examples: Environmental Protection Agency,⁸⁷ Occupational Safety and Health Review Commission⁸⁸

Recommended language: “As soon as practicable after receiving a request, {agency} will provide the requester with the estimated date it will complete processing the request. {Agency} will notify the requester that he or she may reformulate the request, if he or she so chooses, to revise the scope of the request in order to potentially reduce processing time.”

83 See e.g. 40 C.F.R. § 2.102(c) (“Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, you should include any file designations or descriptions for the records that you want. The more specific you are about the records or type of records that you want, the more likely EPA will be able to identify and locate records responsive to your request.”).

84 OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2527, codified as amended at 5 U.S.C. § 552(a)(7)(B) (“Each agency shall ... establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including ... an estimated date on which the agency will complete action on the request.”).

85 Office of Government Information Services, “Agency Best Practices: Communications and Customer Service,” available at <https://ogis.archives.gov/about-foia/best-practices/agency-best-practices---communications-and-customer-service.htm> (“Processing delays result in many FOIA disputes, but OGIS has observed that these problems can often be alleviated by communicating clearly and directly with the requester, and providing a time estimate. OGIS highly recommends making these estimates as accurate as possible, even if the Agency is unable to make the 20-day response time required under the law.”).

86 See 5 U.S.C. § 552(a)(6)(B)(ii) (“[T]he agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit ...”), 5 U.S.C. § 552(a)(6)(D)(ii) (“Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.”); cf. Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Recommendations,” p. 4, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Negotiate lower fees with requesters willing to narrow the scope of their requests”).

87 40 C.F.R. § 2.104(c) (“The Agency will advise you of the processing track in which your request has been placed and of the limits of the different processing tracks. ... If your request is placed in a slower track, the Agency will contact you either by telephone or by letter”).

88 29 C.F.R. § 2201.6(d)(3) (“The Commission will notify a requester when its request is placed in the second track for processing and that notification will include the estimated time for completion. ... In the case of a request expected to take more than 30 working days for action, a requester may modify the request to allow it to be processed faster or to reduce the cost of processing.”).

16. Use Plain Language in All Communications with Requesters

The Plain Writing Act of 2010 directs agencies to use “writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience” in any document that “provides information about any Federal Government benefit or service.”⁸⁹ Citizens deserve clear communications from the government. All agency communications with requesters should be easy to read, understand, and use.

Recommended language: “{Agency} will use plain language in all written communications with requesters.”

Implementation suggestion: Review any FOIA template letters to ensure they use plain language. The Office of Government Information Services can also review agency template letters and offer suggestions.⁹⁰

17. Notify Requesters When Referring Requests

When searching for records requested under FOIA, it is not uncommon for an agency to locate a responsive document that originated outside of the agency. Agencies should notify requesters if they refer the request to another agency and should provide the requester with contact information for the receiving agency.⁹¹

Examples: Consumer Financial Protection Bureau⁹²

89 P. L. 111-274; see also Janet Reno, “The Freedom of Information Act,” Office of the Attorney General, Oct. 4, 1993, available at http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page3.htm (announcing a “comprehensive review of all standard FOIA forms and correspondence ... for their correctness, completeness, consistency, and particularly for their use of clear language”).

90 Carrie McGuire, “More on Plain Writing,” *The FOIA Ombudsman*, July 29, 2011, available at <http://blogs.archives.gov/foiablog/2011/07/29/more-on-plain-writing/>.

91 U.S. Department of Justice Office of Information Policy, “Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them,” Dec. 5, 2011, available at <http://www.justice.gov/oip/foiapost/2011foiapost42.html> (“Advise the FOIA requester that a referral of records has been made, provide the name of the agency to which the referral was directed, and include that agency’s FOIA contact information.”); Office of Government Information Services, “Agency Best Practices for Agency FOIA Regulations,” available at <https://ogis.archives.gov/about-foia/best-practices/Agency-Best-Practices-for-Agency-FOIA-Regulations.htm> (“[N]otify requesters of the name of the agency to which the request has been referred and part of the request that has been referred. ... [P]rovide the requester with a point of contact within the receiving agency to whom the requester can speak regarding the referral”).

92 12 C.F.R. § 1070.15(d) (“Whenever the CFPB refers all or any part of the responsibility for responding to a request to another agency, it will notify the requester of the referral and inform the requester of the name of each agency to which the request has been referred, in whole or in part.”).

Recommended language: “Whenever {agency} refers all or any part of the responsibility for responding to a request to another agency, {agency} will notify the requester of the referral, provide the name of the agency to which the referral was directed, and include that agency’s FOIA contact information.”

Implementation suggestions:

- Ensure that referrals are successfully received and being processed by the receiving agency.
- Promptly inform the requester of any changes in status.

See also: Recommendation #12, “Promptly Reroute Requests to the Appropriate Agency FOIA Office and Notify Requesters” ([p. 19](#))

18. Notify Requesters When Processing Is Delayed

Delays are a major source of FOIA disputes. Proactively and openly communicating with requesters about delays would better inform requesters and may reduce disputes. In fact, FOIA *requires* agencies to notify requesters when processing will be delayed.⁹³ Such communication is a key component of effective citizen service.⁹⁴

Examples: Department of Justice;⁹⁵ Department of Homeland Security;⁹⁶ Department of Veterans Affairs;⁹⁷ Department of Labor;⁹⁸ Office of the Director of National Intelligence;⁹⁹ Administrative Conference of the United States¹⁰⁰

⁹³ 5 U.S.C. § 552(a)(6)(B)(i) (providing that, in unusual circumstances, the time limits for processing a request “may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched”); *also see* U.S. Department of Justice Office of Information Policy, “OIP Guidance: The Importance of Good Communication with FOIA Requesters,” March 4, 2010, available at <http://www.justice.gov/oip/foiapost/2010foiapost5.htm>.

⁹⁴ The White House, *White House Forum on Modernizing Government: Overview and Next Steps*, March 2010, p. 8, available at http://www.whitehouse.gov/sites/default/files/omb/assets/modernizing_government/ModernizingGovernmentOverview.pdf (“When service standards cannot be met, customers must be informed—a non-negotiable best practice in the private sector.”).

⁹⁵ 28 C.F.R. § 16.5(c)(1).

⁹⁶ 6 C.F.R. § 5.5(c)(1).

⁹⁷ 38 C.F.R. § 1.556(c)(1).

⁹⁸ 29 C.F.R. § 70.25(c)(1).

⁹⁹ 32 C.F.R. § 1700.7(c).

¹⁰⁰ 1 C.F.R. § 304.5(c)(1) (“Where the statutory time limits for processing a request cannot be met because of ‘unusual circumstances,’ as defined in the FOIA, and the agency determines to extend the time limits on that basis, it will as soon as practicable notify the requester in writing of the unusual circumstances and of the date by which processing of the request can be expected to be completed.”).

Recommended language: “If {agency} cannot meet the statutory time limits for processing a request because of unusual circumstances, {agency} will extend the time limits for no more than 10 working days by written notice to the requester. Such a notice will explain the unusual circumstances and provide the date by which it expects to complete processing of the request.

If {agency} cannot complete processing within the ten additional days, {agency} will notify the requester. {Agency} will provide the requester an opportunity to limit the scope of the request so that it may be processed within the extended time limit or to arrange an alternative time frame for processing the request or a modified request.”

V. APPLY THE PRESUMPTION OF DISCLOSURE AND PREVENT THE DESTRUCTION OF RECORDS

Agencies serve the public and should favor disclosure to improve government openness for the benefit of the public. As President Obama has commented, “All agencies should adopt a presumption in favor of disclosure,”¹⁰¹ and withholding should be narrowly limited.¹⁰² Furthermore, minimizing withholding can reduce disputes with requesters and avoid litigation. Agencies can also take steps to ensure information is released on a proactive, rolling basis and to prevent the destruction of records.

19. Adopt the Foreseeable Harm Standard for Withholding

Congress has noted that FOIA “establishes a strong presumption in favor of disclosure.”¹⁰³ President Obama’s FOIA memorandum likewise stated that the law “should be administered with a clear presumption: In the face of doubt, openness prevails.”¹⁰⁴

Attorney General Holder’s FOIA guidelines specifically explain how agencies should implement FOIA’s presumption of disclosure. The guidelines provide that “the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”¹⁰⁵ Applying this “foreseeable harm standard” helps to ensure that agencies do not withhold information improperly.

101 Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

102 *FBI v. Abramson*, 456 U.S. 615, 630 (1982) (providing that FOIA exemptions must be “narrowly construed”).

103 OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2524 (“the Freedom of Information Act establishes a ‘strong presumption in favor of disclosure’ as noted by the United States Supreme Court in *United States Department of State v. Ray* (502 U.S. 164 (1991)), a presumption that applies to all agencies governed by that Act”).

104 Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, *available at* http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

105 Eric Holder, “The Freedom of Information Act (FOIA),” Office of the Attorney General, March 19, 2009, *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf> (“I strongly encourage agencies to make discretionary disclosures of information ... [T]he Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”).

The Office of Information Policy has recommended that agencies adopt procedures to affirmatively consider making “discretionary disclosures” where agencies cannot identify harm that would result from the release of information.¹⁰⁶ In doing so, agencies can uphold FOIA’s spirit of transparency while protecting privacy rights and national security information.¹⁰⁷

Examples: Department of Defense;¹⁰⁸ National Archives and Records Administration¹⁰⁹

Recommended language: “[Agency] will apply a presumption of openness when processing requests and will only withhold requested information if it reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions or if disclosure is prohibited by law. Before withholding information, {agency} will conduct a foreseeable harm analysis, which clearly identifies the harm that would occur with disclosure.”

Implementation suggestion: Develop procedures or guidelines on how to conduct a foreseeable harm analysis, which clearly identifies the harm that would occur from disclosure.¹¹⁰ For instance, the U.S. Forest Service requires staff to document the harm in order to apply Exemptions 2 or 5.¹¹¹

20. Release Records on a Rolling Basis

Often, FOIA requesters wish to use the requested information as soon as possible, which makes the timeliness of responses critical to effective FOIA processing. Releasing records as they are processed, rather than waiting to complete processing of the entire request, increases the timeliness of disclosure and thereby the usefulness of the disclosed records. Therefore, the Office of

106 U.S. Department of Justice Office of Information Policy, “OIP Guidance and Suggested Best Practices for Improving Transparency,” Sept. 1, 2010, available at <http://www.justice.gov/oip/docs/best-practices-guidance-sept-2010.pdf> (“Agencies should institute a system, or add a step in their processing procedures, to affirmatively consider whether more information can be released as a matter of administrative discretion”).

107 Department of Justice, “Guide to Discretionary Disclosure and Waiver,” *DOJ Guide to the Freedom of Information Act 2009 Edition*, 2009, p.686, available at http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf (“Accordingly, and inasmuch as the FOIA’s exemptions are discretionary, not mandatory, agencies may make ‘discretionary disclosures’ of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited from doing so.”); U.S. House of Representatives Committee on Oversight and Government Reform, *A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, 2012, p. 3, available at <http://oversight.house.gov/wp-content/uploads/2012/09/Citizens-Guide-on-Using-FOIA.2012.pdf> (“The application of the Act’s exemptions is generally permissive – not mandatory.”).

108 32 C.F.R. § 286.23(c) (“To deny a requested record that is in the possession and control of a DoD Component, it must be determined that disclosure of the record would result in a foreseeable harm to an interest protected by a FOIA exemption, and the record is exempt under one or more of the exemptions of the FOIA.”).

109 36 C.F.R. § 1250.36 (“We will only withhold information where we must (such as information which remains classified, or information which is specifically closed by statute) or we reasonably foresee that disclosure would cause a harm”).

110 Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Recommendations,” p. 1, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Develop agency-specific guidance on how to conduct a foreseeable harm analysis, which clearly identifies the harm that would occur with disclosure”).

111 *Id.*

Information Policy¹¹² and the Office of Government Information Services¹¹³ recommend that agencies conduct rolling releases of records, also known as “interim releases,” whenever possible.

Examples: Department of State practices¹¹⁴

Recommended language: “If a request involves a voluminous amount of material or searches in multiple locations, {agency} will provide the requester with interim responses, releasing the information on a rolling basis.”

21. Prevent the Destruction of Requested Records

Disclosure cannot occur if records are destroyed. When records that have been requested under FOIA are destroyed, it is tantamount to a permanent denial that cannot be appealed. Just as agencies take steps to prevent the spoliation of evidence in legal proceedings, they also should ensure that records requested under FOIA will remain available.¹¹⁵

Records management regulations require agencies to prevent the destruction of records subject to a FOIA request.¹¹⁶ The National Archives and Records Administration provides a government-wide schedule for how long agencies must maintain records related to FOIA requests.¹¹⁷

112 U.S. Department of Justice Office of Information Policy, “OIP Guidance: The Importance of Good Communication with FOIA Requesters,” March 4, 2010, available at <http://www.justice.gov/oip/foiapist/2010foiapist5.htm> (“When an agency is working on a request that involves a voluminous amount of material or which involves searches in multiple locations, whenever feasible, the agency should provide the requester with interim responses rather than waiting until all records are located and processed”).

113 Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Recommendations,” p. 3, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Make rolling releases of information in cases with voluminous records”).

114 Office of Government Information Services, “Improving the FOIA Process,” *The First Year: Building Bridges Between FOIA Requesters and Federal Agencies*, March 2011, available at <https://ogis.archives.gov/about-ogis/ogis-reports/the-first-year/improving-the-foia-process.htm> (“The State Department makes rolling releases of information to requesters rather than waiting until processing ends”).

115 Office of Government Information Services, “Agency Best Practices for Agency FOIA Regulations,” available at <https://ogis.archives.gov/about-foia/best-practices/Agency-Best-Practices-for-Agency-FOIA-Regulations.htm> (“OGIS suggests agencies include in their FOIA regulations information about the preservation of records and records management. OGIS has observed that good records management is essential to the FOIA administrative process.”).

116 36 C.F.R. § 1230.10 (“The heads of Federal agencies must: Prevent the unlawful or accidental removal, defacing, alteration, or destruction of records ... Take adequate measures to inform all employees and contractors of the provisions of the law relating to unauthorized destruction, removal, alteration or defacement of records ... Implement and disseminate policies and procedures to ensure that records are protected against unlawful or accidental removal, defacing, alteration and destruction”); 36 C.F.R. § 1230.3(b) (defining “unlawful or accidental destruction” to include “disposal of a record subject to a FOIA request”).

117 National Archives and Records Administration, General Records Schedules, Transmittal No. 22, “General Records Schedule 14: Information Services Records,” April 2010, available at <http://www.archives.gov/records-mgmt/grs/grs14.html>.

Examples: Department of Veterans Affairs;¹¹⁸ Environmental Protection Agency¹¹⁹

Recommended language: “{Agency} will maintain copies of records that are the subject of a pending request, appeal, or lawsuit under the FOIA. {Agency} will also preserve all correspondence pertaining to FOIA requests until disposition is authorized under the National Archives and Records Administration’s General Records Schedule 14.”

Implementation suggestions:

- Promptly notify program offices of any request for their records with the instruction that the records be maintained.¹²⁰
- Include, in training and guidance for any staff authorized to destroy records, a reminder to check for active FOIA concerns before destroying any records.¹²¹
- Review records retention schedules to ensure that records are preserved for an adequate period of time to be available when requested.
- E-mails are of particular concern as documents that are frequently the subject of FOIA requests, yet often are quickly destroyed. Consider adopting the new “Capstone” approach to managing e-mail records, which preserves e-mail systematically rather than manually, in order to ensure that such documents will be available if requested.¹²²
- Include information on the agency FOIA website about the retention periods for records in order to assist requesters in identifying which information is available.

118 38 C.F.R. § 1.560.

119 40 C.F.R. § 2.106 (“Each FOI Officer shall preserve all correspondence pertaining to the FOIA requests that it receives until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration’s General Records Schedule 14. Copies of all responsive records should be maintained by the appropriate program office. Records shall not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.”).

120 For instance, the search request sheet sent to program offices at the Department of Agriculture’s Animal and Plant Health Inspection Service includes the instructions, “Agency records retention periods are affected by this FOIA/PA request. DO NOT DESTROY ORIGINALS for a minimum of 3 years.” See Animal and Plant Health Inspection Service, “FOIA Overview,” April 2011, p. 14, available at <http://www.aphis.usda.gov/foia/downloads/FOIA%20Overview.pdf>.

121 For instance, conflicting guidance on this issue at the Securities and Exchange Commission may have impacted the agency’s ability to respond to FOIA requests. See Securities and Exchange Commission Office of Inspector General, Report of Investigation: Case No. OIG-567, “Destruction of Records Related to Matters Under Inquiry and Incomplete Statements to the National Archives and Records Administration Regarding that Destruction by the Division of Enforcement,” Oct. 5, 2011, p. 52, available at <https://www.sec.gov/foia/docs/oig-567.pdf>.

122 See National Archives and Records Administration, NARA Bulletin 2013-02, “Guidance on a New Approach to Managing Email Records,” Aug. 29, 2013, available at <http://www.archives.gov/records-mgmt/bulletins/2013/2013-02.html>.

22. *Confirm the Status of Classified Records*

Agencies should not assume that simply because a record bears a classification marking, the record continues to be “properly classified” as FOIA’s exemption for classified information requires.¹²³ For instance, information may have qualified for classification when the record was created but may no longer qualify when an agency receives a FOIA request for that record. To avoid unduly withholding information, agencies should confirm the classified status of requested records by conducting a declassification review prior to withholding the records under Exemption 1.

Examples: Department of Defense;¹²⁴ Department of Justice;¹²⁵ Department of Homeland Security;¹²⁶ Department of Commerce¹²⁷

Recommended language: “Before withholding requested records based in whole or in part on a security classification, {agency} will review the records to determine if they should continue to be classified. If {agency} determines that the records should continue to be classified and must be withheld, {agency} will explain in its response letter to the requester that the records are properly classified and that this determination is based on a declassification review, with an explanation of how that review confirmed the continuing validity of the security classification.”

¹²³ 5 U.S.C. § 552(b)(1).

¹²⁴ 32 C.F.R. § 286.24(e)(2)(ii) (“When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review, with the explanation of how that review confirmed the continuing validity of the security classification.”).

¹²⁵ 28 C.F.R. § 16.7 (“In processing a request for information that is classified under Executive Order 12958 (3 CFR, 1996 Comp., p. 333) or any other executive order, the originating component shall review the information to determine whether it should remain classified. Information determined to no longer require classification shall not be withheld on the basis of Exemption 1 of the FOIA.”).

¹²⁶ 6 C.F.R. § 5.7.

¹²⁷ 15 C.F.R. § 4.8.

VI. LIMIT AND STREAMLINE CONFIDENTIAL BUSINESS INFORMATION CLAIMS

Many FOIA requesters have raised concerns about overly broad claims of confidential business information restricting access to important information that is properly public. Additionally, the procedures that many agencies have instituted to notify submitters about requests for submitted information are lengthy or open-ended and may contribute to delays in FOIA processing. Agencies should adopt regulations on confidential business information that avoid overly broad claims or delay responses to FOIA requests.

23. Require Submitters to Proactively Designate Claimed Confidential Business Information

Having submitters designate information that could be exempt under Exemption 4 can help ensure that agencies do not inadvertently release exempt information. However, to be effective, submitters must make their designations in a timely fashion and narrowly target designations to information likely to be exempt.¹²⁸

Examples: Department of Education;¹²⁹ White House Office of Science and Technology Policy¹³⁰

Recommended language: “(1) A submitter must use good faith efforts to designate, by appropriate markings, either at the time of submission or within 30 days thereafter, specific portions of its submission that it considers to be business information exempt from disclosure under Exemption 4 of FOIA.

¹²⁸ A stronger practice implemented in other federal laws, but to our knowledge not yet under FOIA, requires submitters to substantiate claims at the time of designation, known as “upfront substantiation.” In the FOIA context, this practice holds promise to further streamline processing and avert overly-broad claims. See 42 U.S.C. § 11042(a)(2)(A) (providing that a submitter may claim information as confidential only if includes in the submission “an explanation of the reasons why such information is claimed to be a trade secret, based on the factors enumerated in subsection (b) of this section, including a specific description of why such factors apply”).

¹²⁹ 34 C.F.R. § 5.11(c).

¹³⁰ 32 C.F.R. § 2402.6(c).

(2) A submitter's designations are not binding on {agency} and will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(3) A blanket designation on each page of a submission that all information contained on the page is protected from disclosure under Exemption 4 presumptively will not be considered a good faith effort.”

24. Streamline Notice of Requests to Submitters

An agency generally notifies submitters of information when it receives a request for information that the submitter might claim is confidential business information. While this process is logical and reasonable, these notifications take time and therefore should only be pursued if necessary. Agencies may establish that it is unnecessary to notify submitters if the agency determines that:

- The information should not be disclosed;
- The information has already been published;
- Disclosure of the information is required by law; or
- The submitter has made an obviously frivolous claim of confidential business information.

In those circumstances, the agency should proceed without delaying the process with an unnecessary check with the submitter.

Examples: National Labor Relations Board;¹³¹ Administrative Conference of the United States;¹³² White House Office of Science and Technology Policy¹³³

¹³¹ 29 C.F.R. § 102.117(c)(2)(iv)(F).

¹³² 1 C.F.R. § 304.7(h).

¹³³ 32 C.F.R. § 2402.6(h).

Recommended language: “{Agency} will not notify a submitter if {agency} determines that:

- (1) The information must be withheld under FOIA's exemptions;
- (2) The information lawfully has been published or made available to the public;
- (3) Disclosure of the information is required by statute (other than FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600; or
- (4) The designation made by the submitter appears obviously frivolous – except that, in such a case, the agency will, no fewer than five working days prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.”

25. Require Prompt Objections to Disclosure

FOIA generally requires agencies to respond to requests within 20 working days.¹³⁴ In order to avoid delays in processing the request, agencies should require submitters to promptly respond if they wish to object to disclosure.

Examples: Department of Health and Human Services;¹³⁵ National Archives and Records Administration¹³⁶

Recommended language: “A submitter must respond within five working days from the receipt of {agency}'s notice to object to the release and to explain the basis for the objection. {Agency} may extend this period for an additional five working days, at its discretion. ”

¹³⁴ 5 U.S.C. § 552(a)(6)(A)(i).

¹³⁵ 45 C.F.R. § 5.65(d)(2) (“The submitter has five working days from receipt of the notice to object to disclosure of any part of the records and to state all bases for its objections.”).

¹³⁶ 36 C.F.R. § 1250.82(b) (“The submitter will have 5 working days from the receipt of our notice to object to the release and to explain the basis for the objection. The NARA FOIA Officer may extend this period for an additional 5 working days.”).

26. *Require Substantiation for Claims of Confidential Business Information*

Under FOIA, agencies are required to release any requested information that is not validly covered under the law's specific exemptions. Requiring submitters to explain in detail their grounds for objecting to disclosure, including why they believe the information to be exempt from disclosure, can help agencies effectively and promptly determine whether requested information must be withheld or released.

Examples: National Labor Relations Board;¹³⁷ Administrative Conference of the United States¹³⁸

Recommended language: “A submitter who wishes to object to disclosure must submit a detailed written statement that specifies the grounds for withholding the information under FOIA's exemptions, with specific reference to the submitted information. A submitter who claims that information is exempt under Exemption 4 must show why the information is a trade secret or commercial or financial information that is privileged or confidential.”

¹³⁷ 29 C.F.R. § 102.117(c)(2)(iv)(D).

¹³⁸ 1 C.F.R. § 304.7(f) (“If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential.”).

VII. CLARIFY FEES AND WAIVER PROCEDURES

Agencies should be clear and judicious in their assessment of fees and granting of fee waivers or reductions. Many requesters have expressed frustration with the FOIA fee system, including fee-related delays in processing requests, inconsistent treatment, and high charges. Agencies should ensure that their procedures for FOIA fees are prompt, clear, and judicious. Fee assessment and waiver policies should reflect President Obama's statement that agencies "should act promptly and in a spirit of cooperation,"¹³⁹ and fees should never be used as an impediment to disclosure.¹⁴⁰

27. Adopt a Reasonable Threshold for Minimum Fee Charges

Recouping charges for producing small FOIA requests is uneconomical and may contribute to processing delays.¹⁴¹ FOIA processing would be streamlined by not charging a fee for processing that costs the agency less than \$50.

Examples: Department of the Interior¹⁴²

Recommended language: "{Agency) will not charge fees for any request where the fees would total less than \$50."

139 Barack Obama, Presidential Memorandum, "Freedom of Information Act," The White House, Jan. 21, 2009, [available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct).

140 Peter J. Kadzik, letter to Reps. Darrell Issa and Elijah Cummings, U.S. Department of Justice Office of Legislative Affairs, June 10, 2013, p. 6, [available at http://freebeacon.com/wp-content/uploads/2013/06/DOJ-OIP-Response.pdf](http://freebeacon.com/wp-content/uploads/2013/06/DOJ-OIP-Response.pdf) ("[A]gencies should never use fees for the purpose of dissuading requesters from making requests").

141 5 U.S.C. § 552(a)(4)(A)(iv)(I) ("No fee may be charged by any agency under this section if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee"); *also see* Office of Government Information Services, "FOIA Requirements, Agency Best Practices, and OGIS Best Practices," March 19, 2009, p.4-5, [available at https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf](https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf) ("Charge no fee if the costs of the routine fee collection and processing are likely to equal or exceed the fee amount").

142 43 C.F.R. § 2.49 (a)(1).

28. Provide Discretion to Waive More Fees

In addition to the statutory requirements for awarding fee waivers,¹⁴³ agencies may use administrative discretion to waive or reduce fees in additional circumstances on a case-by-case basis.¹⁴⁴ Recalling that President Obama has called for agencies to administer FOIA “in a spirit of cooperation,”¹⁴⁵ there may be cases where it would be more efficient and accommodating to waive fees than to insist on fees and prompt a dispute.

Examples: Consumer Financial Protection Bureau¹⁴⁶

Recommended language: “{Agency} may also waive or reduce fees in additional circumstances as a matter of administrative discretion.”

29. Comply with the Statutory Prohibition against Fees for Requests Exceeding Time Limits

The OPEN Government Act of 2007 imposes consequences if agencies fail to meet statutory time limits for processing requests.¹⁴⁷ Specifically, the law provides that “an agency shall not assess search fees . . . if the agency fails to comply with any time limit” for processing FOIA requests.

143 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”).

144 Office of Government Information Services, “Agency Best Practices for Agency FOIA Regulations,” available at <https://ogis.archives.gov/about-foia/best-practices/Agency-Best-Practices-for-Agency-FOIA-Regulations.htm> (“Regulations may also provide for an agency to exercise administrative discretion to waive fees in the interest of better serving FOIA and making government more efficient.”).

145 Barack Obama, Presidential Memorandum, “Freedom of Information Act,” The White House, Jan. 21, 2009, available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

146 12 C.F.R. § 1070.22(d)(4) (“the CFPB may not charge a requester a fee for processing a FOIA request . . . [i]f the CFPB determines, as a matter of administrative discretion, that waiving or reducing the fees would serve the interest of the United States Government”).

147 5 U.S.C. § 552(a)(4)(A)(viii); Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Best Practices,” March 19, 2009, p.4-5, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf>.

(“Assess no fees if the agency fails to comply with any time limit, if no unusual or exceptional circumstances apply to processing the request.”); Department of Justice, “OIP Guidance: New Limitations on Assessing Fees,” *FOIA Post*, November 18, 2008, available at <http://www.justice.gov/oip/foiapost/2008foiapost28.htm>; Department of Justice, “Proactive Disclosures,” *DOJ Guide to the Freedom of Information Act 2009 Edition*, 2009, p.11, available at http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf. (“In those situations where the request does not present unusual or exception circumstances, as described above, an agency is prohibited from assessing search fees. . . if the agency fails to comply with the FOIA’s time limits.”).

Examples: Department of the Interior;¹⁴⁸ Special Inspector General for Afghanistan Reconstruction;¹⁴⁹ Consumer Financial Protection Bureau¹⁵⁰

Recommended language: “{Agency} will not charge a fee for processing a FOIA request if the agency exceeds any time limit under 5 U.S.C. § 552(a)(6) in processing that request.”

148 43 C.F.R. § 2.37(f) (“If the Department does not comply with any of the FOIA’s statutory time limits: (1) The bureau cannot assess search fees for your FOIA request, unless unusual or exceptional circumstances apply; and (2) Depending on your fee category, the bureau may not be able to assess duplication fees for your FOIA request, as discussed in § 2.39(b) of this subpart.”).

149 5 C.F.R. § 9301.8(f) (“SIGAR shall not charge a fee to any requester if ... (2) SIGAR fails to comply with any time limit under the FOIA for responding to a request for records where no unusual or exceptional circumstances apply”).

150 12 C.F.R. § 1070.22(d)(3) (“If the CFPB fails to comply with any time limit under §§ 1070.15 or 1070.21 of this subpart, and no unusual circumstances (as that term is defined in § 1070.16(d)) or exceptional circumstances apply to the processing of the request, then the CFPB shall not assess search fees, or if the requester is a representative of the news media or an educational or noncommercial scientific institution, then the CFPB shall not assess duplication fees”).

VIII. IMPROVE ADMINISTRATIVE APPEALS AND DISPUTE RESOLUTION

The administrative appeal process is an important element of oversight of the FOIA system and a useful opportunity for a FOIA requester to get a “second opinion.” Agencies should ensure that the appeal process is accessible to requesters and that appellate reviews are robust. Maintaining a meaningful and user-friendly appeal process can reduce disputes and may avoid litigation.

In addition, agencies should encourage requesters to avail themselves of the assistance provided by FOIA dispute resolution services. In the OPEN Government Act, Congress directed each agency to “make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency.”¹⁵¹ The OPEN Government Act also created the Office of Government Information Services within the National Archives and Records Administration (NARA) and directed the office to “offer mediation services to resolve disputes between” requesters and agencies “as a non-exclusive alternative to litigation.”¹⁵² Making the FOIA Public Liaison and the Office of Government Information Services easily available to requesters can help address questions or misunderstandings that might otherwise lead to disputes or litigation.

30. Provide Adequate Time Limits for Requesters to Submit Appeals

Short appeal deadlines may not provide enough time for a requester to gather all the facts relevant to the request and prepare any arguments they wish to make in the appeal. Providing a minimum of 60 days would allow adequate time for requesters to prepare and submit appeals.

Examples: Special Inspector General for Afghanistan Reconstruction;¹⁵³ Office of the U.S. Trade Representative¹⁵⁴

¹⁵¹ OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2526, codified as amended at 5 U.S.C. § 552(a)(6)(B)(ii); *see also* 5 U.S.C. § 552(l).

¹⁵² OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2529, codified as amended at 5 U.S.C. § 552(h)(3).

¹⁵³ 5 C.F.R. § 9301.6(d).

¹⁵⁴ 15 C.F.R. § 2004.6(d)(1).

Recommended language: “Requesters must submit appeals within 60 days of the decision.”

See also: Recommendation #7, “Provide a Website and/or E-mail Address for Submitting Appeals” ([p. 15](#))

31. *Provide Information about the Agency's FOIA Public Liaison*

Informing requesters about the assistance available from FOIA Public Liaisons and how to contact them can facilitate requesters making greater use of the Public Liaison, which can help resolve disputes.¹⁵⁵

Examples: Federal Trade Commission;¹⁵⁶ Department of the Interior;¹⁵⁷ Council of the Inspectors General on Integrity and Efficiency¹⁵⁸

Recommended language: “Requesters with concerns about the handling of their requests may contact the {agency} FOIA Public Liaison, who will assist requesters with resolving any disputes.” (The regulations should then provide contact information for the Public Liaison.)

Implementation suggestion:

- Make this information easily accessible on the agency FOIA website.
- Consider notifying requesters about the availability of the FOIA Public Liaison in acknowledgement and determination letters.

¹⁵⁵ Peter J. Kadzik, letter to Reps. Darrell Issa and Elijah Cummings, U.S. Department of Justice Office of Legislative Affairs, June 10, 2013, p. 15, available at <http://freebeacon.com/wp-content/uploads/2013/06/DOJ-OIP-Response.pdf> (“Greater use of FOIA Public Liaisons, both by requesters and agencies, could facilitate dialogue between the parties, explain the agency's handling of the request, and address any particular concerns of the requester, in some cases averting potential lawsuits”); Office of Government Information Services, “FOIA Requirements, Agency Best Practices, and OGIS Recommendations,” p. 5, available at <https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf> (“Provide in writing to the requester the ... contact information for the FOIA Public Liaison as quickly as possible”).

¹⁵⁶ 16 C.F.R. § 4.11(a)(2) (“A requester may ask the FOIA Case Officer to speak with the FOIA Public Liaison if there are concerns about the quality of the service received to an initial response, appeal or otherwise, during the process.”).

¹⁵⁷ 43 C.F.R. § 2.66; 43 C.F.R. § 2.57(c) (“Before filing an appeal, you may wish to communicate with ... the FOIA Public Liaison to see if the issue can be resolved informally.”).

¹⁵⁸ 5 C.F.R. § 9800.4(b) (“CIGIE has designated a FOIA Public Liaison to assist in the resolution of disputes between the agency and the requester. Contact information for CIGIE's FOIA Public Liaison can be found on CIGIE's Web site, <http://www.ignet.gov>.”).

32. Notify Requesters about Dispute Resolution Services from the Office of Government Information Services

The OPEN Government Act of 2007 created the Office of Government Information Services and directed it to offer mediation services to resolve disputes between FOIA requesters and agencies.¹⁵⁹ Making dispute resolution services easily available to requesters can help address questions or issues that might otherwise result in costly litigation.¹⁶⁰ Agencies should provide information about dispute resolution services in their FOIA regulations and in appeal determination letters.¹⁶¹

Examples: White House Office of Science and Technology Policy;¹⁶² Department of the Interior;¹⁶³ Special Inspector General for Afghanistan Reconstruction;¹⁶⁴ Equal Employment Opportunity Commission;¹⁶⁵ Department of Justice Office of Information Policy practices¹⁶⁶

Recommended language: “The Office of Government Information Services (OGIS) within the National Archives and Records Administration offers mediation services to resolve disputes between requesters and agencies as a non-exclusive alternative to litigation. Requesters with

¹⁵⁹ OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2529, codified as amended at 5 U.S.C. § 552(h)(3); U.S. Department of Justice Office of Information Policy, “OIP Guidance: Notifying Requesters of the Mediation Services Offered by OGIS,” *FOIA Post*, July 9, 2010, available at <http://www.justice.gov/oip/foiapost/2010foiapost21.htm> (“[A]gencies should include in their final agency responses to requesters a standard paragraph notifying the requester that mediation services are offered by OGIS and giving contact information for that office. This notification to requesters should be provided at the conclusion of the administrative process within the agency, i.e., as part of the agency’s final response on administrative appeal.”); Office of Government Information Services, “Agency Best Practices for Agency FOIA Regulations,” available at <https://ogis.archives.gov/about-foia/best-practices/Agency-Best-Practices-for-Agency-FOIA-Regulations.htm> (“OGIS suggests agencies include in their regulations ... that the agency, in its final appeal determinations, will alert FOIA requesters to OGIS’s services”).

¹⁶⁰ U.S. Department of Justice Office of Information Policy, “OIP Guidance: Notifying Requesters of the Mediation Services Offered by OGIS,” *FOIA Post*, July 9, 2010, available at <http://www.justice.gov/oip/foiapost/2010foiapost21.htm> (“Resolving FOIA disputes through mediation holds the potential to reduce litigation, thereby saving time and money for agencies and requesters alike, as well as enhancing the operation of the FOIA and public collaboration.”).

¹⁶¹ Office of Government Information Services, “Agency Best Practices: Communications and Customer Service,” available at <https://ogis.archives.gov/about-foia/best-practices/agency-best-practices---communications-and-customer-service.htm> (“Include information about OGIS in final appeal letters, advising requesters that the Office can assist in resolving FOIA disputes as an alternative to litigation.”).

¹⁶² 32 C.F.R. § 2402.7(c)(2).

¹⁶³ 43 C.F.R. § 2.21(a).

¹⁶⁴ 5 C.F.R. § 9301.6(d)(3) (“Response to an appeal will advise the requester that the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation”).

¹⁶⁵ 29 C.F.R. § 1610.11(g).

¹⁶⁶ Peter J. Kadzik, letter to Reps. Darrell Issa and Elijah Cummings, U.S. Department of Justice Office of Legislative Affairs, June 10, 2013, p. 14, available at <http://freebeacon.com/wp-content/uploads/2013/06/DOJ-OIP-Response.pdf> (“In OIP’s own FOIA administrative appeal determinations concerning Department records, OIP provides individualized notification to each requester that mediation is available at OGIS as a non-exclusive alternative to litigation. OIP includes detailed contact information for OGIS.”).

concerns about the handling of their requests may contact OGIS.” (The regulations should then provide contact information for OGIS.)

“{Agency} will provide the requester with the name and contact information of the Office of Government Information Services in an appeal determination letter.”

Implementation suggestion: Make this information easily accessible on the agency FOIA website.

AREAS WHERE NEW BEST PRACTICES ARE NEEDED

In addition to the previous issues where there is an established best practice or the path forward for reform is clear, there are a few other issues where requesters have expressed concerns about current agency practice but reforms are more nascent. There is a need for agencies, requesters, and FOIA leaders to come together and develop practical policies that support transparency.

Request for feedback: If you know of effective policies that have been developed in these areas, please share your ideas with the authors. Please submit any comments at <http://www.foreffec-tivegov.org/contact>.

Making Fee Assessments Fair and Timely

Numerous requesters have raised concerns about the assessment of fees for FOIA requests. Concerns have included excessive estimates of fees designed to discourage requests, as well as the lengthy and duplicative processes for qualifying for fee waivers and being assigned to a fee category. The situation is not helped by the fact that the fee guidelines, which the statute directs the Office of Management and Budget to promulgate, were last updated in 1987,¹⁶⁷ despite considerable subsequent changes to the statutory fee provisions and the technological context for providing information.

Although the best practices highlighted in this document should mitigate some concerns with FOIA fees, there are additional issues where best practices would be useful. Four issues in this area appear to cause particular difficulty for requesters:

a. Eligibility for news media status

Some requesters have expressed that they believe they should qualify as a “representative of the news media” for fee category purposes, but agencies have resisted according them this status.

¹⁶⁷ Office of Management and Budget, “The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines,” notice, March 27, 1987, 52 F.R. 10012, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/foia_fee_schedule_1987.pdf.

One difficulty could be in the way that agency FOIA regulations define “representative of the news media.” The OPEN Government Act added a definition of the term to the statute,¹⁶⁸ which some agencies have adopted in their regulations.¹⁶⁹ However, the Electronic Privacy Information Center has suggested an alternative definition for use in agency regulations.¹⁷⁰

b. Eligibility for noncommercial institution status

Some requesters have expressed that they believe they should qualify as an “educational or noncommercial scientific institution” for fee category purposes, but agencies have resisted according them this status.

One proposed solution would extend eligibility for this status to any organization recognized as a 501(c)(3) charitable organization by the Internal Revenue Service (IRS).

c. Lengthy and duplicative procedures for fee assessments

Some requesters have expressed frustration that the procedures for determining their fee category or for deciding fee waiver requests can be time-consuming. Furthermore, requesters have complained that this process must be repeated with each individual request. This may delay the processing of requests; for instance, the National Security Archive has commented that FOIA regulations should “change the ‘tolling’ provisions that keep requests in purgatory until (unnecessary) fee issues are resolved.”¹⁷¹ This is all the more frustrating when considering that no fees are assessed for many FOIA requests and that overall, fees recover only a small percentage of agency FOIA costs.

168 OPEN Government Act of 2007, Pub. L. 110-175, 121 Stat. 2525, codified as amended at 5 U.S.C. § 552 (a)(4)(A)(ii) (“[T]he term ‘a representative of the news media’ means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ‘news’ means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.”).

169 See e.g. White House Office of Science and Technology Policy, 32 C.F.R. § 2402.3(c)(10).

170 Comments of the Electronic Privacy Information Center to the Defense Logistics Agency of the Department of Defense, Dec. 5, 2012, at p. 42-43, available at <http://epic.org/apa/comments/EPIC-DLA-FOIA-Regs-FINAL.pdf> (“The term ‘representative of the news media’ refers to any person actively gathering information to publish or broadcast news to the public. The term ‘news’ means information that is about current events or that would be of current interest to the public. Examples of news media entities include print, broadcast and webcast news services available for purchase or subscription by the general public, or available to the general public by means of an online search.”).

171 National Security Archive, “Freedom of Information Regulations: Still Outdated, Still Undermining Openness,” March 13, 2013, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB417/>.

Agencies should seek to streamline their process for assigning fee categories and adjudicating fee waiver requests. One option would be for agencies to maintain a database of fee waivers that have been granted. Agencies could then consult the database when processing fee waiver requests so that previous waiver recipients can be treated with the presumption of eligibility.

d. Use of fees to discourage requests

Some requesters have expressed concern that agencies may exaggerate estimated fees to discourage FOIA requests. The National Security Archive has commented that FOIA regulations should “end the practice of using fees to discourage requests.”¹⁷² The Department of Justice has stated that such a practice would be inappropriate.¹⁷³

Avoiding Inappropriate Administrative Closure of Requests

Some requesters have expressed concern with some agencies’ practice of contacting requesters, especially those whose requests have been pending for a long period of time, inquiring whether the agency should continue processing the request or close it. As the Office of Information Policy notes, “When done judiciously, this is entirely appropriate because agency resources should not be expended on processing a request when the requester is no longer interested in the records.”¹⁷⁴ (Of course, it would be preferable – and the law expects – for agencies to avoid long processing delays to begin with, obviating the need for such inquiries.)

However, as the Office of Information Policy further states, agencies should be sensitive when making such inquiries. As a particular concern, agencies should only close a request with the affirmative consent of the requester; the lack of response from a requester should not be interpreted as grounds for closing a request.

¹⁷² National Security Archive, “Freedom of Information Regulations: Still Outdated, Still Undermining Openness,” March 13, 2013, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB417/>.

¹⁷³ Peter J. Kadzik, letter to Reps. Darrell Issa and Elijah Cummings, U.S. Department of Justice Office of Legislative Affairs, June 10, 2013, p. 6, available at <http://freebeacon.com/wp-content/uploads/2013/06/DOJ-OIP-Response.pdf> (“[A]gencies should never use fees for the purpose of dissuading requesters from making requests”).

¹⁷⁴ U.S. Department of Justice Office of Information Policy, “OIP Guidance: The Importance of Good Communication with FOIA Requesters,” March 4, 2010, available at <http://www.justice.gov/oip/foiapist/2010foiapist5.htm> (“Limiting ‘Still-Interested’ Letters or Phone Calls”).

Avoiding the Inappropriate Application of Exemptions

Requesters continue to voice concern about agency claims of exemptions beyond those allowable by law. When agencies inappropriately withhold information under FOIA, the public is denied its right to information – often important information which citizens could use to more meaningfully participate in democratic governance or to guard against health, safety, or environmental risks. It is imperative that FOIA's exemptions be construed narrowly and applied only when necessary.

Although the best practices highlighted in this document should mitigate some concerns with the inappropriate application of exemptions, it may be valuable to develop additional best practices. Requesters have expressed particular concern about Exemptions 2 and 5, which are considered the most discretionary exemptions, as the only potential harm from disclosure would be to government functioning; the safety or rights of American citizens are not at stake. For instance, the National Security Archive has commented that FOIA regulations should “Follow Attorney General Holder's instruction to reduce dramatically the use of discretionary withholdings, such as the b(5) ‘deliberative process’ exemption.”¹⁷⁵ Agencies should set a goal to minimize their use of Exemptions 2 and 5 and consider developing procedures or guidance to apply additional scrutiny before withholding information under those exemptions.

¹⁷⁵ National Security Archive, “Freedom of Information Regulations: Still Outdated, Still Undermining Openness,” March 13, 2013, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB417/>.



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