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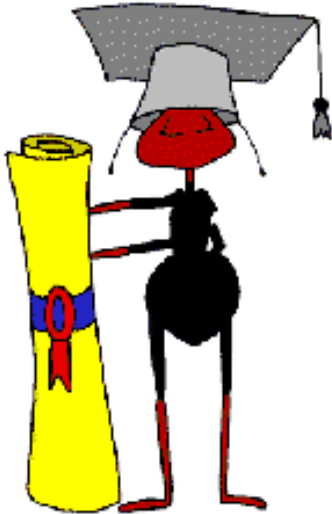
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STEP-BY-STEP GUIDE to using the Freedom of Information Act

by Allan Robert Adler

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INTRODUCTION

The Freedom of Information Act (FOIA) is a law that generally establishes the right of the public to obtain information from agencies of the federal government.

In the FOIA, Congress created a specific procedure through which any person can exercise the public's general right to request and obtain access to particular agency records.

Although Congress tried to make the request procedure as simple as possible, the actual statutory requirements -- on such matters as time limits for agency response, fees that a requester may be charged, exemptions that an agency may claim, and the requester's right to appeal and seek judicial review of any denied request -- can sometimes be more confusing than helpful to the first-time FOIA user.

This Step-by-Step guide can help any individual to make an FOIA request and pursue it toward the desired agency response with a minimum amount of time and effort. Its concise explanation of the various provisions of the FOIA, combined with a set of simple instructions and sample letters, should make the FOIA usable to anyone seeking access to government records.

SOME BASIC QUESTIONS AND ANSWERS ABOUT THE FOIA

What Part of the Government is Covered by the FOIA?

The FOIA is intended to apply to any federal "agency." The FOIA defines "agency" to include the agencies, office and departments of the Executive branch of the federal government (e.g., the Defense Department or the Office of Management and Budget), as well as independent federal regulatory agencies (e.g., the Federal Trade Commission or the Environmental Protection Agency) and federal government-controlled corporations (e.g., the U.S. Postal Service, the Tennessee Valley Authority, or the Smithsonian Institution).

The FOIA does not, however, apply to Congress, the federal courts, or units within the Executive Office of the President whose sole function is to advise and assist the President (e.g., White House Chief of Staff).

What Kind of Information Can be Obtained?

The FOIA provides access to all "agency records," unless they are specifically exempted. The FOIA does not define this term, but the courts have generally interpreted "agency records" to mean printed documents or other information-bearing materials (e.g., photographs or computer tapes) which (1) were created or obtained by a federal agency and (2) are, at the time of the request, within both the possession and control of the agency.

The FOIA does not require an agency to "create" a record in response to a request if the record does not exist at the time the request is made. Similarly, the FOIA does not require an agency to retrieve a requested record that is not in its possession at the time of the request. The term "control," as used to determine whether a record is subject to the FOIA, refers to the power of disposition by the agency over the materials at issue.

Agency records that are accessible under the FOIA may contain information relating to an incredibly diverse range of interests, including public health and environment, consumer product safety, government spending, labor, civil rights, business, taxes, history, foreign policy, national defense, and the economy.

Who Can Make a Request?

The FOIA permits "any person" to request access to agency records.

In practice, this includes U.S. citizens, permanent resident aliens, and foreign nationals, as well as corporations, unincorporated associations, universities, and even state and local governments and members of Congress.

How Quickly Will an Agency Respond?

The FOIA requires an agency to respond to an initial request within ten working days and to an administrative appeal within twenty working days.

An agency may take an additional ten days to respond to either the initial request or the administrative appeal in "unusual circumstances" involving the agency's need to obtain records from field facilities; to process a voluminous amount of separate and distinct records; or to consult with either another agency or two or more of its own components having a substantial interest in the request.

If the agency fails to comply within the applicable time limit requirements, the requester is deemed to have exhausted his administrative remedies and may seek satisfaction in federal court. In such a case, however, if the agency can show that "exceptional circumstances" exist and that it is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

In practice, however, most agencies take much longer than ten days to release records. The courts have ruled that this is permissible so long as they treat each request sequentially on a first come, first served basis. Thus, agencies such as the FBI, CIA, or State Department can take months, and sometimes years, to respond fully to a request. In such cases, the agency will usually respond within two weeks with a form letter notifying the requester that the request has been placed in line and will be processed after a delay.

On What Grounds Can an Agency Deny a Request?

An agency must provide records to a requester regardless of the identity of the requester or the requester's purpose in seeking the records. It must at so provide the records even if the requester can otherwise obtain them from a non-government source, so long as the requested records are "agency records" subject to the FOIA. The agency can refuse to disclose them only when they fall within one of the nine specific statutory exemptions from the FOIA's disclosure provisions under section 552(b) of the law:

> Exemption 1 applies to matters that are "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."

Executive Order 12356, issued by President Reagan, requires agency records to be classified if their disclosure "reasonably could be expected to cause damage to the national security." Such records, if "in fact properly classified" according to the substantive and procedural rules of the Executive Order, are exempt from mandatory disclosure under the FOIA.

Requesters should note that courts have upheld agencies decisions to

"neither confirm nor deny" the existence of requested records in cases where disclosure merely of the records' existence reasonably could be expected to cause damage to the national security.

FOIA amendments adopted in 1986 authorize the FBI to do this for its classified records pertaining to foreign intelligence, counterintelligence, or international terrorism investigations.

> Exemption 2 applies to matters that are "related solely to the internal personnel rules and practices of any agency."

This has generally been interpreted to exempt from disclosure only those minor and routine matters in which the public could not reasonably be expected to have an interest. It has also been interpreted to exempt law enforcement manuals from disclosure where such manuals are predominantly of internal interest to agency personnel and their disclosure significantly risks circumvention of agency regulations or statutes.

> Exemption 3 applies to matters that are "specifically exempted from disclosure by statute (other than Section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

In order to assert this exemption, an agency must cite a federal statute other than the FOIA and show that (1) the statute meets either the (A) or (B) criteria of the exemption, and (2) the records at issue fit within the category of information which the statute authorizes to be withheld.

There is no comprehensive list of statutes meeting the exemption criteria.

> Exemption 4 applies to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

In order to bring a record within this exemption, an agency must show that the information is (A) a trade secret or (B) information that is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential.

If the information was generated by the government, it cannot fall within this exemption. However, the term "person" is here, as elsewhere in the FOIA, broadly construed to include a wide range of entities, private corporations and the like.

Requested records will be considered "confidential" within the meaning of this exemption if their disclosure is likely to either impair the government's ability to obtain necessary information in the future, or

cause substantial harm to the competitive position of the person from whom the information was obtained. A pledge of confidentiality from the agency, or the fact that the information at issue is not customarily available to the public, will not qualify requested materials as "confidential" under this exemption.

Exemption 4 cases sometimes give rise to so-called "reverse FOIA" actions, in which the original submitter of the requested materials will seek to prevent the agency from releasing them to the requester.

> Exemption 5 applies to matters that are "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."

This provision was intended to incorporate certain common law discovery privileges into the FOIA exemption scheme, and it is probably the most complex of the FOIA's nine exemptions. Included within its scope are the "executive" privilege (protecting advice, recommendations and opinions which are part of the deliberative, consultative, decision-making processes of government), the attorney "work-product" privilege (protecting documents prepared by an attorney in anticipation of particular proceedings, where disclosure would reveal the attorney's litigation strategy or theory of the case), and the attorney-client privilege (protecting confidential communications between an attorney and his client).

The "executive" privilege, which is the most frequently encountered application of Exemption 5 generally involves the most difficult "line-drawing" problems for the agencies and the courts. Pre-decisional versus post-decisional, fact versus opinion - these distinctions hold clear only to a point. Courts have held that pre-decisional recommendations, which would ordinarily be exempt, lose the protection of the "executive" privilege if an agency, in making a final decision, chooses expressly to adopt them or incorporate them by reference. Conversely, facts that would ordinarily be available to the public have been withheld where they are selected or summarized in a way that reflects the deliberative process, or where their disclosure would impair the agency's ability to obtain information that is essential to the agency's decision-making process.

> Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

This exemption requires agencies and Courts to balance personal privacy interests against the public interest in disclosure when the record of information at issue can be identified as applying to a particular individual. Although the Supreme Court has noted that the exemption standard of "clearly unwarranted" appears to tilt this balance in favor of disclosure, the Court has also made clear that, for purposes of the FOIA,

there is "public interest" in the disclosure of "personal" information only when such information will shed light on" the operations or activities of some government agency or official.

> Exemption 7 applies to records or information compiled for law enforcement purposes, but "only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual."

Congress had substantially revised the original 1966 language of this exemption in 1974, and the current version reflects further amendments enacted in October 1986.

Before demonstrating that disclosure of particular records would result in at least one of the six enumerated harms, the agency must show that the records are "compiled for law enforcement purposes."

Although civil and criminal, judicial and administrative enforcement proceedings may all qualify for protection, the proceedings must involve a specific, suspected violation of law.

In the case of a criminal law enforcement agency, whether records were "compiled for a law enforcement purpose" is generally a function of whether there is a "rational" link between the information connected and one of the agencies law enforcement duties.

However, in the case of the FBI, some courts have concluded that virtually all Bureau records are necessarily "compiled for law enforcement purposes" because of the nature of the FBI's responsibilities. Many courts have also said that such information, when compiled in the course of a criminal investigation, is presumed confidential under Section (7) (D), unless proven otherwise.

It should also be noted that information contained in records originally compiled for law enforcement purposes does not lose Exemption protection when it is summarized or reproduced in a new document that is compiled for some purpose other than law enforcement. Conversely, records originally

compiled for purposes other than law enforcement can nevertheless qualify for Exemption 7 protection if they are subsequently assembled for law enforcement purposes.

The 1986 FOIA amendments permit an agency to refuse to confirm or deny the existence of records when disclosure of their existence could reasonably be expected to interfere with a criminal law enforcement proceeding and there is reason to believe that the subject of the proceeding is not aware of its pendency.

> Exemption 8 applies to matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."

This seldom-encountered exemption is broadly applied by the courts to withhold a wide variety of reporting materials from many different kinds of "financial institutions." Although the term financial institution is not defined in the FOIA or its legislative history, case law has ruled that it may include any entity authorized to do business under federal laws concerning banks and related institutions. The scope of the exemption is, therefore, not limited to depository Institutions or entities actually regulated by the agency at issue, nor is it limited to matters affecting the solvency of the particular institution.

> Exemption 9 applies to matters that are "geological and geophysical information and data, including maps, concerning oil wells."

This least-asserted, least-litigated exemption of the FOIA provides blanket protection for oil well information, which is in most cases also protected by Exemption 4.

It is important to remember that the exemptions listed above are discretionary rather than mandatory; in effect, this means that an agency can decide to release records to a requester even after it has determined that the records may be withheld pursuant to one or more of the exemptions.

The FOIA also requires an agency to provide a requester with any "reasonably segregable portion" of a record after deletion of the portions which are exempt" from disclosure. This means that any agency may not withhold an entire document on the grounds that some portions of the document are exempt.

What are the Fees?

Congress revised the law on fees and fee waivers in 1986. Under the revised law, and advisory guidelines issued by the Justice Department in

1987, three types of fees may be charged: (A) the costs of searching for documents, (B) the "direct" cost of reviewing documents to decide whether they should be disclosed and (C) the costs of duplication.

If records are requested "for commercial use," the requester can be charged all three types of costs. If the request is "not... for commercial use," only search and duplication costs may be assessed. However, if the requester is from "an educational or non-commercial scientific institution" or is "a representative of the news media" only duplication costs can be charged. Consistent with Congress' intent that fee waivers should be liberally granted, the courts have defined "a representative of the news media" as "any person or organization which regularly publishes or disseminates information to the public," which includes many public interest organizations.

In addition, the agency is given discretion to waive fees on a case by case basis if the request 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 in the commercial interest of the requester."

In any event, the revised law waives fees in noncommercial cases for the first two hours of search time or one hundred pages of duplication. Agencies cannot require advance payment where fees do not exceed \$250, unless the requester has previously failed to make timely payment.

Note on the Privacy Act

Although individuals can use the FOIA to obtain agency records relating to themselves, they should also be aware of their options to utilize the Privacy Act for this purpose as well. Requests for personal records should be made under both the FOIA and Privacy Act.

Unlike the FOIA, which merely enables you to obtain access to such records, the Privacy Act establishes your right to correct, amend, or expunge records in which the information about you is not accurate, relevant, timely or complete. In fact, the Privacy Act permits you to sue the agency for refusal to correct or amend your record, as well as for refusal to give you access.

There are, however, several important distinctions between the FOIA and the Privacy Act which make it advisable to request access jointly under both statutes:

> The Privacy Act may be used only by U.S. citizens or permanent resident aliens and only to obtain access to records which can be retrieved from a "system of records" by the name of the individual or by some number, symbol, or other identifying particular assigned to the individual; the FOIA may be used by "any person" to obtain access to any agency records relating to the requester.

> The Privacy Act exemptions, particularly for law enforcement records, are much broader than they are in the FOIA, and some agencies may not routinely consider your request under the law which gives greater access.

> The Privacy Act does not set forth specific time limits for an agency's response, nor does it provide for an administrative appeal; however, the FOIA has both of these requirements.

> The Privacy Act permits an agency to charge requesters for copying, but not search costs.

> The statute of limitations for filing a lawsuit is only two years under the Privacy Act, but six years under the FOIA.

STEP 1: Making the Request

Where to Write

The first order of business in making a FOIA request is to determine which agency should receive it.

If you are uncertain about which agency may have the information you seek, go to the library and check descriptions of the various agencies in publications like the United States Government organization Manual (U.S. Government Printing Office), or call the local office of your representative in Congress.

Once you have narrowed the possibilities, you might want to call the FOIA or Public Affairs office of those agencies for more specific information.

If you think you know which agency would have the records you want. find out the specific mailing address for its FOIA office. Although a few of the major agencies' FOIA offices are listed in the Step-by-Step Guide, any agency's FOIA office can be found by either calling the agency or looking up the agency's FOIA regulations in the Code of Federal Regulations (CFR), which can be found at any law library and many public libraries.

Describing What you Want

The FOIA simply requires that a request must "reasonably describe" the records being sought. This means that the description must be sufficiently specific so that a government employee who is familiar with an agency's filing system will be able to locate the records within a reasonable amount of time and effort There is no requirement that you explain why you are seeking the information, but such an explanation might be necessary if you want the agency to waive its fees or comply more fully with your request. The more precise and accurate the request, the more likely you are to get a prompt and complete response, with lower search fees. If you do not give a clear description of the information that is being

requested, the agency will contact you for clarification.

Plan Your Request Strategy

> Try to limit your request to what you really want. If you simply ask for "any files relating to" a particular subject (including yourself), you may give the agency an excuse to delay its response and needlessly run up search and copying costs.

> If you know that the request involves a voluminous number of records, try to state both what your request includes and what it does not include.

> If you want material released to you in an order of specific priorities, inform the agency of your needs; for example, you might want to have materials reviewed and released to you in chronological or geographical order, or you may simply not want to wait for all of the records to be reviewed before any are released.

Identify What you Want as Clearly as Possible

> If there are published accounts - newspaper clips, articles, congressional reports, etc.- of the material requested, these should be cited specifically. It may also be helpful to enclose copies of relevant sections.

> If you know that portions of the requested records have already been released, point this out. (It may eliminate or reduce search fees.) Give information, if possible, to identify the previous release (i.e., date, release number, original requester).

> If you know the title or date of a document, who wrote it, the addressee, or the division or field office of the agency in which it originated, such information should be included.

Hints for Requesting Personal Files

> Remember that a request for personal records should contain as much specific identifying data as possible, including such facts as your date and place of birth, Social Security Number, previous names, nicknames, previous addresses, and places and dates of foreign travel. It can be helpful also to mention the nature of your relationship with the agency if, for example, you were an employee there or a participant in an agency program during a particular period. Some agencies, including the FBI, require a signed, notarized statement, including full name, date and place of birth, to ensure that the file corresponds to the requester.

> If your name has changed, you will need to let the agency know this, in order to get a complete response.

> You may want to state where you lived and/or were active, since some files will not be available from headquarters, but only from the local field office. If so, you should ask that the records of relevant field offices be checked. Sometimes the agencies do not carry out these field checks even when asked; therefore you should write a separate request letter. (FBI headquarters, for example, does not honor requests for a check of field offices; separate letters must be written to each.)

> Remember also to make the request under the Privacy Act as well as the FOIA (See Note on the Privacy Act).

Drafting your Request Letter

Anyone can easily write a request letter. This pamphlet provides sample letters and some helpful points to be aware of:

> If possible, the letter should be typed to make sure it is completely and easily legible. If you don't have access to a typewriter, print very clearly and carefully.

> Be sure to date the letter. Many agencies file requests by date and you should refer to this date in future correspondence.

> Be sure to keep a copy of all correspondence to and from the agency. You will need this copy if you write an appeal or if you go to court.

If you follow up on your written request with phone calls, be sure to take notes on what was said, to whom you spoke, and the date of these conversations. It is useful to follow up on these conversations with a letter addressed to the official with whom you spoke. It should state that you are writing to confirm your conversation of that date, and should carefully restate any agreements, definitions, time schedules, fees, and so on, which were decided on. A letter to confirm the conversation will remind the agency personnel of what was said, and will be useful in case your request file is referred to other officials. If there was a misunderstanding, such a letter should alert you both in time to clear things up. And if the agency does not follow through with what it had agreed to do, you can then mention this failure in your future communications with the agency. In general, it can be useful to establish a regular "contact" in the agency's FOIA office whom you can ask for by name.

The following items are points that a carefully written FOIA request should include (the sample letters give examples):

Cite the Statute(s) you are Using

You should begin by stating that you are writing a request under the Freedom of Information Act, 5 U.S.C. Section 552. If your request is for personal files, you will also want to cite the Privacy Act, 5 U.S.C.

Section 552a.

Make it Clear you Know your Rights

Reminding agency officials of their responsibilities under the FOIA may force them to take your request more seriously, if only because it will indicate that there will be more paperwork later on if they do not comply fully.

> State that if the agency response is not satisfactory you will make an administrative appeal, and ask for the name of the official to whom such appeals should be addressed. (Agencies are required to give you this information even if you do not ask.)

> You are entitled to be told the grounds on which the request is denied, and you should ask for a detailed justification.

> Remind the agency that, while the law allows them to withhold specified categories of exempted information, it requires them to release any "segregable" portions that are left after exempt material is deleted.

Straighten out Costs in Advance

You may want the agency to consult with you about search and copying fees before processing a request. If so, tell the agency in your request letter that you should be notified if the fee is going to be over a specified amount.

> It may be possible to avoid the copying costs - but not the search fee - by requesting to see the original documents rather than having copies made. (Some agencies will, however, insist that you buy your copies, although they do not have statutory grounds to do so).

> Many agencies, such as the FBI, have public reading rooms for documents that have been released under the FOIA; these are generally located in Washington, D.C. and open only at certain limited hours. After reviewing the file, one can select particular documents for copying.

Request a Waiver of Fees, if Applicable

If you think you qualify for a waiver of search, review or copying fees, you should ask for a waiver of fees in your request letter.

> Emphasize that the documents are not sought for commercial purposes. Although the revised law does not define "commercial use," Congress apparently limited the concept to requests seeking information solely for a private, profit making purpose. Redissemination of obtained materials to the public, even where the requester charges for copying or receives compensation for publication, should not be considered a "commercial use."

> If you are an "educational or non-commercial scientific institution" or a "representative of the news media," provide proof of this factor to obtain a waiver of search fees.

> If you are requesting your personal files under the Privacy Act, point out that it allows fees to be charged only for copying the records, not for finding or reviewing them.

> If you think you qualify under the "public interest" standard for a waiver of all fees, explain how the requested documents will "contribute significantly to public understanding of the operations or activities of the Government."

> Make as good a case as you can for a fee waiver in your request letter. Later on, if it is denied, you can write additional letters to clarify and/or strengthen your arguments.

The Justice Department has published a policy guidance memo on fee waivers and most agencies have regulations that establish their own criteria for granting a fee waiver.

Look in the Code of Federal Regulations (CFR), and point out the ways your request fits these criteria.

> The best argument is that other people will also want copies of the documents and that it is unfair to make the first requester bear the full cost of the initial search for the material.

Get Requests for Personal Files Notarized

If you are writing for your personal files (under the FOIA and/or the Privacy Act) you should have your signature notarized. Some agencies, such as the FBI, require this in order to ensure that no one except the subject of the files is granted access to personal records. Most banks and city halls have a Notary Public who will notarize your signature, usually for a small fee; you need only to present a drivers license, passport, or other generally-accepted identification to prove to the Notary who you are.

These procedures guard against privacy violations and are designed for your own protection. The Privacy Act provides criminal penalties for deliberately requesting a record about an individual "under false pretenses." This means that unless you are that individual's legal guardian, or are authorized by the individual to make a Privacy Act request, you can be prosecuted for knowingly attempting under false pretenses to get his or her personal records pursuant to the Privacy Act.

Addressing your Request

Mark your envelope as follows: Attention: Freedom of Information/Privacy

Act Unit." If your request is made solely under the Privacy Act state on the envelope, as is appropriate, "Privacy Act Request" or "Privacy Act Correction Request." Request letters without such markings are frequently held in an agency's mail room. (A list of commonly used addresses appears on later in this document.)

STEP 2: Understanding the Agency Response

It is possible that the agency will promptly release all of the information you are seeking. But it is more likely that you will receive one of the following responses:

The Agency Tells you to Wait

As mentioned earlier, government agencies are required to fill your request within ten working days unless they qualify for an additional ten working days in "unusual circumstances." Many agencies meet their deadlines, but some are notoriously slow. When dealing with a backlogged agency, you could wait up to three months before you hear anything and it may, occasionally, take years before a final response is made.

An agency's initial response might simply be an acknowledgement that your request has been received and is being processed, or that a search for the records is under way, or that fees are being calculated. In most circumstances, patience is the requester's best policy.

Several agencies warn requesters of an administrative logjam of requests and advise them to wait their turn, even though such a delay violates the Agency's time restrictions. Some agencies assign a wait number. Generally, you can take the agency's word that the delay is reasonable from the administrative point of view, but you should remember that requests for more time than the statute allows violate the FOIA.

You should call or write the agency's FOIA office and try to get them committed to a release date within four to six weeks. Tell them that if there is no action by this date, you will interpret their "non-denial" as an outright denial and you will appeal.

Whatever the cause of delay, don't hesitate to inquire about the status of your request or about the agency's filing and search procedures in general. You should also send an appeal letter if your follow-up inquiries are ignored, because, according to the FOIA, an excessive delay in complying with a request constitutes a "denial in effect" and is grounds for an appeal.

Technically, the FOIA entitles you to go straight to court if the agency does not produce the requested records within the proper time limit, but unless you have a pressing need for the documents (for example, to prepare a defense in a criminal trial), you should send a letter of appeal first.

Appeal letters are supposed to be handled within twenty working days. If the appeal letter protesting the delay is also ignored beyond this deadline, you can consider filing suit. Ordinarily, however, unless you have an urgent need, or unless the agency's delays are substantially beyond what had been promised to you, it is best to be patient about going to court.

It is in dealing with the time delays that records of your correspondence and conversations with the agencies are important. Such records can be useful in writing an appeal, and if you go to court you are in a stronger legal position if you can show that you made an effort to obtain compliance with the FOIA through the administrative process.

The Agency Claims Inadequate Identification of Requested Materials

If an agency informs you that your description of requested documents is inadequate, you should give the agency the benefit of the doubt and rewrite your request. A telephone call or an appointment with the official processing your request can be useful.

In the case of personal files, such a response usually means that you did not give enough specific identifying information.

The Agency Claims the Requested Material does not Exist

You might assume that the agency is sidestepping your request by claiming that the records you want do not exist. But here, too, a more clear, comprehensive request letter might help. If you are reasonably certain that the records you've requested do exist, then re-write your request and offer the agency some more search "clues." Bear in mind that some agencies simply have disorganized or inadequate filing procedures and that, in some instances, officials have later turned up entire records systems that they initially thought did not exist.

An agency claim that the records do not exist should probably trigger some additional research on your part, as well. Can you find, for example, news reports, congressional hearings, or court records where they are described more fully?

The Agency Claims Some or All Materials Exempt from Disclosure

An agency may notify you that the request is denied, in full or in part, because it falls within one or more of the FOIA's nine exemptions.

The FOIA states, however, that an agency may not withhold an entire file or document because some portion of its contents is exempt from disclosure. The agency may delete only those parts which are exempt from mandatory disclosure.

Even if the agency releases substantial portions of the material you've

requested, you can appeal the decision to delete or Ascents" the rest. You can also request a detailed justification for each deletion. You should be familiar with these exemptions, so that you can argue your right to the information.

Do not let the exemption claims stop you from pursuing your FOIA request. Remember:

- > The exemptions are discretionary, rather than mandatory; an agency, therefore, is not required to withhold information simply because an exemption can legitimately be interpreted to apply. Rather, agency officials can choose to waive the exemptions and release the material unless some other statute specifically limits or prohibits disclosure of that kind of information.
- > The exemptions must be narrowly applied, since the overriding objective of the FOIA is to maximize public access to agency records.
- > The agency cannot simply assert the applicability of an exemption; it must explain the reasons for its determination that any particular exemption applies to any particular information.
- > The agency cannot deny access to entire documents or files because some portion(s) of them are exempt from disclosure; it must release to the requester any nonexempt material which is "reasonably segregable" from the exempt portion(s).
- > You can contest any exemption claim to higher agency officials on administrative appeal and, if that fails, file a lawsuit to compel release of the requested records. The federal court must conduct a full judicial review of the agency's claims and the agency bears the full burden of justifying its denial of the request.

The Agency Charges Excessive Fees or Denies a Waiver

Before making an FOIA request, you may want to ask the agency's FOIA office for the current agency "fee schedule," which is a list setting forth the cost per hour of different kinds of searches (for example, manual versus computer; clerical versus professional) and the cost per page for copying).

In the past, agencies used the fee process as an obstacle to public access to agency records. The potential for abuse continues. Fees can vary widely from agency to agency, and even within a single agency, for similar or identical requests.

Many agencies may want to know in advance how much a requester is willing to pay for the requested information and may attempt to intimidate a requester by implying the necessity for an excessive and expensive search.

If you are charged an excessive or unnecessary fee, write to the official who responded to your request and ask for an itemization of the charges. If you are denied a waiver of fees, or if the agency grants an unsatisfactory reduction of fees, press the agency official to justify such actions through a full explanation of the reasons for such determinations. Fee issues are also subject to judicial review.

Step 3: Making the Appeal

Whatever the problem with the agency's response, a requester should take advantage of the FOIA's procedure for an administrative appeal to higher agency officials.

I here is a good chance that an appeal letter will get results if it can persuade the higher official to overturn the decision of the lower-ranking personnel. Senior officials are often less anxious than their subordinates about making decisions to disclose agency records, and they are usually in a better position to take matters of policy into consideration. In any case, the appeal letter ensures your request a second chance if it has been denied and may also speed up the process.

Writing an appeal letter puts the agency on notice that you are one step closer to filing a lawsuit and sometimes, particularly where the decision to withhold was a "close call," this factor alone can prompt senior officials to release information that their subordinates had previously withheld.

Like the initial request letter, an appeal letter can easily be written by anyone, although it may be helpful to have an experienced lawyer's advice when rebutting specific exemption claims. If an appeal letter is signed by a lawyer, it may further convince the agency that the requester is serious about going to court to pursue the request. But a lawyer's assistance is not necessary or required to write appeal letters in most cases.

The appeal letter should cite paragraph 552 (a) (6) of the FOIA and state the grounds for appeal (for example, a full or partial denial of access, excessive delay, etc.) It should also include a detailed listing of the requested material and, if appropriate, your reasons for seeking access.

If it is unclear why the initial request was denied, demand a more precise explanation for the agency's determination. The right to know why a request is denied and what materials were withheld is the core of the FOIA.

Finally, you should inform the agency in your appeal letter that you expect a final ruling on your appeal within twenty working days, the time specified in the statute. Even when the "final" agency response arrives, you may wish to reply with additional arguments or information if this might convince the senior officials to reconsider.

STEP 4: Getting Help from Congress

If your appeal is ignored or conclusively denied, you manatee try to apply some outside official pressure on the agency before the last resort of a lawsuit.

Your U.S. Representative or Senators, for example, may be willing and able to assist you. Members of Congress legally have no greater rights under the FOIA than any other individual, but they can generally be more successful in obtaining the attention and cooperation of agency officials.

Send one or more of these elected officials copies of your correspondence with the agency and ask them to write or call the agency on your behalf. Your cover letter to them should include a concise seamy of your request, the problem with the agency's response, and the specific help you are seeking from them.

The Honorable _____
U.S. House of Representatives
Washington, D.C. 20515

The Honorable _____
U.S. Senate
Washington, D.C. 20510

Switchboard, U.S. Congress: (202) 244-3121

You may also inform the two congressional committees that oversee the administration of the FOIA; again, enclose copies of your correspondence with the agency.

Subcommittee on Government Information,
Justice & Agriculture
Committee on Government Operations
U.S. House of Representatives
Washington, D.C. 20515
(202) 225-3741

Subcommittee on Technology and the Law
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510
(202) 224-3406

STEP 5: Deciding Whether to Go to Court

If all other means, including the appeal process, have failed to produce the records you are seeking, you should consider filing a lawsuit to force the agency to release the documents.

Although it is technically possible to bring suit if the agency has not responded to your request at the end of the agency's initial response deadline (ten working days), most judges regard this as creating an unreasonable situation for both the agency and the courts. Thus, if your initial request has been ignored or excessively delayed, it is better to send an appeal letter before going to court. If the request has been denied in full or in part, then there is no choice an appeal must be written to the agency in order to exhaust all administrative remedies before a lawsuit can be filed.

At this point, it maybe prudent to consult a lawyer for an assessment of your chances and for possible representation in court Although you may file suit pro se and represent yourself in court, FOIA suits usually involve complex and highly technical interpretations of the law that are generally beyond the layman's grasp. An invaluable technical manual and reference book on Fe Litigation Under the Federal Open Government Laws, is published by the American Civil Liberties Union Foundation (for order information contact the ACLU publications department at (202) 544-1681).

Although the statute requires federal courts to give priority to FOIA suits, FOIA cases usually take at least a year, and may continue for two or three years if a lower court decision is appealed to higher courts.

The government can be adamant about withholding records and may use every courtroom maneuver to delay or prevent mandatory disclosure. You and your attorney will have to decide whether the documents you are seeking- and your probability of success - justify an extensive court battle.

Note that there is a six-year statute of limitations for suing under the FOIA; it is two years for suits under the Privacy Act. This means, in most cases, that you have to file the lawsuit within that time period, from the date you made your request, even if you have received no, or an incomplete, response from the agency. The rules regarding statute of limitations may vary from case to case (especially with respect to various claims under the Privacy Act), so it may be necessary to contact an attorney on this issue.

To help ordinary citizens enforce their rights to obtain information from the government, the FOIA permits a judge to order the agency to pay attorney fees and court costs if the requester ("plaintiff" once a suit is filed) "substantially prevails" in the lawsuit. This means that in most cases you must win the release of some significant portion of the information that has been withheld, or at least a ruling that forces the agency to comply with some requirement of the law. Keep in mind, however, that the judge can, in the exercise of his discretion, deny any award of attorney fees even where the plaintiff has "substantially prevailed."

Getting Help

When you are seeking legal assistance all correspondence, notes, and other background material concerning your FOIA request should be in good order. Attorneys filing suit in federal court are required to certify, under risk of sanctions, that the reasons for the suit are well-grounded in both fact and law, and that the action is not being taken for improper purposes, such as harassment or delay.

Look for an attorney who has experience in federal practice, and, particularly, with the FOIA. Some private law firms will take FOIA cases on a "contingency basis" and seek an attorney fee award from the court if you win. However, the law firm also will probably want an advance payment to cover its various "out-of-pocket" expenses (xeroxing, clerical salaries, filing fees, transcripts, etc.) and may charge more as the case proceeds. Be sure you and your attorneys agree in advance on what the legal costs will be.

Low Cost or No Cost Advice or Legal Representation

There are some law firms, public interest groups, and law schools that may represent you in court for a nominal fee or no fee at all. Such groups are invariably understaffed, underfunded, and over-committed, so don't expect immediate or certain attention.

Although you may attach great importance to the documents you seek, it is up to the attorneys (who are being asked to take the case for little or no money) to decide whether the case raises issues that are sufficiently important to justify committing their organizations' limited resources.

Public interest groups like the American Civil Liberties Union or Ralph Nader's Freedom of Information Clearing house may nonetheless be able to provide information and encouragement through the request and administrative appeal stages, and may be able to refer you to a private attorney if you need representation.

The following organizations can be contacted in writing for information about court decisions, the exemption provisions, trial strategy, legal representation and other aspects of the FOIA:

American Civil Liberties Union

The state or local ACLU affiliate nearest you can provide assistance with your FOIA or Privacy Act request. These chapters may also give you information about state FOIA or "open records" laws, if you are seeking state or local government records. The National ACLU can tell you the address and phone number of the nearest affiliate. The National ACLU's address is 132 W. 43rd Street, New York, N.Y. 10036, phone: (212) 944-9800. The ACLU's Washington Office is located at 122 Maryland Avenue, N.E., Washington, D.C. 20002, phone: (202) 544-1681.

The Center for National Security Studies

CNSS (jointly sponsored by the American Civil Liberties Union Foundation and the Fund for Peace) has had much experience with the FOIA, mostly in matters relating to national security and intelligence records. The Center is located at 122 Maryland Avenue, N.E., Washington, D.C. 20002, phone (202) 544-1681.

The FOIA Service Center

The FOIA Service Center is a joint project of the Reporters Committee for Freedom of the Press and the Society of Professional Journalists, Sigma Delta Chi. The Center primarily assists journalists with FOIA questions and is located at 1735 I Street, N.W. , Washington, D.C. 20006, phone (202) 466-6312.

Freedom of Information Clearinghouse

The Freedom of Information Clearinghouse, a project of Ralph Nader's Center for the Study of Responsive Law, gives legal and technical assistance to public interest groups, journalists, and individual citizens using the laws granting access to government-held information. Please write to P O. Box 19367 Washington, D.C. 20036; phone: (202) 833-3000.

Fund for Open Information and Accountability, Inc.

This agency publishes pamphlets and a newsletter and assists individuals and organizations with FOIA matters. Please write to 239 Waverly Place, New York, N.Y. 10012; phone: (212) 989-3019.

The National Prison Project of the American Civil Liberties Union Foundation

The NPP offers a comprehensive outline for prisoners seeking pre sentence investigation reports, prison files, medical records and personal files held by the Federal Bureau of Prisons and the U.S. Parole Commission. The Prison Project does not provide individual representation but will refer prisoners to local legal aid groups where requests for information from state authorities are involved. The Prison Project's address is 1875 Connecticut Avenue; N.W., Suite 410, Washington, D.C., phone: (202) 234-4830.

Law schools around the country have clinics which may provide legal services, consult one near you. One example:

Institute for Public Interest
Representation, Georgetown
University Law Center

This program is a public interest law firm that operates out of Georgetown University's law school. It is staffed by several full-time attorneys and law students. Although frequently involved in FOIA issues, the institute

cannot give individual advice to those writing request or appeal letters. It will, however, provide representation (usually charging for court costs only) to individuals or groups involved in a significant FOIA dispute with an agency. The decision on whether to take a case will be based on the nature and significance of the documents sought and the importance and novelty of the legal issues. The Institute is located at 600 New Jersey Avenue, N.W., Washington, D.C. 20001, phone: (202) 662-9535.

Sample Letters

The bracketed ([]) areas explain how to use these sample letters to write your own letter.

Freedom of Information Act Request Letter

Agency Head [or Freedom of Information Officer]
Name of Agency
Address of Agency
City, State, Zip Code
Re: Freedom of Information Act Request

Dear _____:

This is a request under the Freedom of Information Act, 5 U.S.C. Sec. 552.

I request that a copy of the following documents [or documents containing the following information] be provided to me: [identify the documents or information as specifically as possible.]

In order to help to determine my status to assess fees, you should know that I am [insert a suitable description of the requester and the purpose of the request].

[Sample requester descriptions:

a representative of the news media affiliated with (a newspaper, magazine, television station, etc., or a public interest organization that publishes or disseminates information etc.), and this request is made as part of news gathering and not for a commercial use.

affiliated with an educational or noncommercial scientific institution, and this request is made for a scholarly or scientific purpose and not for a commercial use.

an individual seeking information for personal use and not for a commercial use.

affiliated with a private corporation and am seeking information for use in the company's business]

[Optional] I am willing to pay fees for this request up to a maximum of \$[]. If you estimate that the fees will exceed this amount, please inform me first.

[Optional] I request a waiver of all fees for this request. Disclosure of the requested information to me 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 my commercial interest. [Include a specific explanation.]

Thank you for your consideration of this request.

Sincerely,

Name
Address
City, State, Zip Code
Telephone Number [optional]

Freedom of Information Act Appeal Letter

Agency Head or Appeal Officer
Name of Agency
Address of Agency
City, State, Zip Code
Re: Freedom of Information Act Appeal

Dear _____:
This is an appeal under the Freedom of Information Act.

On [date], I requested documents under the Freedom of Information Act. My request was assigned the following identification number [00-000-00].

On [date], I received a response to my request in a letter signed by [name of official]. I appeal the denial of my request.

[Optional] The documents that were withheld must be disclosed under the FOIA because * * *.

[Optional] I appeal the decision to deny my request for a waiver of fees. I believe that I am entitled to a waiver of fees. Disclosure of the documents I requested is in the public interest because the information is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interests. [provide details]

[Optional] I appeal the decision to require me to pay review costs for this request I am not seeking the documents for commercial use. [provide details]

[Optional] I appeal the decision to require me to pay search charges for this request. I am a reporter seeking information as part of news gathering and not for commercial use.

Thank you for your consideration of this appeal.

Sincerely,

Name

Address

City, State, Zip Code

Telephone Number [optional]

Request for "Public Interest Waiver or Reduction of Fees Letter

[The request for a fee waiver is sent: first, to the office handling your initial request, and second, if not granted initially, a fee waiver letter is sent to the agency's FOIA appeals office. If you are appealing deletions or withholdings you can combine e this material on the fee waiver in the same letter, or you can write two separate appeal letters.]

Dear _____:

This letter constitutes my request for a waiver of fees in connection with my request of [date] under the FOIA for the [briefly describe the documents requested]. As you know, you have provided me with portions of the requested items and assessed a cost o f \$[].

I have requested and here repeat my request that you waive these fees on the grounds that disclosure "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."

The language of the FOIA makes clear that Congress intended that the assessment of fees not be a bar to private individuals or public interest groups seeking access to government documents. At the same time, it permitted the charging of fees so that corporations or individuals using the Act primarily for private gain could be charged the cost of the services provided.

The legislative history of the FOIA's provision calls for a liberal interpretation of the fee waiver standard. This suggests that all fees should be waived whenever a requester is seeking information on a subject relating to the manner in which a government agency is carrying out its operations or the manner in which an agency program affects the public. A requester is likely to contribute significantly to public understanding if the information disclosed is new, supports public oversight of agency operations ions, including the quality of the agency activities and the effect

of agency policy or regulations on public health or safety; or otherwise confirms or clarifies data on past or present operations of the government.

The release of this information would benefit the public because _____ [here add explanation of the benefits to the public that would follow from the release. Take however much space you need. If you are writing on behalf of an organization, add something about your group's service to the public. If it is a tax-exempt non-profit organization you should say so, and you may want to include your tax exemption number.]

[If possible, add a paragraph here citing specific cases of identical or similar requests which were granted a fee waiver and that your case likewise merits a fee waiver.]

Finally, since this request is for material which is clearly of benefit to the public, other persons will undoubtedly also request these records. It would be unfair if the first requester were to bear the full material cost of the initial search.

[Use this paragraph in an appeal letter if you have already been refused a reduction of fees and if the fees which have been assessed seem excessively high.] If my request for a waiver of fees is not substantially granted, I request an itemization of the charges I am being assessed.

[Use this paragraph only if you intend to travel to the location where the documents are kept, and know that you do not, in fact, want copies of all documents.] As an alternative to being assessed copying fees, I wish to be granted access to the records which are responsive to my request so that I may review them without incurring duplication costs and may select those which I want copied. As you are aware, Section (a) (3) of the FOIA requires agencies to make documents "promptly available" and Section (a) (4) permits "recovery of only the direct costs of such search and duplication." Therefore, agencies are required by law to make documents available for inspection, but may not require the purchase of copies of documents.

Since the information that is the subject of this letter fits the criteria spelled out by Congress for a waiving of fees in the public interest, I believe that your agency should waive such fees, or, at the very least, reduce them substantially.

Sincerely,

Name
Address
City, State, Zip Code
Telephone Number [optional]

Federal Government Agency Addresses

If the agency in which you are interested does not appear here, you will be able to find the correct address by contacting either the local office of that agency or by contacting headquarters in Washington, D.C.

Included here are the Code of Federal Regulations cite (CFR). The Code of Federal Regulations lists the policies for each agency and may be helpful in your research. The CFR can be found in any law library and many public libraries.

AGRICULTURE DEPARTMENT

Office of Information, Room 102A
14th and Independence, S.W.
Washington, D.C. 20250
(202) 720-2791

APPEALS

Agriculture Department
Office of the General Counsel
USDA-OTGC, Room 2043 S
14th and Independence S.W.
Washington, D.C. 20250-1400
(202) 720-3351

Agriculture Department
Office of the Inspector General, Room 117 W
12th and Independence, S.W.
Washington, D.C. 20250
(202) 720-2791
7 CFR Part 1

ARMY

Dept. of Army
Chief, FOIA Division
USAIFC - P(ASQNS-OP-F)
Crystal Square II, Suite 201
1725 Jefferson Davis Parkway
Arlington, V.A. 22202

APPEALS

same address
32 CFR Part 286

CENTRAL INTELLIGENCE AGENCY

Information and Privacy Coordinator
Office of Information Services
Washington, D.C. 20505
(703) 351-2770

APPEALS

same address,
32 CFR Part 1900

CIVIL RIGHTS COMMISSION

Solicitors Office, Room 604
1121 Vermont Avenue, N.W.
Washington, D.C. 20425
(202) 376 8351

APPEALS

same address
45 CFR Part 704

COMMERCE DEPARTMENT

FOIA Officer, Room 6020
14th and Constitution NW
Washington, D.C. 20230
(202) 377-4115

APPEALS

Office of the General Counsel
Room 5882-C
14th and Constitution Ave., N.W.
Washington, D.C. 20230
(202) 377-5384
15 CFR Part 4

CONSUMER PRODUCT SAFETY COMMISSION

Freedom of Information Offices
5401 Westbard Avenue
Bethesda, M.D. 20816
(301) 504 0785

APPEALS

Chairman of Commission
Consumer Product Safety Commission
Washington, D.C. 20207
16 CFR Part 1016

DEFENSE DEPARTMENT

(all branches except Army)
Office of the Secretary of Defense
Director, Freedom of Information
Room 2C757, Pentagon
Arlington, V.A. 20301-1400
(202) 695-9556

ENVIRONMENTAL PROTECTION AGENCY

Freedom of Information Office, A-101

401 M Street, N.W.
Room 227 W Tower
Washington, D.C. 20460
(202) 260 4048

APPEALS

same address
40 CFR Part 2

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Legal Services
1801 L Street, N.W.
Washington, D.C. 20507
(202) 663-4650

APPEALS

Chairman, EEOC
same address
29 CFR Part 1610

FEDERAL BUREAU OF INVESTIGATION

Chief FOIA & Privacy Act Section
Room 6296 JEH
Washington, D.C. 20535
(202) 324-5520

APPEALS

Attorney General, Office of Legal Policy
Department of Justice
Room 2238
10th and Constitution Ave NW
Office of Information and Privacy
Washington, D.C. 20530
202-514-3642
28 CFR Part 16

FEDERAL TRADE COMMISSION

FOIA Branch
Room 682
6th and Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-2431

APPEALS

Freedom of Information Appeals
FOIA Office of General Counsel
6th and Pennsylvania Avenue, N.W.
Washington, D.C. 20580
16 CFR Section 4.11

FOOD AND DRUG ADMINISTRATION
5600 Fishers Lane, (HF 1 - 35)
Rockville, M.D. 20857
(301) 443-6310, ext. 111

APPEALS
same as above
22 CFR Part 6

HEALTH & HUMAN SERVICES DEPARTMENT
Director, FOIA/Privacy Act Division
200 Independence Avenue, S.W., Room 645 F
Washington, D.C. 20201
(202) 472-7453

APPEALS
same as above
45 CFR Part 5

INTERNAL REVENUE SERVICE
Chief FOIA/Privacy Section
Ben Franklin Station
Washington, D.C. 20044
(202) 566 3359

APPEALS
IRS, Chief Counsel
1111 Constitution Ave, N.W., Room 3704
Washington, D.C. 20024
26 CFR Part 601, subpart G

NATIONAL SECURITY COUNCIL
Director
Information Disclosure
Washington, D.C. 20506
(202) 395-3103

NUCLEAR REGULATORY COMMISSION
Chief, FOIA/Privacy Act Branch
Mail Stop P-370
Washington, D.C. 20555
(301) 492-7000/7211

APPEALS
Depends on denial;
they will tell you to whom
you should write your appeal.

SELECTIVE SERVICE SYSTEMS
Records Manager

1023 St. Street, N.W.
Washington, D.C. 20435
(202) 724-1173

APPEALS

General Counsel
Selective Service Systems
1023 St. Street, N.W.
Washington, D.C. 20435
32 CFR Part 1662

SMALL BUSINESS ADMINISTRATION

Freedom of Information/Privacy Act Office
409 3rd Street SW
Washington, D.C. 20416
(202) 653-6460

APPEALS

same address
134 CFR Part 102

TREASURY DEPARTMENT

Disclosure Office, Room 1054
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220
(202) 566 2789

APPEALS

same address
31 CFR Part 1

VETERANS ADMINISTRATION

Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 233-4000

APPEALS

Office of General Counsel
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 535-8001
38 CFR Section 1.500

LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAW

Edited by Allan Robert Adler, Attorney with Cohn & Marks
Published by The American Civil Liberties Union Foundation

Attorneys, journalists, scholars and persons with a wide variety of

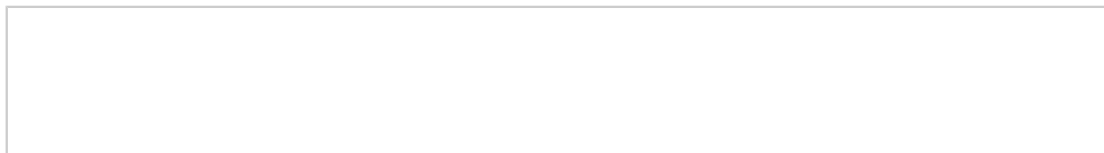
interests and concerns routinely need to obtain information from government agencies. The Open Government Laws set forth procedures for obtaining access to government records. Knowing how the courts have interpreted these two statutes can be the difference between getting or not getting documents you may need for successful litigation, administrative proceedings, research investigations or lobbying activities.

Litigation Under the Federal Open Government Laws keeps you abreast of judicial interpretation and provides information on trial strategy, the statutory availability of attorney fees and use of the FOIA as an adjunct to civil or criminal discovery.

For ordering the FOIA litigation manual, information on the annual Freedom of Information Act & Privacy Act seminar sponsored by the ACLU, or requesting a publications catalog, please call or write:

American Civil Liberties Union
Publications Department, 122 Maryland Avenue N.E., Washington, D.C. 20002
(202) 544-1681

Updated Yearly, \$45.00/copy: attorneys, government, libraries;
\$15.00/copy: C3 & C4 groups, law students and faculty.



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