



## Five Things Journalists Should Know About FOIA (in no particular order)

---

### 1. **On a deadline? Just because you're a journalist doesn't mean you get automatic expedited processing.**

Be prepared to show you have a “compelling need.” Under FOIA, being a journalist helps your case in that the agency should process your request faster than it otherwise might. But FOIA also requires that journalists—or any requester—seeking expedited processing demonstrate “an urgency to inform the public concerning actual or alleged Federal Government activity.” Agencies have 10 calendar days to grant or deny requests for expedited processing. That doesn't mean you'll get the records you requested in 10 days: if an agency grants expedited processing, your request generally moves to the top of a queue and is processed “as soon as practicable.”

### 2. **Know that agencies have 20 business days to respond to your request ... and that the 20-day limit is difficult if not impossible for many departments and agencies to meet.**

It is well-recognized by Federal courts that agencies sometimes fail to comply with statutory time limits when responding to a deluge of requests with inadequate resources. Compliance with the 20-day response time is all over the map, according to an OGIS review of processing times for the year ending September 30, 2010, reported by agencies in their annual FOIA reports to the Department of Justice. The 15 Cabinet-level departments responded to far fewer requests in 20 days than the non-Cabinet-level agencies, but they also have the heaviest request loads. It's a lot easier to respond quickly to requests when your request load is in the double — or even single — digits. Not so much when it's in the thousands or ten-thousands as it is for two-thirds of the Cabinet agencies.

What's a requester to do? OGIS suggests a little patience and understanding on the part of requesters. Take a few minutes to check out an agency's response time and numbers of requests received on foia.gov. If you haven't heard from an agency on Day 21, a gentle inquiry to the agency's FOIA shop or the FOIA Public Liaison is a better option than threatening to sue. You may want to ask for the estimated date of completion or work out a strategy for regular updates if the delay is going to be lengthy.

### 3. **Don't waste time submitting a FOIA request to Congress or the Federal courts.**

FOIA covers records held by the executive branch—15 Cabinet-level departments and 84 agencies—not the legislative or judicial branches of the Federal government. That said, some journalists routinely submit FOIA requests to Federal agencies for correspondence to and from certain members of Congress on certain topics.

#### 4. Holding press credentials doesn't mean an automatic fee waiver.

All FOIA requests are considered in one of three requester categories, and there are different fee structures—and different requirements—associated with each. Being a representative of the news media, the definition of which includes using “editorial skills to turn the raw materials into a distinct work,” generally means placement in the news media category; that means two free hours of search time and 100 free pages.

Fee waivers are different than fee categories and demand a much higher threshold for consideration than a fee category. The Department of Justice's guidance on fee waivers says that the standard for fee waivers is that disclosure of the information (1) is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) is not primarily in the commercial interest of the requester.

The guidance also states that six analytical factors must be considered in applying the statutory fee waiver standard. If you wish to pursue a fee waiver, you will need to supply the agency with information to show how your request meets each of these analytical factors:

- ◆ the requested records must concern identifiable “operations or activities of the government;”
- ◆ the disclosable portions of the requested records must be meaningfully informative, i.e. not routine administrative information;
- ◆ the disclosure must contribute to the public understanding not the requester's individual understanding;
- ◆ the disclosure must contribute “significantly” to public understanding of government operations or activities;
- ◆ the request must not further the commercial interests of the requester (FOIA requests under the auspices of newsgathering are generally not considered to be furthering the commercial interest of a requester); and
- ◆ the public interest in the disclosure is greater than the requester's commercial interest.

#### 5. Communication is key.

Don't be afraid to pick up the phone and call the FOIA professional who is handling your case. Cultivate FOIA professionals as you would sources; don't sit around waiting for them to call you. OGIS has observed that when requesters and FOIA professionals communicate, fewer disputes occur. In many OGIS cases, communications breakdowns are at the root of a dispute. If the FOIA professional isn't returning voice or e-mail, call the agency's FOIA Public Liaison, the public face of each agency's FOIA program whose job it is to provide information and help prevent and resolve disputes. At an impasse? Contact OGIS: we're here to help.